

WOODFALL'S
LAW OF
LANDLORD AND TENANT.

January, 1881.

(WOODFALL'S
LAW OF
LANDLORD AND TENANT;

WITH
A FULL COLLECTION OF PRECEDENTS,
AND
FORMS OF PROCEDURE;

CONTAINING ALSO AN
ABSTRACT OF LEADING PROPOSITIONS, AND TABLES OF CERTAIN
CUSTOMS OF THE COUNTRY.

The Twelfth Edition,

IN WHICH
THE PRECEDENTS OF LEASES HAVE BEEN REVISED AND ENLARGED WITH THE
ASSISTANCE OF F. G. G. ROBBINS, ESQ.,

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PREFACE.

IN the present Edition particular attention has been paid to the subjects of Bankruptcy, Game, Usual Covenants, and Relief against Forfeiture. Three Bills which have been submitted to Parliament upon this latter subject will be found in the Appendix. It will be remembered by those interested in it, that when Mr. Warton's Bill came on, in September last, to be discussed in Committee, Mr. Osborne Morgan opposed it on the part of the Government on the ground that the question was connected with Land Reform, with which the Government would have to deal in the then next session. The Editor would venture to suggest that clauses of this kind would not either be appropriately incorporated in so extensive a measure as a "Land Bill," or stand a better chance of passing by virtue of such incorporation, and he observes with regret that no measure for relief against forfeiture has yet been introduced in the present session.

The cases which have been decided subsequently to the last Edition have all, it is hoped, been inserted in their proper places, and the Editor is glad so soon to have had the opportunity of correcting certain mistakes and omissions. In connection with this latter branch of his duties, the Editor returns his best thanks to many friends and correspondents, and in particular to Mr. A. S. Weston of Denbigh, for many valuable suggestions.

Occasion has been taken to ensure a thorough renovation and revision of the Precedents of Leases. Many new forms have been added (the increase in bulk amounting to more than twenty pages), and it is hoped that the whole body of these Precedents will now suffice for ordinary purposes. In this portion of the Work the Editor has mainly relied on the substantial assistance very kindly afforded by his friend, L. G. G. Robbins, Esq., of Lincoln's Inn, and has also to acknowledge his obligations to Mr. Davidson for allowing him to copy from "Davidson's Precedents" a valuable proviso for re-entry and a Brewers' Lease.

J. M. L.

PREFACE TO THE ELEVENTH EDITION.

IN the present Edition of this Work the whole of the Third Book, which dealt with the subject of "Judicial Procedure," has been broken up, and such parts of it as did not consist of repetition, or have not been rendered obsolete by the Judicature Acts, have been fitted into what seemed to be their proper places. The Editor has also omitted not a few pages—such as those which treated of satisfied terms, the sale of real property, and the practice and procedure in actions generally—which did not seem to have been rightly included in the Treatise. The result has been a reduction in bulk to the amount of about 150 pages. It is hoped, nevertheless, that no part of the procedure peculiar to the relation of Landlord and Tenant has been omitted, and that the ever increasing statutes and cases which bear on that relation are still duly noticed.

In revising—with considerable diffidence—the conveyancing precedents, care has been taken to give alternative forms, and to mark alterations and additions as far as possible. The numerous forms of pleading which appeared in previous editions are entirely omitted for obvious reasons.

Since the publication of the last Edition, the three reports of the Central Associated Chamber of Agriculture upon the customs of the country throughout England have appeared. The complicated schedules with which the third report was accompanied have been attentively considered by the Editor; and, with a view of making the Work more practically useful, he has selected for publication in a tabular form accounts of the customs of certain districts,

relating to the "partial occupation of outgoing and incoming tenants," and an account of the customs throughout England in relation to compensation for "improvements" of the character dealt with by the Agricultural Holdings Act. That statute itself, besides being commented upon in the text, is printed at length in the Appendix, which also contains a set of forms applicable to proceedings under it. The statute has, no doubt, been excluded by the great majority of landlords, but it seems not improbable that it will gradually come more and more into operation.

The brief abstract of leading propositions which is now prefixed to the book will, it is hoped, not only facilitate reference and assist the reader in forming a general idea of the law of Landlord and Tenant, but enable the practitioner in some few cases to give an immediate answer to the numerous questions which constantly arise in this very difficult branch of the law—which in its present state is perhaps less systematic than any other.

The Editor has much pleasure in acknowledging his indebtedness to the works of Mr. Fawcett, of Messrs. Soden and Smith, and of Messrs. Redman and Lyon—all of which were published since the last Edition of WOODFALL—and to the Second Edition of Smith's Law of Landlord and Tenant, which was published in 1866; and to Mr. Weston of Denbigh, to whose suggestion it is mainly owing that the accounts of the custom of the country have been inserted. And it is entirely due to the cordial aid, skill and energy of the late Mr. Noel H. Paterson—whose loss can never cease to be regretted by all who knew him—that the Edition makes its appearance in the present year.

J. M. L.

THE TEMPLE,
November 2nd, 1877.

ADVERTISEMENT

TO THE TENTH EDITION.



THE Eighth Edition of WOODFALL, which was published in 1863, cost the Editor an immense amount of labour, but that labour has been fully recompensed by the rapid sale of two Editions of the book and the general satisfaction expressed by the Legal Profession and the Public at the changes and additions made in the original Work. In this, the Tenth Edition, the Editor has corrected all the errors which he has been able to discover, and has added the later Statutes and Cases up to this date, so that he hopes it may now be looked upon as a very safe guide in all matters of which it treats.

W. R. COLE.*

3, PUMP COURT, TEMPLE,
November, 1870.

* Mr. Cole brought out the Eighth, Ninth and Tenth Editions of the Work. The Seventh was brought out by Mr. Horn, and the Fifth and Sixth by Mr. Wollaston. The First Edition was published in 1802. In 1830 the work was entirely remodelled and greatly enlarged by Mr. S. B. Harrison, the author of "Harrison's Digest."

INTRODUCTION.

THERE are Four Books:—the First Book treats of the Contract between parties standing in the relative situation of Landlord and Tenant:—the Second points out the rights and Liabilities which arise out of that situation:—the Third describes the course of Judicial Procedure to substantiate those rights, and to enforce those liabilities:—and the Fourth contains the usual Precedents and Forms of proceeding applicable to the subject.

The discussion of the nature of the contract which subsists between Landlord and Tenant, and the incidents attending it, is commenced by showing the persons *by* whom terms may be granted, or, in other words, the persons who can convey to others a legal interest in real property for a determinate period; the persons *to* whom such terms may be granted are then enumerated: and mention is made of the several descriptions of property which may be the subject of demise. The nature of leases, and their incidents, are then fully considered: and the situation of persons having tenancies for a less term than years, such as—yearly tenants—tenants of lodgings—and persons in the *quasi* relation of Landlord and Tenant, are discussed. The changes in the relative situation of the parties are pointed out, whether they are consequent upon an assignment of the reversion, or of the term—either absolutely or by way of mortgage—upon underleases, attornments, writs of execution against the tenant, his bankruptcy or insolvency, the marriage or death of either party or the sale of the property. The several methods by which the contract may be determined are shown; and the nature and operation of surrenders, forfeitures, notices to quit and other means of determination are explained.

Rent being the most important of the rights and liabilities of the parties, the Second Book begins with a full discussion of that subject: it then proceeds to explain the nature and propriety of proceedings to recover rent—by distress—by notice to the sheriff when the tenant's goods are taken in execution, or by extent, or the tenant is outlawed—by action in law—and by suit in equity. The nature of taxes,

rates and assessments, and the effects of contracts respecting them, are shown, and the important subjects of repair, cultivation, timber, waste, fixtures, and the survey and valuation of dilapidations, are fully developed. The nature of the other usual contracts, relative to insurance, not parting with the premises without the lessor's licence, residence on the premises, trading and quiet enjoyment are treated of. The rights and liabilities of the parties on the termination of the contract are considered; amongst which are mentioned, the consequences of holding over after the tenancy has expired, the nature of emblements and the situation of outgoing and incoming tenants. The book concludes with the mention of several miscellaneous rights and liabilities, such as commons, ways, lights, game and the like.

The Third Book explains the several species of action applicable to persons in the situation of Landlord and Tenant. The subject of Procedure in Equity is next considered: in the first instance generally, and then as connected with the subject-matter of the work. The book concludes with a description of such offences against the Criminal Law as relate to the subject of Landlord and Tenant.

The Fourth Book contains a full collection of precedents of leases—agreements, both for the granting of terms, and other things connected with the work—assignments—attornments—surrenders—and notices to quit, to pay rent and to repair: it then gives particular directions as to the practical mode of proceeding to levy a distress, or obtain rent where the tenant's goods are taken in execution: and concludes with a collection of such of the Forms, in the actions treated of in the work, as are of general utility and in constant use.

To the whole is added a full Index, in which the analytical arrangement of the work is recast in alphabetical order, and much enlarged, for the purpose of affording facility of reference.

The above Introduction, which was first printed with Mr. Harrison's First Edition, is only partially applicable to the present Edition of this Work. As has been already explained in the Preface to the Eleventh Edition, the matters treated of in the former "Third Book" are rearranged, and the division into books is discontinued.—
J. M. L.

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LIST AND EXPLANATION OF THE ABBREVIATIONS.

A. & E.	Adolphus & Ellis.	Com. Dig.	Comyn's Digest.
Ambl.	Ambler.	Conn. & Law...	Connor & Lawson (Irish).
Andr.	Andrews.	Cowp.	Cowper.
Anstr.	Anstruther.	Cr. & Ph.	Craig & Phillips.
Atk.	Atkyns.	Cro. Eliz.	Croke's Reports, vol. 1.
Bac. Abr.	Bacon's Abridgment.	Cro. Jac.	Croke's Reports, vol. 2.
Ball & B.	Ball & Beatty (Irish).	Cro. Car.	Croke's Reports, vol. 3.
Barnard.	Barnardiston.	C. & M.	Crompton & Moeson.
Barnes.	Barnes's Notes.	C., M. & R. ..	Crompton, Meeson & Roscoe.
B. & A.	Barnewall & Alderson.	Dart V. & P. ..	Dart on Vendors & Purchasers.
B. & Ad.	Barnewall & Adolphus.	D. & M.	Davison & Merivale.
B. & C.	Barnewall & Cresswell.	Deac.	Deacon.
B. & S.	Best & Smith.	Deac. & Chit...	Deacon & Chitty.
Beav.	Beavan.	De G., F. & J...	De Gex, Fisher & Jones.
Bing.	Bingham (Old Series).	De G. & J.	De Gex & Jones.
Bing., N. C. ..	Bingham, New Cases.	De G., J. & S...	De Gex, Jones & Smith.
Blac. Com.	Blackstone's Commentaries.	De G., M. & G.	DeGex, Macnaghten & Gordon.
Blac. H.	Henry Blackstone.	De G. & Sm. ..	De Gex & Smale.
Blac. W.	Sir W. Blackstone.	Dick.	Dickens.
Bli.	Bligh's House of Lords Cases.	Dougl.	Douglas.
Bli. N. S.	Bligh's New Series.	Dow.	Dow's Reports in Parliament.
B. & P.	Bosanquet & Puller.	Dow & Cl.	Dow & Clark.
B. & P., N. R.	Do.—New Reports.	Dowl.	Dowling's Practice Cases.
Bradby.	Bradby on Distresses (2nd ed.).	Dowl. N. S.	Do.—(New Series).
Bridg.	Bridgman.	D. & L.	Dowling & Lowndes.
B. & B.	Broderip & Bingham.	D. & R.	Dowling & Ryland.
Bro. Abr.	Brooke's Abridgment.	Drew.	Drewry.
Bro. C. C.	Brown's Chancery Cases.	Drew. & Sm. ..	Drewry & Smale.
Bro. P. C.	Brown's Cases in Parliament.	Dru. & W.	Drury & Warren (Irish).
Bullen.	Bullen on Distress.	E. & B.	Ellis & Blackburn.
Bull. N. P.	Buller's Nisi Prius.	E., B. & E.	Ellis, Blackburn & Ellis.
Bulst.	Bulstrode..	E. & E.	Ellis & Ellis.
Bunb.	Bunbury.	Eq. Cas. Abr...	Equity Cases Abridged.
Burr.	Burrow.	Esp.	Espinasse.
Camp.	Campbell.	Exch.	Exchequer Reports.
C. B.	{ Common Bench Reports (by	Fitz. N. B.	Fitzherbert's Natura Brevium.
	{ Manning, Granger & Scott).	Fort.	Fortescue.
C. B., N. S.	{ Common Bench Reports, New	F. & F.	Foster & Finlaison.
	{ Series (by Scott).	Freem.	Freeman.
C. & J.	Crompton & Jervis.	Fry.	Fry on Specific Performance.
C. & K.	Carrington & Kirwan.	G. & D.	Gale & Davison.
Car. & M.	Carrington & Marshman.	G. & J.	Glyn & Jameson.
C. & P.	Carrington & Payne.	G. & M.	Gale & Merivale.
Carth.	Carthew.	Giff.	Giffard's Reports.
Ch. Cas.	Cases in Chancery.	Godb.	Godbolt.
Chit.	Chitty's Reports.	H. & C.	Hurlstone & Coltman.
Chit. Arch.	Chitty's Archbold's Practice.	H. & M.	Hemming & Miller.
Chit. Forms ..	Chitty's Forms (9th ed.).	H. & N.	Hurlstone & Norman.
Chit. Pl.	Chitty on Pleading (7th ed.).	H. & R.	Harrison & Rutherford.
Cl. & Fin.	Clark & Finnelly.	H. & T.	Hall & Twells.
Co. Lit.	Coke upon Littleton.	Hard.	Hardres.
Co. R.	Lord Coke's Reports.	Hawk. P. C. ..	Hawkins's Pleas of the Crown.
Cole Ejec.	Cole on Ejectment.	Hob.	Hobart.
Coll. C. C.	Collyer's Chancery Cases.	Holt, N. P. C...	Holt's Nisi Prius Cases.
Comb.	Comberbach.	H. L. Cas.	{ House of Lords Cases, by Clark
Com.	Comyn.		{ & Finnelly—and Clark.

Hud. & B.	Hudson & Brooke (Irish).	Moo. & P.	Moore & Payne.
Hut.	Hutton.	Moo. & S.	Moore & Scott.
Inst.	Lord Coke's Institutes.	Myl. & Cr.	Mylne & Craig.
Ir. Ch.	Irish Chancery.	Myl. & K.	Mylne & Keene.
Ir. Eq. R.	Irish Equity Reports.	N. & M.	Neville & Manning.
Ir. L. R.	Irish Law Reports.	N. & P.	Nevilo & Perry.
Jac.	Jacob.	New R.	{ New Reports of Bosanquet & Puller.
J. & W.	Jacob & Walker.	P. Wms.	Pecro Williams.
Johns.	Johnson.	P. & D.	Perry & Davison.
J. & H.	Johnson & Hemming.	Phil.	Phillips.
Jon. & L.	Jones & Latouche (Irish).	Plow.	Plowden.
Jon. W.	Sir Wm. Jones.	Pollexf.	Pollexfen.
Jon. T.	Sir Thos. Jones.	Q. B.	{ Queen's Bench Reports (Adolphus & Ellis, New Series, 1834—1857).
Jur.	Jurist (Old Series).	Raym., Ld.	Lord Raymond.
Jur., N. S.	Jurist (New Series).	Raym., T.	Sir Thomas Raymond.
K. & J.	Kay & Johnson.	Roll. Abr.	Lord Rolle's Abridgment.
Keb.	Keble.	Ros. Ev.	Roscoe on Evidence.
Ken., Ld.	Lord Kenyon's Reports.	R. S. C.	Rules of Supreme Court.
L. J.	{ Law Journal Reports, New Series, from 1831.	Russ.	Russell.
L. J., O. S.	Do.—Old Series, 1822—1831.	Russ. & M.	Russell & Mylne.
L. R., H. L.	{ The Law Reports (from 1865) —House of Lords Cases.	Ry. & Moo.	Ryan & Moody.
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L. R., P. C.	Do.—Privy Council.	Saund.	Saunders.
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L. R., App. Cas.	{ The Law Reports (from 1875) —House of Lords and Privy Council Cases.	Sim.	Simons.
L. R., Ch. D.	{ Do.—Chancery Division and Appeals therefrom.	Sim., N. S.	Simons, New Series.
L. R., Q. B. D.	{ Do.—Queen's Bench Division and Appeals therefrom.	Sim. & Stu.	Simous & Stuart.
L. R., C. P. D.	{ Do.—Common Pleas Division and Appeals therefrom.	Skin.	Skinner.
L. R., Ex. D.	{ Do.—Exchequer Division and Appeals therefrom.	Sm. & Giff.	Smale & Giffard.
L. T.	Law Times (New Series).	Smith, L. C.	Smith's Leading Cases.
L. T., O. S.	Law Times (Old Series).	Stark.	Starkie.
Leg. Obs.	Legal Observer.	Str.	Strange.
Leon.	Leonard.	Sty.	Style.
Lev.	Levinz.	Sug. Pow.	Sugden on Powers.
Lit.	Littleton's Tenures.	Sug. V. & P.	{ Sugden on Vendors and Purchasers.
L. M. & P.	Lowndes, Maxwell & Pollock.	Swans.	Swanston.
Lutw.	Lutwyche.	Sw. & Tr.	Swabey & Tristram.
M'Clel.	M'Cleland.	Taunt.	Taunton.
M'Clel. & You.	M'Cleland & Younge.	T. R.	Term Reports.
Mac. & G.	Macnaghten & Gordon.	Turn. & Russ.	Turner & Russell.
Macq. H. L. C.	{ Macqueen's House of Lords Cases (Scotch Appeals).	Tyr.	Tyrwhitt.
Madd.	Maddock.	Tyr. & Gr.	Tyrwhitt & Granger.
M. & G.	Manning & Granger.	Vaugh.	Vaughan.
M. & P.	Moore & Payne.	Vern.	Vernon.
M. & R.	Manning & Ryland.	Ves.	Vesey, junior.
M. & S.	Maule & Selwyn.	Vez.	Vesey, senior.
M. & W.	Meeson & Welsby.	V. & B.	Vesey & Beames.
Marsh.	Marshall.	Vin. Abr.	Viner's Abridgment.
Mer.	Merivale.	W. R.	Weekly Reporter.
Mod.	Modern Reports.	Wightw.	Wightwick.
Mood.	Moody.	Wilk. Replev.	Wilkinson on Replevin.
Moo. & M.	Moody & Malkin.	Wilm.	Wilmot's Notes.
Moo. & R.	Moody & Robinson.	Wils.	Wilson.
Moor.	Sir F. Moor's Reports (1662).	Wms. Saund.	{ Saunders's Reports, with Notes by Serjeant Williams, &c.
Moo.	J. B. Moore (1815—1827).	Yelv.	Yelverton.
		You.	Younge.
		Y. & C.	Younge & Collyer, Exch.
		Y. & C. C. O.	Do.—Chancery.
		Y. & J.	Younge & Jervis.

ADDENDA ET CORRIGENDA.

At page 241, *insert*, "In an action by the lessee against the assignee of a lease for breach of a covenant in the deed of assignment to keep the demised premises in repair, it has been held that the lessee, in the absence of actual loss, could only recover nominal damages, although the lessor had commenced an action against him for breach of the covenant in the lease. *Beattie v. Quirey*, 10 Ir. R., C. L. 516."

At page 245, note (z), *add*, "But see *Porter v. Drew*, 5 C. P. D. 143, and the cases there cited."

Page 254, *Reed v. Harvey* is also reported 5 Q. B. D. 184.

At page 426, note (q), *dele* reference to *Jones v. Bright*, 5 Bing. 533.

Page 554, *Budd v. Marshall* is also reported 5 C. P. D. 481.

At page 565, note (u), *add*, "See also *Manchester Bonded Warehouse Co. v. Carr*, 5 C. P. D. 507."

At page 614, *insert*, "In *Porter v. Drew*, 5 C. P. D. 143, an underlease of a nursery-ground contained an express covenant by the underlessee to deliver up all landlord's fixtures at the end of the term. It was held that a representation by the grantors of the underlease that the underlessee should be at liberty, without hindrance from any one, to remove trade fixtures during the term, could not be implied."

At page 623, *add*, "A policy of fire insurance is a contract of indemnity, and upon payment of the amount of loss the insurer is entitled to be put into the place of the assured. If, therefore, a landlord insure against a loss (such as by explosion covered by a covenant of the tenant to repair containing an exception for fire only), and the demised premises being damaged by gas, the tenant reinstates them in pursuance of his covenant, the insurers can recover the insurance money back from the landlord. *Darrell v. Tibbits*, 5 C. P. D. 560."

At page 628, note (t), *add*, "*Treloar v. Bigge* was followed with approval by Hall, V.-C., in *Scar v. House Property and Investment Society*, 43 L. T. 531."

At page 651, note (o), *add*, "For instance of the covenant being held not broken by the bursting of a water-pipe, see *Anderson v. Oppenheimer*, 5 Q. B. D. 602.—C. A."

HISTORICAL OUTLINE, WITH ABSTRACT OF LEADING PROPOSITIONS.



It is proposed in this Chapter to set out in a concise and readable form the leading propositions of the law of England affecting the relation of landlord and tenant; but it may perhaps be well to begin with a very brief historical sketch of the statute law. We may omit some early statutes, chiefly concerned with the landlord's peculiar remedy for recovery of rent by distress (*a*), and proceed at once to 32 Hen. 8, c. 34. Most of the statutes which will call for notice, and indeed most of the numerous statutes which have from time to time dealt specifically with the subject, are still unrepealed.

By 32 Hen. 8, c. 34, it is provided that grantees of reversions may take advantage of conditions and covenants in leases, and by another act of even date, 32 Hen. 8, c. 37, that executors may sue or distrain for rent due to their testator in his lifetime. 32 Hen. 8,
cc. 34, 37.

The statute 1 & 2 Ph. & M. c. 12, enacts that cattle seized for rent may not be driven out of the hundred where they are taken, except to a pound overt within the same shire not above three miles distant. 1 & 2 Ph. & M.
c. 12.

The effect of the Statute of Frauds was to enact that leases for more than three years, and all agreements for leases, however short, must be in writing. 29 Car. 2,
c. 29.

It was not until 1689 that distress ceased to be merely a pledge in the hands of the landlord. An act passed in that year provides that goods distrained for rent may be sold unless the tenant shall within five days "replevy" them, that is, proceed in due course of law, and in the peculiar manner appropriate to such procedure, to prove that the seizure was wrongful. 2 W. & M.
st. 1, c. 5.

At common law an assignment of a reversion was not good against a tenant unless the tenant "attorned to" or recognized his new landlord. An act of Anne did away with the necessity for attornment, but provides that the new landlord cannot take advantage of non-payment of rent, without having given notice of the assignment of the reversion to the tenant. 4 Ann. c. 16.

Another act of Anne, 8 Ann. c. 14, is of great importance. It provides that no goods may be taken in execution without the execu-

(*a*) 51 Hen. 3, stat. 4; 52 Hen. 3, stat. 4; 3 Edw. 1, c. 16; 3 Edw. 1, c. 17.

tion creditor paying the landlord up to one year's arrears of rent; and that a distress may be made at any time within six months after the termination of a lease. A further provision of the same statute—that landlords might follow goods fraudulently removed to avoid a distress—was not long afterwards superseded by a more extensive provision to the same effect.

4 Geo. 2,
c. 28.

In the reign of George the Second it was enacted that tenants holding over after a landlord's notice might be sued for double the yearly value of the premises, and in order to remedy inconveniences happening "by reason of the many niceties that attend the re-entries at common law," that landlords entitled by law to re-enter might re-enter in case of half year's rent being in arrear and no sufficient distress being found on the premises, the statute providing at the same time that on the tenant paying all arrears of rent the proceedings should cease. These latter provisions were superseded by enactments to the same effect in the Common Law Procedure Act of 1852.

11 Geo. 2,
c. 19.

The statute 11 Geo. 2, c. 19, is a long and important one. It extends to thirty the five days which were allowed by the statute of Anne for following goods fraudulently removed to avoid distress, confers upon the landlord power to break open places of concealment anywhere, and visits with heavy penalties persons in collusion with the tenant. It benefits both landlord and tenant alike by allowing a distress to be impounded on the demised premises. It provides for the recovery by a landlord of compensation for "use and occupation," although the contract of tenancy be written, so long as it is not by deed—thus obviating the nonsuits which might otherwise arise. It allows landlords to recover deserted premises before justices of the peace in cases where one year's rent is in arrear and no sufficient distress is found on the premises, and to recover double rent from tenants holding over after their own notice to quit. This also is the first statute which provides for "apportionment" of rent in the case of a landlord, being himself tenant for life, dying between two rent days; the rule of the common law having been that in such a case the executors of the landlord could recover nothing.

56 Geo. 3,
c. 60.

The act 56 Geo. 3, c. 50, provides that sheriffs may not carry off straw or other agricultural produce in cases where the tenant has covenanted with the landlord to consume such produce on his farm; and the act 57 Geo. 3, c. 93, fixes a limit to the expenses of a distress where the sum due does not exceed 20*l*.

57 Geo. 3,
c. 93.

1 Geo. 4,
c. 87.

By 1 Geo. 4, c. 87, it was first enacted that tenants holding under a contract in writing, and wrongfully holding over, might be compelled in a summary way to give security for the costs of an ejectment and might be ejected. This provision was superseded by a very similar one of the Common Law Procedure Act, 1852.

By 1 & 2 Vict. c. 74, provision is made for the recovery before justices of the peace of small premises wrongfully held over; the statute applying only to tenancies at will, or for not more than seven years, or at a rent of not more than 20% a year. 1 & 2 Vict. c. 74.

In 1845 it was enacted, in effect, that leases for more than three years must be by deed, and a concise statutory form of lease was provided. In this form, the proviso for re-entry applies to breaches of covenant generally.

Although it had been laid down in *Elwes v. Mawe*, in 1803, that the exceptions gradually introduced into the doctrine of irremovability of fixtures did not extend to agriculture, it was not till 1851 that the agricultural tenant obtained relief. An act passed in that year gives to this class of tenant the right of removing fixtures erected with the written consent of the landlord, this right being subject to an option of purchase by the landlord. The same statute provides for the prolongation till the end of the current year of the term of a tenant determined by the death of a landlord who was himself only a tenant for life, the prolongation being given in lieu of the common law right to the growing crops and other "emblements." 14 & 15 Vict. c. 25, s. 1.

The Common Law Procedure Act, 1852, re-enacted in substance the provisions of 4 Geo. 2, c. 28, and 1 Geo. 4, c. 87, as to recovery of premises in case of non-payment of rent and in case of holding over. The County Courts had not originally jurisdiction in ejectment, but the County Court Act, 1856, adopts with little variation the provisions of the Common Law Procedure Act above referred to. 15 & 16 Vict. c. 76.

The act 22 & 23 Vict. c. 35 provides for the relief of a tenant against forfeiture for non-insurance, for the relief of the executors of a tenant, having assets, against certain personal liabilities, and for the preservation of the right of re-entry in case of a severance of the reversion. The act 23 & 24 Vict. c. 38 enacts that one waiver of a breach of covenant shall not operate as a general waiver. 19 & 20 Vict. c. 108.

In 1870 a comprehensive "Apportionment Act" was passed, providing for the apportionment of rent between the heirs and executors of a landlord; but occasion was not taken to repeal the many previous acts *in pari materia* or any of them. 22 & 23 Vict. c. 35.

In 1871 the goods of lodgers, which at common law are liable to be seized for rent due to a superior landlord, were first rendered exempt from such distress, and a similar protection was extended in 1872 to railway rolling stock. 33 & 34 Vict. c. 35, s. 1.

The Agricultural Holdings Act, 1875, which applies where applicable unless it is excluded in writing by the landlord or tenant, extends the notice to quit, which is requisite in the case of a tenancy from year to year, from six months to twelve; gives agricultural tenants a *prima facie* property in fixtures; and allows such tenants com- 34 & 35 Vict. c. 79, s. 1.

35 & 36 Vict. c. 50, s. 1.

38 & 39 Vict. c. 92.

pensation for certain improvements therein specified. The statute is applicable only to such holdings of two acres or more, as are either wholly agricultural or wholly pastoral. Statistics show that the operation of the statute has been excluded by landlords in the vast majority of cases, and that from a variety of causes it is unpopular with the vast majority of agricultural tenants.

40 & 41 Vict.
c. 18.

It would not be worth while to notice the Settled Estates Act, 1877, were it not that, in sect. 46, it limits the application of the proviso for re-entry to cases of non-payment of rent, whereas both the corresponding section of the Settled Estates Act, 1856, and (as we have seen) the form provided by the Legislature in 1845 had applied such proviso to the breach of covenants generally.

43 & 44 Vict.
c. 47.

The Ground Game Act, 1880, for the first time in the history of the subject, interferes with the liberty which landlord and tenant have at common law to make what contracts they please. Where the contract of tenancy was silent, game was always the property of the tenant by virtue of his property in the land. Landlords, however, have for a long time been in the habit of "reserving" the game to themselves by special stipulation, and where this is the case the tenant is punishable upon summary conviction, under the act 1 & 2 Will. 4, c. 31, for taking the game. With respect to hares and rabbits, the Ground Game Act, although it does not interfere with *existing leases*, provides that such reservations shall *in future* only have the effect of giving the landlord a "concurrent right" with the tenant to kill and take them. This act affords another example of the undeniable truth that the course of modern legislation runs in favour of the tenant.

These then, very briefly, are the principal English (*b*) statutes affecting the relation of landlord and tenant. A short abstract of the leading propositions of the law of the subject is now submitted.

Definitions.

Landlord and
Tenant.

The relation of landlord and tenant is created by the landlord allowing the tenant to enjoy the landlord's house or land for a consideration termed rent, recoverable by distress.

(*b*) But few of the English statutes relate also to Scotland or Ireland. The following are exceptions:—The Emblements Act, 1851 (14 & 15 Vict. c. 25), and the Lodgers' Goods Protection Act, 1871 (34 & 35 Vict. c. 79), relate to Ireland, while the Apportionment Act, 1870 (33 & 34 Vict. c. 36), and the Railway Rolling Stock Protection Act, 1872 (35 & 36 Vict. c. 50), relate both to Ireland and Scotland. The Scotch common law of the subject is widely different from the English, and the Scotch statutes which specifically relate to the subject are very few. See Hunter's Landlord and Tenant. The

Irish common law on the other hand is identical with the English, and the Irish statutes very numerous. The principal Irish statutes are:—14 & 15 Vict. c. 57 (remedy by tenant distrained on by superior after paying rent to immediate landlord); 23 & 24 Vict. c. 154 (summary ejectment, prolongation of term in lieu of emblements, distress for one year's rent only); 33 & 34 Vict. c. 45 (legality of tenant right). The last is called "The Landlord and Tenant (Ireland) Act, 1870." See Furlong's Landlord and Tenant.

Reversion is the interest remaining in the landlord, who is therefore frequently termed the reversioner. Reversion.

A man is a tenant for years where the landlord lets lands or tenements to him for a term of certain years, agreed upon between the landlord and the tenant, and the tenant enters by force of the lease. Tenant for Years.

A tenant from year to year is one who by a contract of tenancy, implied from entry and the payment of rent with reference to a yearly tenancy, is entitled to half (c) a year's notice to quit, expiring at that period of the year at which his tenancy commenced. Tenant from Year to Year.

See *Doe v. Coates*, 7 T. R. 85, and p. 308, *post*.

A tenancy at will takes place where the letting is for no certain term, but is to continue for the joint will of both parties, and no longer. Tenant at Will.

A tenant by sufferance is one who comes in by right and holds over without right, as if a tenant for the life of another continue to hold after the death of him for whose life he entered. Tenant by Sufferance.

See Smith, L. & T. 13, 16, 31.

Any contract of tenancy is a lease, but the expression "lease" is commonly restricted to a contract of tenancy for years or lives by deed. Lease.

Disabilities of Landlords.

Infants, lunatics, owners of settled estates and other persons under disability become landlords under certain statutory restrictions, the principal restriction being that owners for life may bind remaindermen by leases for 21 years and no longer, and that those who represent landlords under disability make leases under the supervision of the Chancery Division of the High Court of Justice. Settled Estates, &c.

Settled Estates Act, 1877, ss. 4, 46, pp. 4, 31, *post*.

Ecclesiastical corporations may, with the consent of the Ecclesiastical Commissioners, grant building leases for not more than 99 years. Parsons may lease glebe for not more than 14 years (or 20 years, if the tenant covenant for improvements), with the consent of bishop and patron. Ecclesiastical Corporations.

5 & 6 Vict. c. 27, p. 23, *post*; 21 & 22 Vict. c. 57, s. 2, p. 22, *post*.

Municipal corporations may not lease lands for more than 31 years without the consent of the Treasury. Municipal Corporations.

5 & 6 Will. 4, c. 76, p. 15, *post*.

Disabilities of Tenants.

Spiritual persons may not take leases of more than 80 acres of land without the consent in writing of the bishop of the diocese. Spiritual Persons.

1 & 2 Vict. c. 106, s. 28, p. 62, *post*.

(c) If the Agricultural Holdings Act applies (see lxxv, *post*), the notice is a year's notice.

Charity Trustees. Trustees for charitable uses can only take leases by deed made 12 months before the death of the landlord.

Mortmain Acts, p. 63, *post*.

Infants. A lease to an infant is not void, but only voidable, on his coming of age.

Baylis v. Dyneley, 3 M. & S. 477, and p. 64, *post*.

Agreement for Lease.

Specific Performance. An agreement for a lease must be in writing and signed, to be sued upon as such; but he who enters and pays, or agrees to pay rent under an oral agreement for a lease, or otherwise partly performs the agreement, may obtain a decree for a lease.

Stat. Frauds, s. 4, p. 79, *post*; *Nunn v. Fabian*, L. R., 1 Ch. 35, p. 94, *post*.

Tenancy from Year to Year. He who enters and pays, or agrees to pay, rent under an agreement for a lease is tenant from year to year, upon such terms of the agreement as are consistent with a yearly tenancy: and most of the terms of an ordinary agreement for a lease, *e. g.* an agreement to paint every seventh year, are consistent with such a tenancy.

Doe v. Amey, 12 A. & E. 476; *Martin v. Smith*, L. R., 9 Ex. 203, p. 206, *post*.

Stamp. The stamp upon an agreement for a lease not exceeding 35 years is the same as the stamp upon a lease, and the stamp upon a lease made in conformity with an agreement duly stamped is sixpence.

Stamp Act, 1870, s. 96, and p. 836, *post*.

Title of Landlord. Under an agreement for a lease for years, the intended tenant may not call for the title to the freehold.

Vendor and Purchaser Act, 1874, s. 2, p. 2, *post*.

Lease.

Mode of making. A lease for three years or less may be written or oral, but a lease for more than three years must be by deed, otherwise it is void.

Stat. Frauds, s. 1; 8 & 9 Vict. c. 106, s. 3, p. 118, *post*.

Entry under void. He who enters and pays, or agrees to pay, rent under a void lease, is tenant from year to year upon such terms of the void lease as are consistent with a yearly tenancy.

Doe v. Bell, 2 Sm. L. C. 96, and p. 206, *post*.

Custom of Country. The custom of the country is incorporated in every lease unless expressly excluded.

Wigglesworth v. Dallison, 1 Sm. L. C. 598, and p. 725, *post*.

The ordinary rule is, that where the lease and the counterpart differ, the lease prevails, but this rule does not apply where there is an evident mistake in the lease. Discrepancy of Lease and Counterpart.

Burchell v. Clark, L. R., 2 C. P. D. 88, and p. 120, *post*.

Implied Contracts of Landlord.

The landlord impliedly contracts with the tenant to give him possession, and guarantees the tenant against eviction by any person having a title paramount to that of the landlord, and against the disturbance which would be occasioned by some person enforcing a charge which the landlord ought to have satisfied. Quiet Enjoyment.

See *Coe v. Clay*, 5 Bing. 440; *Bandy v. Curtwright*, 8 Ex. 913 (*d*), and p. 643, *post*.

There is an implied contract by the landlord of a furnished house that it is fit for occupation; but with respect to an unfurnished house or land there is no such implied contract. Fitness of Premises.

Wilson v. Finch Hatton, L. R., 2 Ex. D. 336; *Hart v. Windsor*, 12 M. & W. 68, and p. 159, *post*.

Implied Contracts of Tenant.

The tenant impliedly contracts with the landlord to pay rent, not to commit waste either voluntary or permissive, and to give up possession at the end of the tenancy. To pay Rent, &c.

See 11 Geo. 2, c. 19, s. 14; *Morrison v. Chadwick*, 7 C. B. 266; *Henderson v. Squire*, L. R., 4 Q. B. 1.

A tenant is estopped from alleging that his landlord had no title at the period of the demise; but he is not estopped from alleging that the title of the landlord has expired. Not to deny Title.

Cooke v. Lowley, 5 T. R. 4; *Delancy v. Fox*, 2 C. B., N. S. 768, and p. 200, *post*.

Express Contracts of Landlord.

The express contract of a landlord for quiet enjoyment is usually worded so as to be less than the implied one (which it excludes), and not to guarantee the tenant against eviction by title paramount. Quiet Enjoyment.

See *Merrill v. Frame*, 4 Taunt. 329, and p. 645, *post*.

Where a landlord contracts to repair, a notice by the tenant that the premises need repair is an implied condition precedent to an action on such contract. Repair.

Makin v. Watkinson, L. R., 6 Ex. 25, and p. 568, *post*.

(*d*) This case decides that an implied contract for quiet enjoyment arises upon an oral lease.

Express Contract of Tenant.

To pay Rent. The contract for rent must be performed in all events, and notwithstanding the destruction of the premises by fire or other cause, whether preventible or not.

See *Belfour v. Weston*, 1 T. R. 310, and p. 379, *post*.

Insurance. The contract to insure is broken by a failure to insure for any time, however short, and the breach of such a contract is a continuing breach.

. *Doe v. Shewin*, 3 Camp. 131, and p. 624, *post*; *Doe v. Gladwin*, 6 Q. B. 953, and p. 625, *post*.

To repair. The contract to repair must be performed in all events, notwithstanding the destruction of the premises by fire or other cause, whether preventible or not.

Bullock v. Dommit, 6 T. R. 650, and p. 565, *post*.

Damages for non-repair. The damages for non-repair are measured by the injury to the reversion.

Mills v. East London Union, L. R., 8 C. P. 79, and p. 573, *post*.

Against Assignment. The contract not to assign without licence is not broken by an assignment by operation of law.

Slipper v. Tottenham, &c. Rail. Co., L. R., 4 Eq. 112, and p. 630, *post*.

Not to do Acts without Licence. Where there is a contract not to assign without licence, or not to do any other act without licence of the landlord, such licence, if given, extends only to the single assignment or other act for which the licence is required.

22 & 23 Vict. c. 35, s. 1, and p. 627, *post*.

Rent.

Where payable. Rent is payable on the demised premises where there is no covenant to pay it; but in the case of a covenant, it is incumbent on the tenant to seek out the person to whom it is payable.

Haldane v. Johnson, 8 Ex. 689, and p. 366, *post*.

Deductions. The tenant may deduct from rent any payment which he is obliged to make in order to protect himself from a distress by a ground landlord.

See *Taylor v. Zamira*, 6 Taunt. 524.

Apportionment in respect of Estate; Rent is apportioned in respect of estate where part of the demised premises changes hands, *e.g.* where the tenant surrenders or is evicted from part, or where there is a severance of the reversion.

In respect of Time. All rents as between the heirs and executors of the landlord are considered as growing due from day to day, and are apportionable

in respect of time accordingly, but the tenant may not be resorted to for an apportioned part.

Apportionment Act, 1870, p. 376, *post*.

As against an execution creditor, the landlord has a claim for **1 year's arrears of rent** if the tenancy be for a year or more; and if the tenancy be for less than a year, for the arrears of rent accruing during **4 terms of payment**. Satisfaction of Rent by Execution Creditor.

8 Ann. c. 14, s. 1; 7 & 8 Vict. c. 96, s. 67, and p. 454, *post*.

Distress for Rent.

A distress for rent, in the absence of express agreement, can be made on the demised premises only, but an agreement that a distress may be made on other premises than those demised is valid.

Daniel v. Stepney, L. R., 9 Ex. 185, and p. 383, *post*.

A distress for rent may be made by or on behalf of the landlord upon all goods and animals found upon the demised premises, except that— Subject-matters of Distress.

- (1) Fixtures, things in actual use, things in the custody of the law, things perishable, things delivered to the tenant in the way of his trade, animals of a wild nature, the goods of an ambassador, and gas-meters, are absolutely privileged from distress.

See *Simpson v. Harlopp*, 1 Sm. L. C. 439, and p. 404, *post*.

- (2) The goods of a lodger, and railway rolling stock not belonging to the tenant, are absolutely privileged from distress, upon the lodger or owner complying with the terms of the Lodgers' Goods Protection Act, 1871, and Railway Rolling Stock Protection Act, 1872.

34 & 35 Vict. c. 79, p. 414, *post*; 35 & 36 Vict. c. 50, p. 416, *post*.

- (3) The tools of the tenant's trade, and his sheep and beasts of the plough, are conditionally privileged from distress—that is, they are privileged if there be other sufficient distress upon the premises, and not otherwise.

See 51 Hen. 3, stat. 4, and p. 465, *post*.

If any tenant fraudulently, and in order to avoid a distress, remove any goods or chattels from the demised premises, the landlord may, within 30 days, seize and sell them wherever found, except in the hands of a *bona fide* purchaser for value. Fraudulent Removal.

11 Geo. 2, c. 19, s. 1, p. 433, *post*.

Distress after Tenancy. A distress may be made at any time within 6 months after determination of the tenancy.

8 Ann. c. 14, s. 6, p. 421, *post*.

Amount of Rent recoverable. A distress must be made within 6 years after the rent distrained for is due or acknowledged in writing to be due.

3 & 4 Will. 4, c. 27, s. 42, p. 422, *post*.

Liability of Landlord for Bailiff. The landlord is liable for the irregular but not for the wrongful acts of his bailiff making the distress.

Haseler v. Lemoyne, 5 C. B., N. S. 530, and p. 425, *post*.

Impounding on Premises. A distress may be impounded on the premises where taken; and when it is so impounded, any person may enter the premises in order to view, appraise and buy it.

11 Geo. 2, c. 19, s. 10, and p. 442, *post*.

Impounding Animals. Persons impounding animals in a pound must supply them with food and water, and may recover the expense from the owner. In default of supply by the impounder, any person may supply food and water, and may recover the expense from the owner, or, after 7 days' impounding, may pay himself by sale of the animal, rendering the overplus to the owner.

12 & 13 Vict. c. 92, s. 5; 17 & 18 Vict. c. 60, p. 439, *post*.

Retainer of Distress as Pledge. The landlord may, if he pleases, retain the distress as a pledge until the rent be paid, or be proved not to have been due by action of replevin. For 5 days after seizure, but no longer, the tenant has an absolute right to treat the distress as a pledge, and proceed to recover it by action of replevin. After the 5 days the tenant has a conditional right to replevy, exerciseable at any time before an actual sale.

See 2 W. & M. sess. 1, c. 5; *Jacob v. King*, 5 Taunt. 451.

Sale of Distress. Unless the tenant replevy, the landlord, at any time after 5 days from the seizure, may sell the distress to satisfy the rent and expenses; but he must first give notice in writing to the tenant, and cause the distress to be appraised. He is not bound to sell.

2 W. & M. sess. 1, c. 5; *Philpot v. Lechain*, 35 L. T. 855, and p. 450, *post*.

Expenses of Distress. Where the distress is for not more than 20*l.*, a scale of expenses is limited by statute. In other cases, there is no limit to the expenses except that they must be reasonable.

See 57 Geo. 3, c. 93, s. 1, and p. 447, *post*.

In the case of an illegal distress, *e.g.* where no rent is due, or where goods privileged from distress are seized, the tenant may rescue the goods before impounding, or obtain restitution at any time before sale by replevin, or, at his option, he may sue for damages. If no rent be due, and the distress be sold, he recovers double the value.

Remedies for
illegal
Distress.

See *Gibbs v. Cruikshank*, L. R., 8 C. P. 454, and p. 489, *post*; 2 W. & M. sess. 1, c. 5, and p. 497, *post*.

In the case of an irregular distress, *e.g.* where the distress is sold without notice, or not for the best price, the tenant may recover full satisfaction for the special damage sustained, and no more.

Remedies for
irregular
Distress.

11 Geo. 2, c. 19, s. 19; *Lucas v. Tarleton*, 3 H. & N. 116.

In the case of an excessive distress, the tenant may recover such damages as a jury may find to be the value of the goods seized, less the rent due. He is entitled to at least nominal damages.

Remedy for
excessive
Distress.

See *Chandler v. Douulton*, 34 L. J., Ex. 89, and p. 501, *post*.

Determination of Tenancy.

The principal modes in which a tenancy is determined are notice to quit, surrender and forfeiture.

Modes of
Determina-
tion.

A tenancy from year to year is impliedly determinable by half a year's notice to quit, expiring at the end of some current year of the tenancy. If the Agricultural Holdings Act applies [see lxxv, *infra*], the notice is a year's notice.

Notice to quit
Tenancy from
Year to Year.

The notice to quit need not be in writing, but it must be binding on the noticor, and the noticee must have reason to believe it so to be.

The notice to quit need not be delivered to the tenant personally. It is sufficient to deliver it to a person on the premises whose duty it would be to deliver it to the tenant.

Doe v. Crick, 5 Esp. 196; *Jones v. Phipps*, L. R., 3 Q. B. 567; *Tanham v. Nicholson*, L. R., 5 H. L. 561.

If a terminable lease be granted without saying who is to have the option of determining it, such option is with the tenant, and not with the landlord.

Option to
determine
Tenancy for
Years.

But where a lease provides that it shall become void upon the lessee breaking any of the covenants contained therein, it is at the option of the lessor, not of the lessee, whether the lease shall or shall not be determined.

Dann v. Spurrier, 3 B. & P. 399; *Doe v. Buncks*, 4 B. & A. 401.

Every express surrender must be by writing, and every express surrender of a more than 3 years' term must be by deed.

Surrender.

See 8 & 9 Vict. c. 106, s. 3, p. 274, *post*.

A surrender may be implied from anything which amounts to an agreement by the tenant to abandon and by the landlord to resume the premises, *e. g.* by the delivery of keys, by the entering into a new contract of tenancy, or by the landlord accepting a new tenant.

See *Phené v. Popplewell*, 12 C. B., N. S. 334, p. 279, *post*.

Forfeiture.

A forfeiture is incurred ipso facto by breach of a condition in a lease, but not by a breach of covenant, unless the lease contain a proviso for re-entry applicable to the breach.

If the landlord has a right to re-enter for non-payment of rent (but not otherwise), he may re-enter without formal demand of rent on proving that half a year's rent is in arrear, and that no sufficient distress be found on the premises.

C. L. P. Act, 1852, s. 210.

Waiver of Forfeiture.

If the landlord at any time, after notice of breach of covenant committed, acknowledges the continuance of the tenancy, *e. g.* if he distrain or sue for rent due after the forfeiture, he waives the forfeiture and loses his right to re-enter.

See *Ward v. Day*, 5 B. & S. 364, and p. 298, *post*.

Continuing Breach.

Some covenants, *e. g.* the covenant to insure, are of such a nature that a breach of them is continuing, so that the effect of a waiver is practically nil.

See *Doe v. Gladwin*, 6 Q. B. 953, and p. 300, *post*.

Restriction of Waiver to particular Breach.

A waiver does not extend to any breach of covenant other than that to which it specially relates.

23 & 24 Vict. c. 38, s. 6, p. 302, *post*.

Relief against Forfeiture.

Relief against forfeiture for non-payment of rent can be obtained at any time within 6 months after execution executed upon payment of all arrears of rent and full costs.

See C. L. P. Act, 1852, s. 210, p. 304, *post*.

Relief against forfeiture for non-insurance may be obtained in case of accident, and where there has been no loss by fire, but such relief can be granted once only.

22 & 23 Vict. c. 35, s. 4, p. 305, *post*.

Except in the above two cases, and except in case of accident or surprise, the tenant cannot obtain relief against forfeiture for breach of any covenants whatever.

See *Hill v. Barclay*, 18 Ves. 56, and p. 302, *post*.

Rights of Parties on Determination of Tenancy.

The tenant must deliver up complete possession of the premises, and is answerable for the holding over of a sub-tenant. Encroachments on a waste are for the benefit of the landlord.

Delivery of Possession.

Henderson v. Squire, L. R., 4 Q. B. 170, and p. 712, *post*; *Whitmore v. Humphries*, L. R., 7 C. P. 1, and p. 714, *post*.

If a tenant for years hold over, and pays or agrees to pay rent, he may become a tenant from year to year upon such terms of his lease as are consistent with a yearly tenancy, and it is a question for the jury whether he does so or not.

Rightful holding over by Tenant for Years.

See *Hyatt v. Griffiths*, 17 Q. B. 505, and p. 207, *post*.

If a tenant for years wilfully hold over after written demand of possession, the landlord may sue him for damages at the rate of double the yearly value of the premises held over so long as held over.

Wrongful holding over by Tenant for Years.

4 Geo. 2, c. 28, s. 1, and p. 717, *post*.

If any tenant hold over after his own notice to quit, he becomes bound to pay double rent so long as he holds over, recoverable in the same manner as the single rent.

Holding over by any Tenant after his own Notice to Quit.

11 Geo. 2, c. 19, s. 18, p. 720, *post*.

Where an existing custom for the tenant of a farm to retain possession after the end of his tenancy is proved as a fact, such tenant has a right to retain possession accordingly, unless he hold under a contract of tenancy inconsistent with the custom.

Partial Occupation by Custom of the Country.

Where an existing custom for the outgoing tenant of a farm to be paid compensation for improvements is proved as a fact, such tenant has a right to compensation in accordance with such custom unless he hold under a contract of tenancy inconsistent therewith. Valuations between an outgoing and incoming tenant are a matter of convenience only, and if there be no incoming tenant, the landlord is liable to the outgoing tenant under the custom.

Compensation for Improvements by Custom of the Country.

See *Faviell v. Gaskoin*, 7 Ex. 273, and p. 725, *post*.

If the tenant of a farm of two acres or more hold under a contract of tenancy which began on or after the 15th of February, 1876, then, unless the landlord and the tenant shall have agreed in writing that the Agricultural Holdings Act shall not apply to the contract of tenancy, the tenant is entitled to compensation for drainage, marling, application of purchased manure, and other improvements specified in that act, on the scales specified in that act.

Compensation for Improvements under Agricultural Holdings Act.

If the tenancy be from year to year or at will, and was current on the 14th February, 1876, the tenant is entitled to such compensation,

unless some day before the 14th April, 1876, either the landlord or the tenant excluded the operation of the act by a notice in writing, not afterwards revoked in writing.

The tenant may claim compensation under the custom of the country, as well as under the act, but not in respect of the same improvement.

Prolongation
of Term where
Landlord had
uncertain
Interest.

The tenant of a farm at rack rent, in any case where the tenancy determines by the cesser of the estate of a landlord entitled for his life, or for other uncertain interest, may continue to hold the farm till the end of the then current year of the tenancy.

Agricultural Holdings Act, 1875, p. 751, *post*; 14 & 15 Vict. c. 25, s. 1, and p. 722, *post*.

Fixtures.

The primary rule is that all things attached by the tenant to the demised premises become the property of the landlord, and are not removable by the tenant at any time or under any circumstances; but the exceptions to this rule abrogate it in respect to trade fixtures, domestic fixtures and agricultural fixtures in a varying degree.

Trade
Fixtures.—
Domestic
Fixtures.

Trade fixtures, *e. g.*, engines for working collieries, and conservatories, and domestic fixtures, *e. g.*, ornamental chimney-pieces, but not conservatories, may be removed by the tenant during the tenancy, provided that the removal can be effected without doing substantial injury to the freehold.

See *Lawton v. Lawton*, 3 Atk. 13, and p. 599, *post*; *Buckland v. Butterfield*, 2 B. & B. 54, and p. 602, *post*.

Agricultural
Fixtures.

Agricultural fixtures erected by the tenant with the written consent of the landlord become the property of the tenant, and removable by the tenant if the tenant shall have given one month's notice in writing of his intention to remove, and the landlord shall not have exercised an option to purchase them.

14 & 15 Vict. c. 25, s. 3, and p. 605, *post*.

If the Agricultural Holdings Act applies (see lxxv, *supra*), the landlord has an option of purchase, but his consent to the erection of the fixtures is not, except in the case of steam engines, a condition precedent to the tenant having the property in the fixtures.

Agricultural Holdings Act, 1875, s. 53, and p. 606, *post*.

Except as mentioned in the above two paragraphs, agricultural fixtures are irremovable.

See *Elwes v. Mawe*, 2 Sm. L. C. 162, and p. 605, *post*.

Removal of
Fixtures.

The right to remove fixtures can be exercised only during the term or during such period as the tenant holds over with the consent of the landlord.

See *Lyde v. Russell*, 1 B. & Ad. 334, and p. 613, *post*.

Assignment.

Every contract for assignment must be in writing, and every assignment must be by deed. Mode of Assignment.

Stat. Frauds, s. 4; 8 & 9 Vict. c. 106.

The assignee may sue or be sued upon all covenants which concern the premises demised, *e. g.*, on a covenant to repair, whether the assignor may have covenanted for his assigns or not. What Covenants pass to Assignee.

See *Spencer's case*, 1 Sm. L. C. 60, and p. 149, *post*.

Assignment of Reversion.

Before suing for rent the assignee of the reversion must give notice to the tenant of the assignment to him, but he may avail himself of a condition for re-entry on breach of covenants other than the covenant to pay rent without any such notice. Notice to Tenant.

4 Ann. c. 16, s. 10; *Scullock v. Hurston*, L. R., 1 C. P. Div. 106.

Both the assignee of part of the reversion in the premises and the assignee of the reversion of part of the premises may sue and be sued on the covenants in respect of the part assigned or apportioned to him. Assignment of Part of Reversion, and of Reversion of Part.

See *Stevenson v. Lumbar*, 2 East, 375; 22 & 23 Vict. c. 35, s. 3.

Assignment of Term.

Every tenant, except a tenant by sufferance, may assign or sublet unless expressly restrained by the contract of tenancy from doing so. Right to assign.

See *Church v. Brown*, 15 Ves. 258.

A sublease for the whole term, or for a period beyond it, is an assignment, and puts the subtenant in the place of the tenant. Sublease.

See *Beardman v. Wilson*, L. R., 4 C. P. 57, and p. 244, *post*.

A lessee assigning remains liable on his covenants, but an assignee may assign over to a pauper. By such assignment the assignee frees himself from all liability to the lessor, but his liability to the assignor continues. Liability of Lessee and Assignee.

See *Thursby v. Plant*, 1 Wms. Saund. 241; *Taylor v. Shum*, 1 B. & P. 21.

Upon the bankruptcy of the tenant the tenant's estate in the premises is assigned by law to his trustees in bankruptcy, who may either disclaim or take to that estate. Bankruptcy.

If any person interested requires the trustees to decide whether they will disclaim or not, and they do not decide within 28 days, the option to disclaim is gone, and the tenant's estate is absolutely vested in them with its burdens and benefits.

Subject to such requisition, the right of disclaimer is absolute, and may be exercised at any time.

Bankruptcy Act, 1869, ss. 24, 25; *Re Sneezum*, L. R., 3 Ch. D. 463; p. 253, *post*.

The covenant not to assign without licence is not broken by an assignment by bankruptcy, but a proviso for re-entry on the tenant's bankruptcy is good.

Doe v. Devan, 3 M. & S. 353; *Roe v. Galliers*, 2 T. R. 133.

Death.

The tenant's estate is personal property, and passes to his personal representatives. In Scotland the tenant's interest passes to his heirs.

An executor cannot waive a term, although it be worth nothing; he must either renounce the executorship in totó or not at all.

Rubery v. Stevens, 4 B. & Ad. 244.

Personal Liability of Executor.

Personal representatives are personally liable for rent only up to the value of the premises.

Personal representatives having satisfied all existing liabilities on a lease, and having set apart a sufficient sum to answer any future liquidated liability, may assign the lease to a purchaser and distribute assets. Thereupon the personal liability of the personal representatives is extinguished, but the landlord may follow the assets in the hands of the beneficiaries.

22 & 23 Vict. c. 35, s. 27, p. 267, *post*.

In cases to which the above two paragraphs are not applicable, the personal representatives of a tenant are personally liable upon his covenants.

See Tremere v. Morrison, 1 B. N. C. 86, p. 267, *post*.

Recovery of Premises by Landlord.

Special Procedure where Tenant under written Contract holds over.

If a tenant for years or from year to year who holds under a written contract refuse to give up possession at the end of his term, after demand in writing, the landlord may compel the tenant to find bail for the costs of an action, and, in default of bail, sign judgment for recovery of possession. If a trial is had, and a verdict pass for the landlord, execution may not be stayed unless the tenant find security not to commit waste.

C. L. P. Act, 1852, ss. 213, 215, pp. 761, 765, *post*.

Ordinary Action.

The special procedure applies only where the tenancy is in writing, and for not less than a year; the landlord may proceed by ordinary action if he prefers it.

C. L. P. Act, s. 218, p. 766, *post*.

The landlord recovers by the verdict of the jury mesne profits from the date of the determination of the tenant's interest down to the date of the verdict. Mesne Profits.

C. L. P. Act, s. 214, p. 780, *post*.

If neither the value nor the rent of the premises exceed 50*l.* a year, and the tenant refuse to deliver up possession at the end of the tenancy, the landlord may sue the tenant or person holding through him in the County Court of the district in which the premises lie; and the judge of such County Court may, on proof of the landlord's title and other matters, order possession to be given up to the landlord. Action in
County Court
where
Premises
held over.

County Court Act, 1856, s. 50, p. 782, *post*.

If neither the value nor the rent of the premises exceed 50*l.* a year, and the rent be in arrear for one half-year, and the landlord be entitled to re-enter for non-payment of rent, the landlord of any premises may, without any formal demand for re-entry, sue the tenant in the County Court of the district where the premises lie. Thereupon, unless the tenant in 5 days pay the rent, on proof of no sufficient distress being found on the premises and other matters, the judge of such County Court will order possession to be given up to the landlord in not less than 4 weeks, unless the rent and costs be sooner paid. Action in
County Court
where Rent in
Arrear.

County Court Act, 1856, s. 52, p. 788, *post*.

If neither the value nor the rent of the premises exceed 20*l.* a year, the landlord may, upon any cause of forfeiture whatsoever, eject the tenant by action brought in the County Court of the district where the premises lie. But if the causes of action be either non-payment of rent or holding over, the landlord must follow the special procedure provided for such causes of action. Action in
County Court
in ordinary
Cases.

County Court Act, 1867, s. 11, p. 795; County Court Rule, 1875, p. 796, *post*.

If the tenant occupy at will or for a term of not more than 7 years, or at a rent of not more than 20*l.* a year, and refuse to quit at the end of the tenancy, the landlord may summon the tenant before two justices of the peace, who, upon proof of the landlord's claim and other matters, may issue a warrant to the constables of the district commanding them to give possession within a period not less than 21 nor more than 30 days from the date of the warrant. But the execution of the warrant may be stayed if the tenant will become bound with sureties to sue the landlord for trespass. Recovery
before
Justices of
Premises held
over.

1 & 2 Vict. c. 74, p. 801, *post*.

Recovery before Justices of deserted Premises.

If a tenant at rack rent, or at a rent of three-fourths of the yearly value of the demised premises, be in arrear for one half-year's rent, and desert the demised premises, and leave no sufficient distress thereon, two or more Justices of the peace may view the premises at the request of the landlord, and affix thereon a notice stating what day, at the distance of 14 days at least, they will return to take a second view. If upon such second view the tenant do not pay the rent, or if there be no sufficient distress upon the premises, the justices may put the landlord into possession, and the contract of tenancy becomes void.

11 Geo. 2, c. 19, s. 16; 57 Geo. 3, c. 52, and p. 807, *post*.

Criminal Law.

Letting infected House.

If a person let any house or room in which any person has been suffering from an infectious disorder, without having such house or room disinfected, he is liable to a penalty of 20*l.*, and if he falsely answer any question of an intending tenant as to an infected person being, or having been within 6 months, on the premises, he is liable to a penalty of 20*l.*, or a month's imprisonment with hard labour.

Public Health Act, 1875, ss. 128, 129, and p. 812, *post*.

Larceny by Tenant.

Any tenant stealing any fixture is guilty of felony, and is liable to two years' imprisonment, with whipping, if a male; and, if the value of the fixture exceed 5*l.*, to penal servitude for 7 years.

24 & 25 Vict. c. 96, s. 74, and p. 812, *post*.

Demolition by Tenant.

Any tenant unlawfully demolishing any building demised to him, or severing any fixture from the freehold, is guilty of a misdemeanor.

24 & 25 Vict. c. 97, s. 13, and p. 813, *post*.

THE L A W LANDLORD AND TENANT.

CHAPTER I.

BY WHOM TERMS MAY BE GRANTED.

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SECT. 1.—*Generally.*

ALL persons who are not under any legal disability may grant leases for such terms as are not inconsistent with the nature and quantity of the estates which they have: but if a lease be made for a longer term than the estate of the lessor will warrant, it will generally operate as a valid demise during so much of the term as he has power to grant. Thus, if a tenant for life demise by deed for a long term (say ninety-nine years), it will operate as a valid lease during his life (*a*).

(*a*) *Bragg v. Wiseman*, Brownlow & G. 22.

CH. I. SECT. 1. If a person, having no estate whatever in the land, demise it by deed to another, who enters and takes possession under or by virtue of such demise, the law will not allow the latter to deny the title of the person from whom he has accepted the demise, and a tenancy by estoppel and also a reversion in fee by estoppel will be thereby created (*b*); but of course such demise will be inoperative as against the real owner, except so far as it may increase the difficulty of proving his title and right to the possession of the land.

Who may Lease generally.
Leases by Estoppel.
 Person having mere Right of Entry may demise. At one time it was necessary that the party granting the lease, who is called the lessor, should be in possession of the lands intended to be leased or in receipt of the rents and profits thereof; for if he had a mere right of entry, he could not grant it to another (*c*). But by 8 & 9 Vict. c. 106, s. 6, not only contingent, executory and future interests, and possibilities coupled with an interest, but also “a right of entry whether immediate or future, and whether vested or contingent, into or upon any tenements or hereditaments in England of any tenure, may be disposed of by deed.” This enactment does not relate to a right to re-possess or re-enter for a condition broken, but only to an original right where there has been a dissoisin, or where the party has a right to recover lands, and his right of entry and nothing but that remains (*d*).

Lessor's Title. A lease is, both in contemplation of law and in fact, a conveyance of the demised premises for the term therein mentioned, subject to the rent, covenants and conditions. It usually contains a very qualified and restricted covenant for quiet enjoyment, such as any person may safely enter into who never had title to the demised premises (*e*). By the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), s. 2, it is enacted that “under a contract to grant or assign a term of years, whether derived or to be derived out of a freehold or leasehold estate, the intended lessee or assign shall not be entitled to call for the title to the freehold;” but this is “subject to any stipulation to the contrary in the contract.”

SECT. 2.—By Tenants in Fee.

Tenants in fee may make leases without limit or restraint, for any number of lives or years, and upon such terms and conditions as they may think fit (*f*). A lease of lands of which the lessor was seised in fee, and of other lands of which he was seised for life (with power of

(*b*) *Sturgeon v. Wingfield*, 15 M. & W. 224; *Cuthbertson v. Irving*, 4 H. & N. 742; 6 Id. 135; *Doe d. Marriott v. Edwards*, 5 B. & Adol. 1065; *Cole Ejec.* 217.
 (*c*) 32 Hen. 8, c. 9, ss. 2, 4; *Doe d. Williams v. Evans*, 1 C. B. 717.

(*d*) *Hunt v. Bishop*, 8 Exch. 675, 680; 22 L. J., Ex. 337; *Hunt v. Remnant*, 9 Exch. 635; 23 L. J., Ex. 135; *Bennett v. Herring*, 3 C. B., N. S. 370.
 (*e*) See post, Chap. XVII., Sect. 8 (*b*).
 (*f*) Com. Dig. *Estates by Grant* (G. 2).

leasing) at one entire rent, but which was not well executed according to the power, was held to be good after the death of the lessor for the lands held by him in fee, though not for the other lands (*g*).

CH. I. SECT. 2.
*Lease by
Tenants in
Fee.*

SECT. 3.—*By Tenants in Tail.*

By the common law a tenant in tail could make no lease which would bind his issue in tail, or remaindermen, or the reversioner.

At Common
Law.

By the Act for the Abolition of Fines and Recoveries (3 & 4 Will. 4, c. 74), s. 15, "every actual tenant in tail" [i. e. every tenant of an estate tail which shall not have been barred], "whether in possession, remainder, contingency or otherwise, shall have full power to dispose of, for an estate in fee simple absolute, or for any less estate, the lands entailed," as against the issue in tail, and all persons whose estates are to take effect after the determination or in defeasance of the estate tail. But by sect. 21, this power is not given to expectant heirs or issue in tail.

Under the
Fine and
Recoveries
Abolition
Act, 1833.

A lease for any number of years, or for a life or lives, is a "disposition" *pro tanto* within the meaning of the above act. But by sect. 34, if there be a protector of the settlement, his consent is necessary to make the lease valid, not as against the issue in tail, but as against persons whose estates are to take effect after the determination or in defeasance of the estate tail; and if the tenant in tail making the disposition is a married woman, the concurrence of her husband is necessary to give effect to the same; and any deed which may be executed by her for effecting the disposition must be acknowledged by her before a judge, or before two perpetual commissioners, as directed by the act (*h*), or before a county court judge (*i*).

A Lease is a
"Disposition"
pro tanto.

By sect. 41, "no assurance by which any disposition of lands shall be effected under this act by a tenant in tail thereof (*except a lease for any term not exceeding twenty-one years*, to commence from the date of such lease, or from any time not exceeding twelve calendar months from the date of such lease, where a rent shall be thereby reserved, which, at the time of granting such lease, shall be a rack rent or not less than five-sixth parts of a rack rent) shall have any operation under this act unless it be enrolled in his Majesty's High Court of Chancery (*k*) within six calendar months after the execution thereof."

Enrolment,
when necessary.

It is to be observed that a lease for less than twenty-one years must be enrolled pursuant to this section, if the rent reserved does not amount to at least five-sixth parts of a rack rent, or if the term is not to commence for more than one year from the date thereof. So

(*g*) *Doe d. Vaughan v. Meyler*, 2 M. & S. 276.

(*i*) 19 & 20 Vict. c. 108, s. 73.

(*h*) Sects. 40, 77, &c.

(*k*) Now the Chancery Division of the High Court: Judicature Act, s. 34.

CH. I. SECT. 3. if the lease is for a longer term than twenty-one years, and in all other cases not within the above exception.

*Lease by
Tenants in
Tail.*

Settled Es-
tates Act,
Leases under.

The power of tenants in tail to grant leases, &c., pursuant to the above act, does not appear to be affected by the Settled Estates Act, 1877 (40 & 41 Vict. c. 18). But if a tenant in tail be an infant, or a lunatic, or for any other reason incompetent to exercise the power of making leases and other dispositions under the Act for the Abolition of Fines and Recoveries, the lands entailed or any part thereof may be demised under the Settled Estates Act, with the authority of the Chancery Division and with the concurrence of all necessary parties, and subject to the restrictions and conditions in that act mentioned.

Confirmation
by the Issue
in Tail.

A lease for years by a tenant in tail, not made in pursuance of the provisions of either of the above-mentioned acts, is not absolutely determined by his death, but the issue in tail is at liberty either to affirm or avoid it, as he may think fit (*l*). Acceptance by the issue in tail of the rent (*m*), or bringing an action for the recovery thereof, or an action of waste, have been considered such acts as amount to a confirmation of the lease, because they plainly manifest an intent to continue the lessee in possession upon the terms of his lease. A lease at common law by the tenant in tail differs from a rent granted by such tenant; for the last is void by the death of the grantor: whereas the former is only voidable by the issue in tail, whose acceptance of rent amounts to a confirmation (*n*).

By Tenants in
Tail after
Possibility of
Issue extinct.

An estate in tail after possibility of issue extinct, is where one is tenant in special tail, and the person from whose body the issue was to spring dies without issue, or, having issue, that issue becomes extinct (*o*). The law looks upon this estate as equivalent to an estate for life only, and it is so treated in the Settled Estates Act, 1877. His power to demise, therefore, will come more properly under consideration in the next section.

SECT. 4.—*Lease by Tenant for Life.*

At Common
Law.

At common law a tenant for his own life (not having any special power to grant leases) can make no leases to continue longer than his own life (*p*). By 14 & 15 Vict. c. 25, s. 1, where the lease of a farm or lands determines by the death of a tenant for life, the lessee con-

(*l*) Bac. Abr. tit. *Leases* (D.).
(*m*) *Doe d. Southhouse v. Jenkins*, 5 Bing. 469; *Doe d. Phillips v. Rollings*, 4 C. B. 188.

(*n*) Cruise's Dig. tit. II. c. 2, s. 8; Bro.

Abr. tit. *Grant*, 145; 2 I.d. Raym. 779; *Andrew v. Pearce*, 1 New R. 158.

(*o*) 2 Blac. Com. 124.

(*p*) Bac. Abr. tit. *Leases* (I.); *Adams v. Gidney*, 6 Bing. 656.

tinues to hold until the expiration of the then current year of his tenancy. CH. I. SECT. 4.

By the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), s. 46, "it shall be lawful for any person entitled to the possession or to the receipt of the rents and profits of any *settled estates* for an estate for any life, or for a term of years determinable with any life or lives, or for any greater estate, either in his own right or in right of his wife, unless the settlement shall contain an express declaration that it shall not be lawful for such person to make such demise, and also for any person entitled to the possession or to the receipt of the rents and profits of any *unsettled estates* as tenant by the curtesy, or in dower, or in right of a wife who is seised in fee, *without any application to the court*, to demise the same or any part thereof, except the principal mansion-house and the demesnes thereof and other lands usually occupied therewith, from time to time for any term *not exceeding 21 years, to take effect in possession* at or within one year next after the making thereof; provided, that every such demise be made by deed, and the best rent that can reasonably be obtained be thereby reserved, without any fine or other benefit in the nature of a fine, which rent shall be incident to the immediate reversion; and provided that such demise be not made without impeachment of waste, and do contain a covenant for the payment of the rent and such other usual and proper covenants as the lessor shall think fit; and also a condition of re-entry on non-payment of the rent for a period of 28 days after it becomes due, or for some less period to be specified in that behalf; and provided a counterpart of every deed of lease be executed by the lessee" (q). Lease by Tenant for Life.
Settled Estates Act.
Tenants for Life, &c. may grant Leases for 21 Years.
Demise to be by Deed for Rent, without Fine.

This section does not apply to a case where trustees have the management of an estate, of which they pay the net annual rents to the tenant for life (r). In such a case the tenant for life is not even entitled to petition under the act (s).

By sect. 47, every demise authorized by the last preceding section shall be valid against the person granting the same, and all other persons entitled to estates subsequent to the estate of such person under or by virtue of the same settlement, if the estates be settled (t), and in the case of unsettled estates against the wife of any husband granting such demise of estates to which he is entitled in right of such wife, and against all persons claiming through or under the wife or husband (as the case may be) of the person granting the same. Sect. 47.
Demise against Remaindermen, &c.

By sect. 48, the execution of a lease by the lessor "shall be deemed Sect. 48.

(q) See form, post, Appendix B., Sect. 16. And as to the act generally, see p. 31, note (f), post.

(r) *Taylor v. Taylor*, L. R., 20 Eq. 297; 44 L. J., Ch. 727; 33 L. T. 89; 23 W. R.

947, per Jessel, M. R.

(s) *Id.*, L. R., 1 Ch. D. 426.

(t) As to concurrence in an application to the court on behalf of lunatics, &c., see sect. 49.

CH. I. SECT. 4. sufficient evidence" that a counterpart of such lease has been duly executed by the lessee as required by the act.

*Lease by
Tenant for
Life.*

Sect. 54.

Concurrence
of Incum-
brancers.

By sect. 54, "for the purposes of this act, a person shall be deemed to be entitled to the possession or to the receipt of the rents and profits of estates, although his estate may be charged or incumbered either by himself or by the settlor or otherwise howsoever, to any extent ; but the estates or interests of the parties entitled to any such charge or incumbrance shall not be affected by the acts of the person entitled to the possession or to the receipt of the rents and profits as aforesaid, unless they shall concur therein."

Sect. 56.
Leases of
Copyholds.

By sect. 56, "nothing in this act shall authorize the granting of a lease of any copyhold or customary hereditaments, not warranted by the custom of the manor, without the consent of the lord, nor otherwise prejudice or affect the rights of any lord of a manor." And by sect. 9, the powers of leasing include powers to lords of settled manors to give licences to their copyhold or customary tenants to grant leases.

By sect. 57, "the provisions in this act contained respecting demises to be made without application to the court, shall extend only to settlements made after the 1st of November, 1856 (*u*).

Leases by
Tenants for
Life under
express
Powers.

A tenant for life, with express power to grant leases for any limited term, or building, repairing or mining leases, &c., subject to certain restrictions and conditions, may of course grant any such lease *strictly in accordance with the power* (*x*), and no leave of the court is necessary to enable him to grant any such lease. But where the settlement creates no such power, and it is wished to grant a lease not warranted by the Settled Estates Act, 1877, s. 46 (*y*), the authority of the court must be obtained pursuant to the provisions of the last-mentioned act. Sometimes a private act of parliament may be necessary.

Confirmation
by Re-
mainderman.

A lease by a tenant for life, except as authorized by the Settled Estates Act, or by some express powers in the settlement or will from which he derives his title, is absolutely void against a remainderman, and cannot be confirmed by such remainderman's acceptance of rent, suffering the tenant to remain in possession (*z*), or even by a grant of the freehold treating the lease as valid (*a*) ; but in a case where the remainderman lay by, and suffered an assignee of an invalid lease to

(*u*) This being the date of the original Settled Estates Act (19 & 20 Vict. c. 120), the 44th section of which contained a similar saving.

(*x*) See Chap. V., Sect. 19.

(*y*) Ante, 5.

(*z*) *Doe v. d. Simpson v. Dutcher*, Doug. 50 ; *Jenkins d. Yates v. Church*, Cowp. 482 ; *James d. Aubray v. Jenkins*, Bull.

N. P. 96 ; *Doe d. Martin v. Watts*, 7 T. R. 83 ; 2 Esp. 501 ; *Doe d. Collins v. Weller*, 7 T. R. 478 ; *Jones d. Cowper v. Verney*, Willes, 169.

(*a*) See *Smith v. Widlake*, L. R., 3 C. P. D. 10 ; 47 L. J., C. P. 282 ; C. A., 26 W. R. 52, reversing judgment of Cockburn, O. J.

lay out money in re-building, and might be presumed to have had notice of the fact, Lord Hardwicke directed a new lease, *with proper covenants*, to be granted to the assignee for the remainder of the term (*c*); and subsequent acceptance of rent, or other acknowledgment of tenancy, may be evidence of a new demise from year to year by the remainderman (*d*); the lessee being a mere tenant by sufferance in the interval (*e*). The liability of a lessee of tenant for life ceases with the determination of the estate by the death of the lessor, or, in the case of a farm, at the end of the then current year of the tenancy (*f*). The lessee is not estopped from showing that the estate has so determined (*g*). But if a tenant for life, seised also of the remainder in fee expectant on an intervening estate tail in the premises, make a lease, the demise, though defeated by his death as to his life estate, may ultimately take effect for the residue of the term out of his remainder in fee, by the decease of the tenant in tail without issue, and without his having acquired the fee by a proper mode of assurance (*h*). If a tenant for life grant a lease for years, and then surrender or forfeit his estate, the lease will remain good during his life, if the years so long continue (*i*). A lease executed by a tenant for life, in which the reversioner, who was then under age, is named as one of the lessors, but which was not executed by him, is void on the death of the tenant for life, and an execution of it by the reversioner afterwards is no confirmation so as to bind the lessee, for it is not his covenant (*k*).

SECT. 5.—*Lease by Tenant for the Life of another.* *

Where a person holds for the term of another's life, he is called tenant pur autre vie; leases made by him, of course, determine on the death of the cestui que vie, or person during whose life he holds (*l*), or in the case of a farm, at the end of the then current year of the tenancy (*m*), but not on his own death (*n*); and a lease by him may be made to commence after his death (*o*).

(*c*) *Stiles v. Cowper*, 3 Atk. 692; compare *East India Co. v. Vincent*, 2 Atk. 83; *Jackson v. Cator*, 5 Ves. 688; *Dunn v. Spurrier*, 7 Ves. 231, 235, 236.

(*d*) *Doe d. Martin v. Watts*, 2 T. R. 83; *Roe d. Jordan v. Ward*, 1 H. Blac. 96; *Roe d. Brune v. Pridcaux*, 10 East, 187; *Doe d. Collins v. Weller*, 7 T. R. 478; *Doe d. Tucker v. Morse*, 1 B. & Adol. 365; *Doe d. Pennington v. Taniere*, 12 Q. B. 998; *Cornish v. Stubbs*, L. R., 5 C. P. 334.

(*e*) *Preston v. Love*, Noy, 120; *Roe d. Jordan v. Ward*, 1 H. Blac. 96.

(*f*) 14 & 15 Vict. c. 25, s. 1.

(*g*) *Brudenell v. Roberts*, 2 Wils. 143; *Neave v. Moss*, 1 Bing. 360; *Whittome v. Lamb*, 12 M. & W. 813; *Weld v. Baxter*,

11 Exch. 816; 1 H. & N. 568; *Cole Ejec.* 217.

(*h*) *Taylor v. Stibbert*, 2 Ves. jun. 437, 442; 3 & 4 Will. 4, c. 74, s. 40.

(*i*) *Sutton's case*, 12 Mod. 557, 558.

(*k*) *Ludford v. Barber*, 1 T. R. 80.

(*l*) *Blake v. Foster*, 8 T. R. 437; *Roe d. Jackson v. Ramsbottom*, 3 M. & S. 516; *Fenner v. Duplock*, 2 Bing. 10; *Hill v. Saunders*, Id. 112; S. C. in error, 4 B. & C. 529; *Doe d. Strode v. Seaton*, 2 C. M. & R. 728; *Cole Ejec.* 217.

(*m*) 14 & 15 Vict. c. 25, s. 1.

(*n*) *Com. Dig. tit. Estates* (E. 1); 2 Blac. Com. 136.

(*o*) *Uttly Dale's case*, Cro. Eliz. 182.

CHAP. I. SECT. 5. To remedy a difficulty which frequently occurred in proving the death of the cestui que vie, or person for whose life the estate was held, when he had gone abroad, the statute 19 Car. 2, c. 6 (*p*), enacts (*sect. 2*), that if the cestui que vie “shall remain beyond the seas, or elsewhere absent himself in this realm for seven years together,” and no sufficient proof be made of his life in any action for recovery of the estate by the lessor or reversioner, in such case he shall be accounted dead, and the judge shall direct the jury to give their verdict accordingly.

*Lease by
Tenant pur
autre Vie.*

19 Car. 2, c. 6.

Presumption
of Death of
cestui que vie.

By sect. 5, if any person be evicted by virtue of the act, and afterwards the cestui que vie return again from beyond seas, or “on proof in such action as aforesaid” be made appear to be living or to have been living at the time of the eviction, then the tenant who was ousted may re-enter and hold the estate “during the life or lives, or for so long a term as the person or persons upon whose life or lives the said estate or estates depend, shall be living,” and may also recover mesne profits against the reversioner; and this whether the cestui que vie be living or dead.

6 Ann. c. 18.

Production of
cestui que vie.

By 6 Ann. c. 18 (*q*), it is enacted, that any person “who hath or shall have any claim or demand in or to any remainder, reversion, or expectancy in or to any estate after the death of any person within age, married woman or any other person whatsoever,” upon affidavit that he has cause to believe that such minor, married woman or other person is dead, and that the death is concealed (*r*), may once a year move the court (*s*) for an order, which the court is bound to grant, upon the parties interested for the production of “such minor, married woman or other person as aforesaid,” upon not more than two persons named in the order by the party applying. In case of such repeated refusals or neglects as in that act mentioned, “such minor, married woman or other person so concealed shall be taken to be dead;” and the prosecutor may enter as if such minor, &c. were actually dead (*t*).

SECT. 6.—*By Tenants by the Curtesy, Tenants in Dower or Jointure.*

Tenants by the curtesy or in dower may grant leases pursuant to the Settled Estates Act, in like manner as tenants for life (*u*).

Leases granted by any such tenants, not made in pursuance of the

(*p*) C. 11 in the Revised Statutes.

(*q*) C. 72 in the Revised Statutes.

(*r*) It is not necessary in support of such application, to prove any active concealment of the death; *Re Clancy*, 2 Sm. & Giff. 46; 18 Jur. 222; *Re Dennis*, 8 W. R. 649; 7 Jur., N. S. 230. As to the costs of the proceedings, see *Re John Isaac*, 4 Myl. & Cr. 11.

(*s*) The Lord Chancellor is named in the act. Any judge of the Chancery Division has jurisdiction (Judicature Act, 1873, s. 34).

(*t*) As to the mode of proceeding under this act and the form of order, see 2 Daniell Ch. Prac. 1843—1847, 4th ed.; *In re St. John's Hospital, Cirencester*, 16 W. R. 556; 18 L. T. 12.

(*u*) Ante, 6.

above act, become absolutely void at their death (*r*), or, if the holding be agricultural, at the end of the then current year of the tenancy (*x*). If the lessee then holds over he becomes tenant on sufferance; but a new tenancy at will, or from year to year, may be created with the express or implied assent of the reversioner, or by his acceptance of subsequent rent. That, however, will not confirm the original lease for the term therein expressed to be granted (*y*), but will only create a new tenancy. If a tenant in dower lease for years, and marry, her second husband's executors are entitled to the arrears of rent due at his death (*z*).

CH. I. SECT. 6.

*Lease by
Tenants by the
Curtesy, &c.*

SECT. 7.—*By Joint Tenants and Tenants in Common.*

Joint tenants and tenants in common may, according to the interest they have, join or sever in making leases; and such leases bind, whether made to commence in præsentiori or in futuro (*a*). If joint tenants join in a lease, there is but one lease, and they all make but one lessor, for they have but one freehold; but if tenants in common join in a lease, there are several leases of their several interests (*b*): for although tenants in common cannot make a joint lease of the whole of their estate (*c*), yet if they join in a lease for years by indenture of their several lands, it is the lease of each for their respective parts, and the cross confirmation of each for the part of the other, and no estoppel on either part, because an actual interest passes from each respectively (*d*). There is no doubt that a demise by tenants in common, though joint in its terms, operates as a separate demise by each tenant in common of his undivided share, and a confirmation by each of his companions (*e*). Where joint tenants concur in granting a lease, the interest of the lessee continues, notwithstanding the decease of either of the lessors, and the survivor is entitled to the whole rent (*f*). So, if the lease be at will, the death of one of the lessors does not operate as a countermand of the tenancy even for a moiety; all survives to the other, and if the lessee continue his possession, the survivor may maintain an action for the whole rent (*g*). But though each joint tenant is con-

By Joint Tenants and Tenants in Common to other Persons.

(*v*) Bac. Abr. tit. *Leases* (I. 1); *Miller v. Mayncaring*, Cro. Car. 399.

(*r*) 14 & 15 Vict. c. 25, s. 1.

(*y*) Bac. Abr. tit. *Leases* (I. 1); *Miller v. Mayncaring*, Cro. Car. 399.

(*z*) *Anon.*, Moor. pl. 25.

(*a*) Co. Lit. 186 a; Com. Dig. *Leases* (I. 5); Bac. Abr. tit. *Joint Tenants and Tenants in Common* (H. 1); Bro. Abr. *Grant*, 154.

(*b*) 8 Ander. 16; *Jurdain v. Steere*, Cro. Jac. 83; Com. Dig. tit. *Estates* (G. 6).

(*c*) *Heatherly d. Worthington v. Weston*, 2 Wils. 232; *Doe v. Errington*, 1 A. & E.

750; *Burne v. Cambridge*, 1 Moo. & R. 539.

(*d*) Com. Dig. tit. *Estates* (K. 8); Bac. Abr. tit. *Joint Tenants and Tenants in Common* (H. 1); *Mantle v. Worthington*, Cro. Jac. 166; *Brooks v. Jaccroft*, Clayton, 136; 1 Roll. Abr. 877, l. 48, 52.

(*e*) *Thompson v. Hakewill*, 19 C. B., N. S. 713; 35 L. J., C. P. 18; *Eccleston v. Cliphsham*, 1 Wms. Saund. 153; 2 Roll. Abr. 61; Shrp. Touch. 85; *Heatherly d. Worthington v. Weston*, 2 Wils. 232.

(*f*) *Henstead's case*, 5 Co. R. 10 b; *Doe d. Aslin v. Summersett*, 1 B. & Ad. 135.

(*g*) *Henstead's case*, 5 Co. R. 10 b.

CH. I. SECT. 7. Leases by Joint Tenants, &c. sidered entitled to the whole while the joint tenancy continues, and is said to be seised “per my et per tout” (*h*), yet, for the purposes of alienation, each has an exclusive right to and dominion over, his own share or proportion; and, therefore, if one of two joint tenants make a lease of the whole, his moiety only will pass (*i*). So a lease purporting to be made by both, and executed by one only, is a good lease for the moiety of him only who has executed (*k*).

If one joint tenant make a lease of his moiety for years, and die before the lessee’s entry, the lease will bind the survivor, and the lessee will retain his interest in the moiety demised until his term expire. And so one joint tenant may make a lease to commence after his death, and his co-tenant, if he survive, will be bound by it (*l*).

To each other. One joint tenant or tenant in common may make a lease for years of his part to his companion; for it only gives the latter a right of taking the whole profits instead of the moiety; and he may contract with his companion for that purpose, as well as he may with a stranger (*m*); and such a lease extinguishes the jointure for the time (*n*), and gives a right to distrain for the agreed rent (*o*). If there be three or more joint tenants, the lessee would hold the share demised to him as tenant in common with the others (*p*).

SECT. 8.—By Coparceners.

Where a tenant in fee or in tail dies, leaving several daughters and no son; or several sisters and no issue, father or brother; or several aunts and no issue, &c.; lands descend among all the daughters, sisters, aunts, &c. equally, who make but one heir, and are called coparceners (*q*). Although they have an unity, they have not an entirety of interest, but are properly entitled each to the whole of a distinct share, and there is no survivorship among them (*r*). Until partition is made (*s*), they may either join in a lease, or each may make a lease of her own share. If they join in a lease, it operates (as with tenants in common) as the separate demise by each of her

(*h*) Lit. s. 288; Co. Lit. 186 a; 2 Blac. Com. 182.

(*i*) Co. Lit. 186 a; *Bellingham v. Alsop*, Cro. Jac. 52.

(*k*) *Cartwright’s case*, cited 1 Vent. 136.

(*l*) Lit. s. 289; *Grute v. Locroft*, Cro. Eliz. 287; *Harbin v. Barton*, Moor. 395; *Whitlock v. Horton*, Cro. Jac. 91; *Bellingham v. Alsop*, Cro. Jac. 52; *Clerk v. Clerk*, 2 Vern. 323.

(*m*) Com. Dig. tit. *Leases* (I. 5); *Cowper v. Fletcher*, 6 B. & S. 464; 34 L. J., Q. B.

187.

(*n*) Co. Lit. 186 a.

(*o*) *Cowper v. Fletcher*, *supra*.

(*p*) *Jurdain v. Stcere*, Cro. Jac. 83; *Blackaspe’s case*, Noy, 13.

(*q*) Com. Dig. tit. *Parceners* (A. 1), (A. 3).

(*r*) Bull. N. P. 107; 2 Blac. Com. 182, 188; Co. Lit. 164 a.

(*s*) See the Partition Acts, 1868 and 1876 (31 & 32 Vict. c. 40, and 39 & 40 Vict. c. 17).

share, and should be so pleaded (*t*). If they join in a lease they hold the rent reserved in common (*u*); the observations, therefore, made as to leases by tenants in common (*x*) apply also to leases by coparceners. One cannot sue separately for her portion of rents accruing to her and her fellows (*y*).

CH. I. SECT. 8.

*Leases by Coparceners.*SECT. 9.—*Sublease, by Tenant for Years.*

A lessee or tenant for years, who is not restrained by his lease from subletting, may demise for any less term than he himself has, at such rent, and subject to such covenants, &c. as may be agreed on (*z*). But the sublease should contain an express covenant by the sublessee to perform all the covenants in the original lease, except such of them as the lessee himself is to continue to perform (*a*). If the covenants in the original lease are *repeated verbatim* in the sublease, the legal effect of the two sets of covenants will be different, owing to the different dates at which the two tenancies commenced (*b*). Therefore a sublease should never be prepared in that form, although this has sometimes been done. Although, there being no privity of contract, the sublessee is not liable to the original lessor in an action upon any of the covenants in the original lease (*c*), the original lessor may distrain for rent, or evict the sublessee, if the lessee has incurred a forfeiture (*d*). Or he may proceed for an injunction to restrain the sublessee from committing a breach of a covenant contained in the original lease, but not in the sublease, ex. gr., a covenant not to permit a sale by auction on the demised premises (*e*).

Sublease.

A rent-charge granted for life by a tenant for years is not void, but is good as a chattel interest; and the goods of a stranger not shown to hold the premises by title paramount to the rent-charge (as by a prior demise) may be distrained for the arrears (*f*).

Rent-charge.

(*t*) *Milliner v. Robinson*, Moor. pl. 939.(*u*) 2 Prest. Abstr. 74.(*x*) Ante, 9.(*y*) *Decharms v. Horwood*, 10 Bing. 526.(*z*) Bac. Abr. tit. *Leases*; *Rez v. Wil-*
son, 5 M. & Ry. 157, n.(*a*) *Doughty v. Bowman* (in error), 11 Q. B. 454; *Piggott v. Stratton*, 29 L. J., Ch. 1, 7. See Form of Sublease, post, Appendix B., Sect. 14.(*b*) *Penley v. Watts*, 7 M. & W. 601; *Walker v. Hatton*, 10 M. & W. 249, 258; 2 Dowl., N.S. 263; *Logan v. Hall*, 4 C. B.598; *Sweet*, app. *Seager*, resp., 2 C. B., N. S. 119.(*c*) *Holford v. Hatch*, 1 Doug. 183; *Earl of Derby v. Taylor*, 1 East, 502; *Pilking-*
ton v. Shaller, 2 Vern. 374; *Doe d. Wyatt*
v. Byron, 1 C. B. 623, 626.(*d*) *Arnsby v. Woodward*, 6 B. & C. 519.(*e*) *Parker v. Whyte*, 1 H. & M. 167; 32 L. J., Ch. 520; *Clements v. Welles*, L. R., 1 Eq. 200; 35 Beav. 513.(*f*) *Saffery v. Elgood*, 1 A. & E. 191.

CH. I. SEC. 10.

*Sublease, by
Tenant for less
than Years.*

SECT. 10.—*Sublease, by Tenant for less than Years.*

Tenants for a less period than for years, but who are possessed of a certain quantity of interest, may alienate the whole, or any part of it, unless expressly restricted from so doing. In fact every tenant, except a tenant at will or at sufferance, has a right, in the absence of a contract to the contrary, to make a sub-tenancy, as incident to his tenancy.

By Tenants
from Year to
Year.

A tenant from year to year, therefore, may assign his term, or may underlet part of it, as for three-quarters of a year, or so many months, &c.; but he cannot by underletting grant an interest exceeding his own in point of duration. If he grant a lease by deed for twenty-one years, such term will continue in force during his own yearly tenancy (*g*). If he underlet from year to year, the sub-tenancy will take effect during his own tenancy, and he will have a sufficient reversion to enable him to distrain for the rent (*h*).

A tenant for a less term than one year, as for half a year, a quarter, or a month, or the like, may grant his interest, or any portion of it, to another, unless some agreement subsists between him and his lessor, which expressly restricts him from making such disposition.

By Tenants
at Will.

A tenant at will cannot demise, for that would amount to a determination of his estate at will (*i*); but a demise by a tenant at will, with possession thereunder, will create a tenancy by estoppel as between him and his lessee (*k*), and will be good as against himself (*l*).

By Tenants
on Sufferance.

A tenant on sufferance cannot demise (*m*); but a demise by such tenant, with possession, will create a tenancy by estoppel (*n*).

SECT. 11.—*Lease by the Crown.*

Restrained by
1 Ann. stat. 1
c. 7, s. 5.

Leases for 31
Years or Three
Lives.

The sovereign is a corporation sole, and at common law might have granted leases for lives or for years to any extent, and have thereby bound the successors (*a*). But by 1 Ann. stat. 1, c. 7, s. 5, every grant and lease by the crown of any lands and tenements thereto belonging (except advowsons and vicarages) shall be void, unless made for a term not exceeding one-and-thirty years, or three lives, or for some term of years determinable upon one, two or three lives, to commence from the date or making thereof; and if made to take effect in reversion or expectancy, the same, together with the estate or estates in possession,

(*g*) *Mackay v. Mackreth*, 4 Doug. 213;
Oxley v. James, 13 M. & W. 209.

(*h*) *Pike v. Eyre*, 9 B. & C. 909; *Curtis v. Wheeler*, Moo. & M. 493.

(*i*) 1 Inst. 57; *Moss v. Gallimore*, 1 Doug. 279; 1 Smith L. C. 629 (7th ed.);
Birch v. Wright, 1 T. R. 382.

(*k*) Ante, 2, note (*b*).

(*l*) *Blunden v. Baugh*, Cro. Car. 302;
Doc d. Goody v. Carter, 9 Q. B. 865; *Colo Ejec.* 449.

(*m*) *Thunder d. Weaver v. Belcher*, 3 East, 499; *Cole Ejec.* 456.

(*n*) Ante, 2.

(*o*) Com. Dig. *Grant* (G. 3).

not to exceed three lives, or the term of one-and-thirty years in the whole: the tenant to be liable to punishment for waste: the ancient or most usual rent or more, or such other rent as in the said act mentioned, to be reserved and made payable during the whole term. By sect. 6, where the greatest part of the yearly value of any such crown lands consists of buildings thereon which want to be repaired or re-edified, a lease thereof may be granted for any term not exceeding fifty years or three lives, subject to similar restrictions and conditions to those above mentioned (*p*).

CH. I. SEC. 11.
Lease by the Crown.

Building or
Repairing
Leases for
50 Years.

In modern times most of the crown lands have been placed under the management of the Commissioners of Woods, Forests and Land Revenues, who act under the orders, directions, instructions and rules of the Lords of the Treasury (*q*). They may grant leases for any term not exceeding thirty-one years (*r*), or building leases for any term not exceeding ninety-nine years (*s*), subject in each case to certain restrictions and conditions (*t*), amongst which there is a restriction that "in each such lease there *shall* be contained" a proviso for re-entry on non-payment of rent, or non-observance, or non-performance of the covenants (*u*); a survey and report as to the value, &c. must be previously made (*x*), and the lease must be enrolled in the office of Land Revenues, Records and Inrolments (*y*).

Leases by
the Commis-
sioners of
Woods and
Forests.

Proviso for
Re-entry.

Leases of mines, minerals and quarries of the crown in Dean Forest, Gloucestershire, are granted by the Commissioners of Woods and Forests, pursuant to 1 & 2 Vict. c. 43, as amended by 24 & 25 Vict. c. 40 (*z*).

Dean Forest,
Mines and
Quarries.

Lands belonging to the crown, in right of the Duchy of Lancaster, may be demised pursuant to 48 Geo. 3, c. 73; 1 & 2 Geo. 4, c. 52; which are not repealed by 10 Geo. 4, c. 50, so far as they relate to the Duchy of Lancaster. As to sales and purchases of lands on behalf of the Duchy, see 18 & 19 Vict. c. 58.

Duchy of
Lancaster.

Lands belonging to the Duchy of Cornwall may be demised pursuant to the Duchy of Cornwall Management Acts, 1863 and 1868 (*a*). When such lands happen to be vested in the crown they may be demised pursuant to 1 & 2 Will. 4, c. 5.

Duchy of
Cornwall.

(*p*) See also 1 Geo. 3, c. 1; 34 Geo. 3, c. 76; but none of the restrictions contained in any of these acts apply or extend to the *private* estates of her Majesty, which are regulated by 25 & 26 Vict. c. 37.

(*q*) 10 Geo. 4, c. 50; 2 & 3 Will. 4, cc. 1, 112; 3 & 4 Will. 4, c. 1; 2 & 3 Vict. c. 80; 3 & 4 Vict. c. 87; 4 & 5 Vict. c. 40; 7 & 8 Vict. c. 1; 8 & 9 Vict. c. 99; 14 & 15 Vict. c. 42 (and the numerous acts mentioned in the schedule to that act); 15 & 16 Vict. c. 62; 29 & 30 Vict. c. 62.

(*r*) 10 Geo. 4, c. 50, ss. 22, 26. See

Chit. Stat. vol. ii. tit. *Crown Lands*.

(*s*) Sects. 23, 24, 26.

(*t*) Sects. 27—33.

(*u*) Sect. 27.

(*x*) Sect. 61.

(*y*) 2 Will. 4, c. 1, s. 21.

(*z*) *Goold v. Great Western Deep Coal Co.*, 2 De Gex, J. & S. 600; the other Dean Forest Acts are 20 Car. 2, c. 8; 1 & 2 Will. 4, c. 12; 6 & 7 Will. 4, c. 3; 1 & 2 Vict. c. 42; 5 & 6 Vict. cc. 48, 65; 29 & 30 Vict. c. 62, ss. 4, 5; 29 & 30 Vict. c. 70.

(*a*) 26 & 27 Vict. c. 49; 31 & 32 Vict. c. 35.

CH. I. SEC. 11.

*Lease by
the Crown.*By Admiralty
or other
Board.

When the Admiralty or any other government board are authorized to acquire land for public purposes, they are generally empowered to sell, exchange or *demise* such parts thereof as in their opinion will not be required for the public service. In any such case the provisions of the particular statute must of course be strictly complied with (*b*).

SECT. 12.—*By Corporations generally.*

Corporations are either ecclesiastical or lay, the latter being divided into eleemosynary and civil. The universities of Oxford and Cambridge are regarded as civil corporations (*c*).

Lease by
Deed.

Corporations cannot make any disposition of their property otherwise than by deed sealed with their common seal; thus they cannot, without deed, make a lease for years (*d*). But one who enters upon, occupies and pays rent for corporate property under a lease for years which is not sealed, becomes a tenant from year to year on such terms of the lease as are applicable to a yearly tenancy (*e*).

Name of the
Corporation.

A corporation cannot either take or grant but by its proper name of incorporation; though sometimes a minute variation in the name is not so material as to avoid a grant (*f*). As to naming the corporation, it need only be observed, that corporations *aggregate*, as dean and chapter, mayor and commonalty, warden and fellows, &c., may make or confirm leases without expressing either the christian or surname of the dean, mayor, warden, &c., because, in their politic capacity as a corporation aggregate, they continue always the same, and are said never to die; but in leases or confirmations by a bishop, dean or other *sole* corporation, both the christian and surname, or at least the christian name and title, ought to be expressed; as "John, Bishop of P." (*g*).

Appointment
of Attorney,
when neces-
sary.

Where any personal act is necessary in the case of a corporation, that act must be done by attorney appointed by deed under their common seal (*h*); for however it may be as to ordinary services, they cannot appoint a person to do any act which concerns their interest or title in land, unless it be by deed (*i*). A corporation cannot appear in court otherwise than by attorney (*k*), who ought,

(*b*) 5 & 6 Vict. c. 94, s. 12; 18 & 19 Vict. c. 117; 24 & 25 Vict. c. 41, ss. 14, 15, 16.

(*c*) *Parkinson's case*, Carth. 93; *R. v. Vice-Ch. of Cambridge*, 3 Burr. 1056.

(*d*) *R. v. Chipping-Norton*, 5 East, 239, 242; *Bird v. Higginson*, 6 A. & E. 284; *R. v. North Duffield*, 3 M. & S. 247; 1 Kyd on Corp. 263.

(*e*) *Ecclesiastical Commissioners v. Mervil*, L. R., 4 Ex. 162; 38 L. J., Ex. 93.

(*f*) 1 Kyd on Corp. 234, 237; *Mayor, &c. of Carlisle v. Blamire*, 8 East, 487.

(*g*) 2 Inst. 666; Bac. Abr. tit. *Leases* (G. 3).

(*h*) *Doe d. Bank of England v. Chambers*, 4 A. & E. 410; 1 Kyd on Corp. 268.

(*i*) Bac. Abr. tit. *Corporations* (E. 3).

(*k*) 1 Kyd on Corp. 270.

for his own security, to have a retainer under their common seal (l). CH. I. SECT. 12.

*Lease by
Corporations
generally.*

A lease to charitable uses by a corporation of lands already in mortmain is not affected by the provisions of 9 Geo. 2, c. 36 (m). Where a corporation has by a private act of parliament power to sell and exchange land, a power to lease the land and give the option of purchase to the lessee is implied (n).

Companies incorporated by act of parliament for the purpose of carrying on any undertaking may demise lands by their directors or a committee of directors under the common seal of the company if the lease be for more than three years, and by writing or parol if it be for a less period, by virtue of the 97th section of the Companies Clauses Consolidation Act, 1845 (8 Vict. c. 16). LEASE BY
COMPANY
UNDER COM-
PANIES CLAUSES
ACT.

A railway company may not lease their line except by virtue of some special act; and when such lease is authorized, it must, by virtue of the 112th section of the Railways Clauses Consolidation Act, 1845 (8 Vict. c. 20), contain all usual and proper covenants on the part of the lessee for maintaining the railway. LEASE BY RAIL-
WAY COMPANY
UNDER RAIL-
WAYS CLAUSES
ACT.

SECT. 13.—By Municipal Corporations.

At common law there was no restraint on *civil* corporations granting such leases as they pleased, consistently with their own estates, by-laws and private statutes (o). AT COMMON
LAW.

By 5 & 6 Will. 4, c. 76, s. 94, municipal corporations cannot demise their lands, without the consent of the Lords of the Treasury, for a longer term than thirty-one years, reserving during the whole term such clear yearly rent as to the council of the borough shall appear reasonable, without taking any fine for the same. When the council deem it expedient to demise or lease for a longer term than thirty-one years or upon different terms and conditions to those above mentioned, they must obtain the approbation of the Lords of the Treasury. UNDER 5 & 6
WILL. 4, c. 76.
LEASES FOR 31
YEARS WITHOUT
FINE.

OTHER LEASES
WITH APPRO-
BATION OF
TREASURY.

By sect. 95, in certain specified cases, leases may be *renewed* by the council of the borough, for such term or number of years, either absolutely or determinable with any life or lives, or for such life or lives, and at such rent, and upon the payment of such fine or premium, either certain or arbitrary, and with or without any covenant for the future renewal thereof, as such body corporate could or might have done in case that act had not passed. RENEWED
LEASES.

(l) *Arnold v. The Mayor, &c. of Poole*, 4 M. & G. 860; 2 Dowl., N. S. 574, cited 5 Q. B. 546; *Lewis v. The Mayor, &c. of Rochester*, 9 C. B., N. S. 401. See form of retainer, Id. 408.

(m) *Walker v. Richardson*, 2 M. & W. 882; *Att.-Gen. v. Glyn*, 12 Sim. 84; *Ash-ton v. Jones*, 28 Beav. 460.

(n) *In re Female Orphan Asylum*, 15 W. R. 1056; 17 L. T. 59.

(o) *Smith v. Barrett*, 1 Sid. 161.

CH. I. SEC. 13.

*Lease by
Municipal
Corporations.*

This section is to be construed liberally: but although renewals need not be on precisely the same terms there must be such an uniformity as to show that the same lease has been renewed. A renewal on a fine, and at an undervalue, with variations in the covenants, and a different rent reserved, is not valid (*p*).

Building
Leases for
75 Years.

By sect. 96, leases and contracts for leases for any term not exceeding seventy-five years may be made by the council of any borough "of tenements or hereditaments, the greater part of the yearly value of which shall at the time of making the lease or agreement consist of any building or buildings, of land or ground proper for the erection of any houses or other buildings thereupon, with or without gardens, yards, curtilages or other appurtenances to be used therewith; and where the lessee or intended lessee shall covenant or agree to erect a building or buildings thereon of greater yearly value than such land or ground, of land or ground proper for gardens, yards, curtilages or other appurtenances to be used with any other house or other building erected or to be erected on any such ground, belonging either to such body corporate or to any other proprietor, or proper for any other purpose calculated to afford convenience or accommodation to the occupiers of any such house or building."

Mortgages.

Mortgages by municipal corporations, whether by way of demise or otherwise, can only be made with the consent of the Lords of the Treasury and subject to the provisions and conditions of "The Municipal Corporation Mortgages, &c. Act, 1860" (23 Vict. c. 16), as amended and extended by 23 & 24 Vict. c. 106, s. 6.

SECT. 14.—*Ecclesiastical Leases.*(a) *At Common Law.*At Common
Law.

By the common law, all ecclesiastical corporations *aggregate* possessed the power of making any leases they thought fit, without the confirmation of any person (*q*). And a similar power was possessed by eleemosynary corporations, as masters and fellows of colleges, masters of hospitals and their brethren (*q*). But ecclesiastical corporations *sole*, as archbishops, bishops, deans, archdeacons, prebendaries, preceptors, chancellors, parsons and vicars, and others, could not make leases *binding on their successors*, of lands and tenements whereof they were seised in their corporate right, except with the consent, and in some cases with the confirmation, of such persons as the law required (*r*).

(*p*) *Att.-Gen. v. Great Yarmouth*, 21 Beav. 625.

(*q*) Co. Lit. 44 a.

(*r*) Co. Lit. 44 a, 67 a; Shep. Touch. 281; Woodf. L. & T. 20—23 (9th ed.)

(b) *The "Enabling" and "Disabling" Statutes.*

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*Ecclesiastical
Leases
(Enabling, &c.
Acts).*

The exercise of such powers having been much abused by owners for the time being, to the great prejudice and impoverishment of their successors, the legislature has from time to time interfered and passed various *disabling* or *restraining* statutes (s). Prior to certain acts, such as "*The Ecclesiastical Leasing Act, 1842*," all passed in the reign of Queen Victoria, which will be presently adverted to, no lease from any ecclesiastical corporation, aggregate or sole, could safely be made otherwise than in pursuance of some or one of these statutes, with such consent (if any) and subject to such restrictions, and containing such covenants and conditions for the protection and benefit of the successors, as are prescribed or required by the act or acts pursuant to which the lease is made. The "*disabling*" or "*restraining*" statutes, however, although not repealed (t), are almost entirely superseded (u) by the statutes of Queen Victoria, and are now of consequence chiefly in relation to the vested interests created under them, as showing the course of legislation on the subject, and as explaining the phraseology of ecclesiastical leases.

By 32 Hen. 8, c. 28 (commonly called the Enabling Act) all persons seised of lands in fee simple *in right of their churches* (x) (except parsons and vicars (y)) may by indenture demise such parts thereof as have been most commonly letten to farm and occupied by the farmers thereof for twenty years next before such demise, for any term not exceeding twenty-one years or three lives, reserving yearly during the whole term the most accustomed rent or more; such lease not to be made without impeachment of waste, nor whilst there is any old lease, unless the same shall expire or be surrendered or ended within one year next after the making of the new lease.

The Enabling Act.
Leases for 21 Years or 3 Lives.
Parsons and Vicars excepted.

It is to be observed that leases made in pursuance of this act do not require any confirmation whatever.

No Confirmation necessary.

Archbishops, bishops, and other ecclesiastical corporations *sole* (except parsons and vicars) may grant leases pursuant to the above act. A prebendary appears to be within the act (z); and so does the chancellor of a cathedral church (a), but not a perpetual curate, whose curacy has been augmented by a grant of lands under the Queen Anne's Bounty Acts; for either he is not seised in fee in right of his

What Dignitaries are within Enabling Act.

(s) Vide infra, and see Chit. Stat. tit. "Leases," vol. iv. tit. *Lease (Ecclesiastical, &c.)*.

(t) See *Jenkins v. Green*, 27 Beav. 440.

(u) See Phillimore's Ecclesiastical Law, vol. ii. p. 1647.

(x) This act has been repealed by 19 & 20 Vict. c. 120, s. 35, "except so far as relates to leases made by persons having

an estate in right of their churches."

(y) Sect. 4.

(z) *Acton v. Pritchard*, 4 Leon. 51; *Watkinson v. Man*, Cro. Eliz. 349; but see Lit. ss. 611—648; *Doe d. Richardson v. Thomas*, 9 A. & E. 556.

(a) *Bisco v. Holte*, Lev. 112; Sid. 158; *Eusden v. Dennis*, Palm. 105.

CH. I. SEC. 14. church, or he is a quasi-vicar (*b*). Corporations aggregate, such as deans and chapters, universities, colleges, &c., are not within the statute (*c*); nor are copyhold lands (*d*).

Ecclesiastical Leases (Enabling, &c. Acts).

1 Eliz. c. 19, s. 5. The first Disabling Act.

By the Disabling or Restraining Act (1 Eliz. c. 19), s. 5, all leases by any archbishop or bishop of any parcel, &c. for more than twenty-one years or three lives, or whereupon the old accustomed yearly rent or more shall not be reserved and made payable yearly during the whole term, "shall be utterly void" (*e*).

Only extends to Archbishops and Bishops.

It is to be observed that only archbishops and bishops are restrained by this statute. But the act applies to all leases made by them, *although confirmed by the dean and chapter*, except leases made pursuant to 32 Hen. 8, c. 28 (*f*), which are not interfered with. Concurrent leases, if confirmed by the dean and chapter, are valid provided they do not exceed (together with the lease in being) the term permitted by the above act.

13 Eliz. c. 10, s. 3. Leases by Corporations, Aggregate or Sole, of Ecclesiastical Property for 21 Years or 3 Lives.

By the Restraining Act (13 Eliz. c. 10), s. 3, all leases, grants, &c. by any master and fellows of any college, dean and chapter of any cathedral or collegiate church, master or guardian of any hospital (*g*), parson, vicar or any other having any spiritual or ecclesiastical living of any parcel, &c. for more than twenty-one years or three lives, or not reserving the accustomed yearly rent or more, shall be utterly void. Sect. 4 provides that this act shall not make good any lease made by any such college or collegiate church within the Universities of Oxford or Cambridge, or elsewhere in England, for more years than are limited by the private statutes of the same college.

This Act does not enable, but only restrains.

This act does not enable parsons or vicars to make any leases whatever without the consent of the patron and ordinary (*h*). But it restrains them from making any lease, *even with such consent*, for more than twenty-one years or three lives, or without reserving the accustomed yearly rent or more. A lease by a vicar (with such consent) for three lives of uninclosed waste land not let before is void as against his successor, notwithstanding the lessee covenants to inclose the land and pay a rack-rent for it (*i*).

Void means Voidable, i. e. Void at Election.

Although this statute declares that all leases not made according to its provisions shall be utterly void, it has been frequently held that such leases are good during the life of the lessor (*k*); and even after the lessor's death they are not void, but only voidable by the

(*b*) *Doe d. Richardson v. Thomas*, 9 A. & E. 556.

(*c*) 10 Co. R. 60 a.

(*d*) As to leases of copyholds, see 24 & 25 Vict. c. 105, post, 26.

(*e*) The exception in this act of leases to the crown was repealed by 1 Jac. 1, c. 3, which renders all such leases utterly void.

(*f*) Ante, 17.

(*g*) Explained, as to hospitals, by 14 Eliz. c. 14; and see 39 Eliz. c. 5, s. 6; post, 20.

(*h*) Bac. Abr. tit. *Leases* (I. G.).

(*i*) *Goodtitle d. Clarges v. Fumecan*, 2 Doug. 565; *Doe d. Tennyson v. Lord Yarborough*, 1 Bing. 24; *Bp. of Hereford v. Scory*, Cro. Eliz. 874.

(*k*) *Doe d. Bryan v. Bancks*, 4 B. & A. 407, Bayley, J.

successor, who may confirm them (*l*). But the Statute of Limitations (3 & 4 Will. 4, c. 27) does not begin to run against such successor until he exercises his option by bringing an action for the recovery of the property. This was decided in a case where the governors of a hospital granted a lease in 1783 for ninety-nine years at a pepper-corn rent, and their successors brought an action to set the lease aside in 1876 (*m*).

CH. I. SEC. 14.
*Ecclesiastical
Leases
(Enabling, &c.
Acts).*

By 14 Eliz. c. 11, s. 16, "All leases, bonds, promises and covenants of and concerning benefices and ecclesiastical livings with cure, to be made by any curate, shall be of no other or better force, validity or continuance, than if the same had been made by the beneficed person himself that demised or shall demise the same to any such curate" (*n*).

14 Eliz. c. 11,
s. 16. Leases
by Curates.

By 14 Eliz. c. 11, s. 17, the 13 Eliz. c. 10, shall not extend to any grant, assurance or lease of any houses belonging to any the persons, or bodies politic or corporate aforesaid, nor to any ground to such houses appertaining, which houses are situate in any city, borough, town corporate or market town, or the suburbs of any of them; but all such houses and grounds may be granted, demised and assured as by the laws of this realm, and the several statutes of the said colleges, cathedral churches and hospitals, they lawfully might have been before the making of the said statute, or lawfully might be if the said statute were not: so always that such house be not the capital or dwelling-house used for the habitation of the persons above said, nor have ground to the same belonging above the quantity of ten acres, anything in the said act to the contrary notwithstanding.

14 Eliz. c. 11.
Houses and
Grounds in
Towns, &c.

Sect. 19 provides, "That no lease shall be permitted to be made by force of this act, in reversion, nor without reserving the accustomed yearly rent at the least, nor without charging the lessee with the reparations (*o*), nor for longer term than *forty years* at the most."

Not for more
than 40 Years.

A covenant by the trustees of a charity to put in a new life so often as one of three lives drops, in the case of a lease for more than forty years, will not be enforced (*p*). But a lease by a vicar of messuages in the city of London—of which the dwelling-house used for the habitation of the vicar formed no part, and the ground demised was less

Covenant to
put in Lives.

(*l*) *Edwards v. Dick*, 4 B. & A. 217; *Doe d. Pennington v. Taniere*, 12 Q. B. 998; *Pennington v. Cardale*, 3 H. & N. 666, 668.

(*m*) *Magdalen Hospital v. Knotts*, 46 L. J., Ch. 149; L. R., 5 Ch. D. 175.

(*n*) *Doe d. Richardson v. Thomas*, 9 A. & E. 556.

(*o*) *Crane v. Taylor*, Hob. 269.

(*p*) *Moore v. Clench*, L. R., 1 Ch. D. 447; 45 L. J., Ch. 80; 34 L. T. 13; 24 W. R. 169. Here the lease was in 1836 for 40 years and a month, with a concur-

rent term of 99 years for three lives, and a covenant during the 40 years and the month to add a life. In 1867 a new life was put in, but in 1872 the Charity Commissioners having vetoed the lease under 18 & 19 Vict. c. 124, s. 29, the governors refused to put in another life. Jessel, M. R., in refusing specific performance of the covenant to put in the life, expressed an opinion that the Charity Commissioners could not have vetoed the renewal of the lease if it had been originally valid.

CH. I. SEC. 14. *Ecclesiastical Leases (Enabling, &c. Acts).* than ten acres—for twenty-one years from the date of the lease, made at a time when a former lease of the same premises for forty years was in being, but within three years of its expiration, was held not void under either of the restraining acts of *Elizabeth* (q).

18 Eliz. c. 6, s. 1. *Corn Rents.* By 18 Eliz. c. 6, s. 1, in college leases one-third part at the least of the old rent must be reserved and paid in corn (wheat or malt) for the said colleges, at certain rates therein mentioned; and see 39 & 40 Geo. 3, c. 41, s. 7.

18 Eliz. c. 11, s. 2. *Concurrent Leases.* The 18 Eliz. c. 11, after reciting the 13 Eliz. c. 10, s. 3, enacts (sect. 2), that all leases of any ecclesiastical, spiritual or collegiate lands, tenements or hereditaments, whereof any former lease for years is in being, and not to be expired, surrendered or ended within three years next after the making of such new lease, shall be void, as well as all bonds and covenants for the renewal of the same. And by 43 Eliz. c. 9, s. 8, all payments had for the intent to have and enjoy any lease contrary to these statutes shall be void in the same manner as bonds and covenants are appointed to be.

Leases of Fifield Manor. By 18 Eliz. c. 11, ss. 5, 6, Saint John's College, Oxford, may grant leases of the manor of Fifield, in Oxfordshire, to the kindred of their founder, Sir Thomas White, for ninety-nine years.

39 Eliz. c. 5, s. 6. *Leases by Hospitals, &c.* By 39 Eliz. c. 5, s. 6, all leases, grants, &c., made by any corporation founded in pursuance of that act as a hospital, maison de Dieu, abiding place or house of correction, exceeding twenty-one years in possession, or whereupon the accustomed yearly rent or more by the greater part of twenty years next before the making of such lease shall not be reserved and yearly payable, shall be void (r).

Ancient Offices not within the Statutes. The grants of ancient offices belonging to ecclesiastical persons are not within any of these acts, and therefore stand as at common law (s).

39 & 40 Geo. 3, c. 41. *Ancient Rents may be apportioned.* By 39 & 40 Geo. 3, c. 41, where any part of the possessions of any archbishop, bishop, master and fellows, dean and chapter, master or guardian of any hospital, or any other person or persons, or body or bodies politic or corporate, *having any ecclesiastical living*, shall be demised by several leases which was formerly demised by one lease under one rent; or where a part shall be demised for less than the ancient rent, and the residue shall be retained in the possession of the lessor; the several rents reserved on the separate demises of the specific parts shall be taken to be the ancient rents within the meaning of the statutes 32 Hen. 8, c. 28; 1 Eliz. c. 19; 13 Eliz. c. 10; and 14 Eliz. c. 11; and are to be equitably apportioned in manner therein provided (t).

42 G. 3, c. 116. *Land-tax redeemed by a Bishop.* By the Land-Tax Redemption Act (42 Geo. 3, c. 116), ss. 69, 83, 88, the land-tax, when redeemed by any bishop, shall be considered as

(q) *Visian v. Blomberg*, 3 Bing. N. C. 311; 3 Scott, 681; 7 Sim. 548.

(r) And see 13 Eliz. c. 10, s. 3, ante, 18,

explained by 14 Eliz. c. 14.

(s) *Bp. of Salisbury's case*, 10 Co. R. 61a.

(t) Sect. 2 et seq.

yearly rent, and shall be reserved in all demises. A lease by a bishop in which such land-tax is not expressly reserved as rent is voidable by the successor (*u*).

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*Ecclesiastical
Leases
(Enabling, &c.
Acts).*

By 6 Will. 4, c. 20, no archbishop or bishop, ecclesiastical corporation, sole or aggregate, dignitary, canon, or prebendary, or other spiritual person, nor any master or guardian of any hospital, shall grant any new lease of parcel, &c., by way of renewal of any lease which shall have been previously granted of the same *for two or more lives*, until one or more of the persons for whose lives such lease shall have been so made shall die, and then only for the surviving lives or life and for such new life or lives as, together with the life or lives of such survivor or survivors, shall make up the number of lives, not exceeding three in the whole, for which such lease shall have been so made as aforesaid; and that where any such lease shall have been granted *for forty years*, no such archbishop, &c. shall grant any new lease by way of renewal of the same until fourteen years of such lease shall have expired; and where any such lease shall have been made as aforesaid *for thirty years*, no such archbishop, &c. shall grant any new lease by way of renewal of the same until ten years of such lease shall have expired; and where any such lease shall have been granted *for twenty-one years*, no such archbishop, &c. shall grant any new lease by way of renewal of the same or (in the case of archbishops or bishops) concurrently therewith until seven years of such lease shall have expired; and where any such lease shall have been granted for years, no such archbishop, &c. shall grant any lease by way of renewal of the same or otherwise for any life or lives; any law, statute or custom to the contrary notwithstanding.

6 Will. 4, c. 20.
Renewed
Leases by
Ecclesiastical
Persons, &c.
For Lives.

For 40 Years.

For 30 Years.

For 21 Years.

No Lease for
Years to be
renewed for
Lives.

By sect. 2, the new lease must contain a recital or statement of the previous lease, &c.; but by 6 & 7 Will. 4, c. 64, no such renewed lease shall be void "by reason only of its not containing such recital or statement."

Previous
Lease to be
recited.

By sect. 3, where it has been the usual practice to renew leases for forty, thirty or twenty-one years respectively at shorter periods than fourteen, ten or seven years respectively, and that practice is certified as in this section provided, such leases may be renewed at shorter intervals, according to the practice so certified.

Renewal of
Leases at
shorter
Periods.

Sect. 6 provides, that nothing in this act contained shall prevent any grants or renewal of leases which may have been authorized by acts of parliament specially relating to the particular estates demised by such leases (*v*).

Under Special
Acts.

By sect. 7, renewed leases, by way of confirmation only for the same life or term, may be granted.

By way of
confirmation
only.

(*u*) *Doe v. Murray v. Bridges*, 1 B. & A. chett, 3 B. & Ad. 921.

847. As to the sale of land for the redemption of land-tax, see *Warner v. Pol-* (*v*) See 18 Eliz. c. 11, ante, 19.

CH. I. SEC. 14.
*Ecclesiastical
 Leases (Acts
 of Victoria.)*

By sect. 8, no lease not authorized by the laws and statutes now in force "shall be rendered valid by anything in this act contained."

By sect. 9, leases "contrary to this act shall be void;" but this was qualified as to sect. 2 by 6 & 7 Will. 4, c. 64, as before mentioned.

(c) *The Acts of Queen Victoria.*

Lease of Par-
 sonage to con-
 tain Condition
 for avoiding
 it.

By 1 & 2 Vict. c. 106, s. 59, "any agreement made for the letting of the house of residence, or the building, gardens, orchards or appurtenances necessary for the convenient occupation of the same, belonging to any benefice, to which house of residence any spiritual person may be required, by order of the bishop as aforesaid, to proceed and to reside therein, or which may be assigned or appointed as a residence to any curate by the bishop, shall be made in writing, and *shall contain a condition for avoiding the same*, upon a copy of such order, assignment or appointment being served upon the occupier thereof or left at the house, and otherwise shall be null and void." And a summary remedy is provided for enforcing such condition.

Incumbents
 may grant
 Leases for
 14 Years with
 Consent of
 Bishop and
 Patron.

By stat. 5 & 6 Vict. c. 27, which applies to farming leases, incumbents of ecclesiastical benefices (*y*) may, *with the consent of the bishop and patron*, lease lands belonging to their benefices, except the parsonage house and offices and ten acres of glebe situate most convenient to be occupied therewith, for any term *not exceeding fourteen years*, subject to the restrictions and conditions imposed upon them by the said act for the benefit and protection of their successors. But it is provided that "the term to be granted by any such lease as aforesaid may be *twenty years* in any case where the lessee shall covenant thereby to adopt and use any mode or system of cultivation more expensive than the usual course, or to drain or subdivide, or embank and warp at his expense any part of the demised premises, or to erect, at his own expense, on the said premises any buildings, or to repair in a more expensive manner and at a greater expense than is usually required of lessees of farms any buildings on the demised premises, or in any other manner to improve at his expense the demised premises or any part thereof" (*z*). No lease granted under this act can be surrendered without the consent of the bishop and patron (*a*). The act itself must be referred to for details. At common law a lease granted by the incumbent of a benefice, in whatever terms it was framed, operated as a demise so long only as he continued incumbent, for he could not pass a greater interest (*b*).

In certain
 cases the
 Leases may be
 for 20 Years.

(*y*) By s. 15, "the word 'benefice' shall be construed to comprehend every rectory, vicarage, perpetual curacy, donative, endowed public chapel, parochial chapelry and district chapelry; the incumbent of which in right thereof shall be a corporation sole."

(*z*) Sect. 1.

(*a*) Sect. 5.

(*b*) *Wheeler v. Heydon*, Cro. Jac. 328; *Price v. Williams*, 1 M. & W. 6; *Doe d. Kerby v. Carter*, Ry. & Moo. 237; *Doe d. Tennyson v. Lord Yarborough*, 1 Bing. 24; *Cole Ejec.* 602.

By sect. 4, "the execution by the bishop and patron whose consents are hereby made requisite of any lease to be granted under the authority of this act shall be conclusive evidence that the lease does not comprise any lands which ought not to be leased under the provisions of this act, and that a proper portion of the glebe land remains unleased, and that the rent reserved by such lease is the best and most improved rent that could be reasonably gotten for the lands and hereditaments comprised therein at the time of granting such lease, and that all the covenants contained in such lease are proper covenants."

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Ecclesiastical Leases (Acts of Victoria).

Effect of Consents as Evidence.

In consequence of sect. 4, a lease which is executed by the patron and ordinary as well as the incumbent may be valid in favour of the lessee, although it does not strictly comply with all the requisitions of the statute: for instance, where it reserves the rent half-yearly instead of quarterly (*c*). *Quod fieri non debet factum valet*.

Validity of irregular Lease.

The above act does not repeal the 13 Eliz. c. 10: and therefore a rector, with the consent of the patron and bishop, may demise his glebe under the powers of the common law, subject to the provisions of the statute of Elizabeth, though the lease may not be conformable to the restrictions imposed by the statute of Victoria (*d*).

The Act does not repeal 13 Eliz. c. 10.

By "The Ecclesiastical Leasing Act, 1842" (*e*), as amended by "The Ecclesiastical Leasing Act, 1858" (*f*), any ecclesiastical corporation, aggregate or sole, except any college (*g*) or corporation of vicars choral, priest vicars, senior vicars, custos and vicars or minor canons, and except also any ecclesiastical hospital, or the master thereof, may, *with the consent of the Ecclesiastical Commissioners for England*, and with such further consents as in the said acts mentioned, grant building and repairing leases for any term not exceeding ninety-nine years: also leases of running water and way-leaves, and other rights and easements, for any term not exceeding sixty years: also mining leases, for any term not exceeding sixty years: all of which leases must be made subject to certain restrictions and conditions for the protection and benefit of their successors. The acts must be referred to for details, but it may be mentioned here that sect. 1 of the act of 1842 expressly authorizes a lease "with or without a proviso that no breach of covenant (except the covenant for payment of rent and other such covenants, if any, as may agree to be excepted) *shall occasion any forfeiture unless judgment shall have been obtained in an action for such breach of covenant, nor unless the damages and costs*

Ecclesiastical Leasing Act, 1842.

Ecclesiastical Commissioners.

Proviso for Re-entry.

(*c*) *Jenkins v. Green*, 27 Beav. 440; but the Acts 24 & 25 Vict. c. 105, and 25 & 26 Vict. c. 52, post, seem, to a great extent, to get rid of the effect of this decision.

(*d*) *Jenkins v. Green*, 28 Beav. 87.

(*e*) 5 & 6 Vict. c. 108.

(*f*) 21 & 22 Vict. c. 57. The Act 12 &

13 Vict. c. 26, for granting relief against defects in leases under powers, does not (see sect. 7) apply to ecclesiastical leases, or to leases of the possessions of any college, hospital, or charitable foundation.

(*g*) As to leases by colleges, see post, Sect. 15.

CH. I. SEC. 14. to be recovered in such action shall have remained unpaid for the space of three calendar months after judgment shall have been obtained in such action." The execution of any such lease by the necessary consenting parties is to be conclusive evidence that the requisites of the above acts have been complied with.

*Ecclesiastical
Leases (Acts
of Victoria).*

A Premium
or Fine may
be taken.

Under sect. 30 of the first-mentioned act they were prohibited from taking any premium, fine or foregift; but that was repealed by 21 & 22 Vict. c. 57, ss. 1, 2.

Previous
Powers of
Leasing not
interfered
with.

By sect. 8 of the first-mentioned act, "nothing in this act contained shall restrain any corporation hereby empowered to grant leases and make grants as aforesaid from granting any leases or making any grants, whether by way of renewal or otherwise, which such corporation might have lawfully and rightfully granted or made either under the provisions of any public (h) or private act of parliament, or under any other authority, or in any manner whatsoever, in case this act had not been passed, or from the taking of any fine, premium or foregift from the lessees in any renewed or new leases named or to be named, or from their underlessees, or from any other persons having or claiming an interest in any such renewal, for any such renewed or new leases, save and except that in every lease (other than any lease granted under the powers of this act) which shall be granted by any such corporation as aforesaid, of any lands or houses which shall have been leased for building or repairing purposes under any of the powers of this act, there shall be reserved the best improved rent, payable half-yearly or oftener, which can be obtained for the same, without taking any fine, premium or foregift, or anything in the nature of a fine, premium or foregift, for making or granting the same."

Exception.

*Ecclesiastical
Leasing Act,
1858.*

By "The Ecclesiastical Leasing Act, 1858" (21 & 22 Vict. c. 57), s. 1, "in any case in which it shall be made to appear to the satisfaction of the ecclesiastical commissioners for England that all or any part of the lands, houses, mines, minerals or other property of or belonging to any ecclesiastical corporation which are by the 5 & 6 Vict. c. 108, authorized to be leased, might to the permanent advantage of the estate or endowments belonging to such corporation be leased in any manner, or be sold, exchanged or otherwise disposed of, it shall be lawful for any ecclesiastical corporation, aggregate or sole, except as in the said act is excepted, from time to time, with such consents as in the said recited act mentioned, and with the approval of the said commissioners, to be testified by deed under their common seal, to lease all or any part or parts of the lands, houses, mines, minerals or other property belonging to such corporation, whether the same shall or shall not have been previously leased or dealt with under the provisions of the said recited act, or of this act, and either in considera-

(h) See 18 Eliz. c. 11, s. 6, ante, 20; 6 Will. 4, c. 20, ante, 21.

SECT. 14.—ECCLESIASTICAL LEASES.

tion or partly in consideration of premiums or not, or for such other considerations, and for such term or terms, and under and subject to such covenants, stipulations, conditions and agreements on the part of the lessee or lessees, and generally in such manner as the said commissioners shall under the circumstances of each case think proper and advisable."

CH. I. SEC. 14.
*Ecclesiastical
Leases (Acts
of Victoria).*

By 14 & 15 Vict. c. 104, intituled "An Act to facilitate the Management and Improvement of Episcopal and Capitular Estates in England" (*i*), ecclesiastical corporations, sole or aggregate, with the approval in writing of the Church Estate Commissioners, may sell, enfranchise or exchange their church lands, or purchase the interest of their lessors. And by sect. 9, "no lease of any lands purchased or acquired, or in which the estate or interest of a lessee, or of a holder of copyhold or customary land, is purchased or acquired, by any ecclesiastical corporation under this act, shall, except as hereinafter provided, be granted by such ecclesiastical corporation, otherwise than from year to year, or for a term of years in possession *not exceeding fourteen years*, at the best annual rent that can be reasonably gotten, without fine, the lessee not to be made punishable for waste, or exempted from liability in respect of waste: provided always, that it shall be lawful for such ecclesiastical corporation, with the approval of the Church Estate Commissioners, from time to time to grant mining or building leases," as therein mentioned (*k*).

14 & 15 Vict.
c. 104, &c.
Episcopal and
Capitular
Estates Acts.

By 23 & 24 Vict. c. 124, s. 8, "no lands assigned or secured as the *endowment of any see under this act* shall be granted by the archbishop or bishop otherwise than from year to year, or for a term of years in possession *not exceeding twenty-one years*, at the best annual rent that can be reasonably gotten, without fine, the lessee not to be made punishable for waste, or exempted from liability in respect of waste; and so that in every such lease such or the like covenants, conditions and reservations be entered into, reserved or contained with or for the benefit of the archbishop or bishop and his successors, as under sect. 1 of the act 5 & 6 Vict. c. 27 (for better enabling the incumbents of ecclesiastical benefices to demise the lands belonging to their benefices on farming leases), are to be entered into, reserved or contained in a lease granted under that enactment to or for the benefit of the incumbent and his successors, or as near thereto as the circumstances of the case will permit; but where under the said section of the last-mentioned act any consents are provided for or required, the consent only of the archbishop or bishop for the time being shall be requisite: provided always, that it shall be lawful for

23 & 24 Vict.
c. 124, s. 8.
Leases by
Archbishops
or Bishops of
Endowments
under this
Act.

(*i*) A temporary act, amended by 17 & 18 Vict. c. 116; 22 & 23 Vict. c. 46; 23 & 24 Vict. c. 124; 31 & 32 Vict. c. 114, s. 10; and continued by numerous Expiring Laws Continuance Acts; and lastly, by the Ex-

piring Laws Continuance Act, 1880 (43 & 44 Vict. c. 48), until the 31st December, 1881.

(*k*) See also the Ecclesiastical Leasing Acts, 1812, 1858, ante, 23, 24.

CH. I. SEC. 14. *Ecclesiastical Leases (Acts of Victoria).* the archbishop or bishop, with the approval of the estates committee of the ecclesiastical commissioners, testified under the common seal of the said commissioners, which the said committee are hereby empowered to affix to any lease for this purpose, from time to time to grant mining or building or other leases of any such lands, for such periods, for such considerations, upon such terms, and generally in such manner as such committee under the circumstances of each case may think fit; and it shall be lawful for such committee to require that any portion of the rent reserved on any such lease shall be payable to the said ecclesiastical commissioners."

Mining or Building Leases.

Ecclesiastical Commissioners may inspect repairs and give Notice of Dilapidations, &c.

By sect. 9, "the estates committee shall cause the property assigned as an endowment for any see as aforesaid to be inspected so often as they think fit, and shall cause notice in writing of all dilapidations or want of repair found on such inspection, and of the repairs or works necessary for remedying the same, to be given to the archbishop or bishop of such see, and such archbishop or bishop shall forthwith do or cause to be done, at his or their own expense, or at the expense of his or their lessees or tenants (as the case may require), the repairs or works mentioned in such notice; and if any difference arise between such archbishop or bishop and the estates committee with regard to the condition of such property, or the repairs or works required by the estates committee, the matter in difference shall be referred to arbitration as hereinafter provided."

They may, on request, manage and demise Lands for an Archbishop or Bishop.

By sect. 11, "the estates committee shall, when required by any archbishop or bishop to whom lands may have been assigned as an endowment under this act, undertake the management of such lands and receive the rents and profits thereof during the incumbency of the archbishop or bishop; and in every such case as aforesaid the estates committee, during their management, may grant all such leases as might have been granted by such archbishop or bishop if the lands had continued under his or their management, and may with the approval of such archbishop or bishop grant such other leases as might have been granted by him or them with the approval of the estates committee; and the commissioners shall, during the time such lands are under the management of the said estates committee, pay to such archbishop or bishop the annual income to secure which the lands may have been assigned."

By sect. 31, rights of renewal and other obligations under special acts, &c. preserved, notwithstanding anything done under sect. 10.

24 & 25 Vict. c. 105. Leases of Copyholds by Incumbents.

By 24 & 25 Vict. c. 105, intituled "An Act to prevent the future Grant by Copy of Court Roll and certain Leases of Lands and Hereditaments in England belonging to Ecclesiastical Benefices" (*l*), after reciting "that there are in England certain ecclesiastical benefices to

(*l*) Amended by 25 & 26 Vict. c. 52, or Restraining Acts extended to copyholds except 5 & 6 Vict. c. 27, ante, 22.
post, 28. None of the previous Disabling

which belong manors, lands, tenements and hereditaments, which by custom or otherwise the rectors, vicars, perpetual curates or incumbents thereof have power to grant and lease out for lives and long terms of years, and such grants have been made by them at nominal annual rents, to the prejudice of their successors, and it is expedient to determine and put an end to the power to make such grants ; ” it is enacted as follows :—

CH. I. SEC. 14.
*Ecclesiastical
Leases (Acts
of Victoria).*

By sect. 1, “ it shall not be lawful for any prebendary of any prebend, not being a prebend of any cathedral or collegiate church, rector, vicar, perpetual curate or incumbent, *who after the passing of this act may become possessed* of or entitled to any manors, lands, tenements or hereditaments belonging to any ecclesiastical benefice in England to make any grant by copy of court roll or lease of any such manors, lands, tenements or hereditaments in consideration of any fine, premium or foregift, but the same may, by any rector, vicar, perpetual curate or incumbent appointed after the passing of this act, be *leased*, sold, exchanged or enfranchised, or disposed of under the provisions of 5 & 6 Vict. c. 27 ; 5 & 6 Vict. c. 108, and 21 & 22 Vict. c. 57, or such of the provisions of such acts respectively as are now in force.”

Fines
prohibited.

By sect. 2, “ nothing herein contained shall interfere with or prevent the right and power of any such present prebendary, rector, vicar, perpetual curate or incumbent, during his incumbency, to make any grant by copy of court roll or lease which he might lawfully have made before the passing of this act, and nothing herein contained shall prejudice or affect any grant heretofore made by such prebendary, rector, vicar, perpetual curate or incumbent, or any right of renewal or tenant right, if any such there be, in any manors, lands, tenements or hereditaments held under any such grant or under any lease, nor shall this act prejudice or affect any power of sale, exchange or enfranchisement existing under any statute now in force, or any present or future right of admission of any person to any copyhold tenement according to the custom of the manor of which it is holden, and to which such person may be legally entitled.”

Rights ac-
quired before
this Act not
interfered
with ;

nor prior
Leases ;

nor Rights of
Renewal.

By sect. 3, notwithstanding anything contained in the 11th section of an act 14 & 15 Vict. c. 104, any rector, vicar, perpetual curate or incumbent shall have such and the same powers of sale, exchange and enfranchisement as are possessed by any ecclesiastical corporation, sole or aggregate, under any act now in force ; and the provisions of an act 23 & 24 Vict. c. 124, shall, so far as the same relate to powers for the raising or application of money by trustees, allowances to lessees, arbitration, valuation, rate of interest, apportionment of rent and substitution of titles on exchange, be applied, *mutatis mutandis*, to sales, exchanges or enfranchisements of any

Powers to
Incumbents.

CH. I. SEC. 14. manors, lands, tenements or hereditaments in this act comprised; but the proceeds of any such sales or enfranchisements and any monies received by way of equality of exchange, shall be applied according to the provisions in that behalf contained in the said act 5 & 6 Vict. c. 108, and in the said act 21 & 22 Vict. c. 57.

25 & 26 Vict. c. 52. By 25 & 26 Vict. c. 52, the prohibition to make any grant by copy of court roll or lease contained in 24 & 25 Vict. c. 105, s. 1, shall not only extend to grants made in consideration of any fine, premium, or foregift; but shall also extend to all grants and leases made for a longer term or in any other way than according to the provisions of the several statutes mentioned in sects. 1, 3 of that act.

31 & 32 Vict. c. 114, s. 9. Leases by Deans and Chapters when re-endowed. By 31 & 32 Vict. c. 114, s. 9, none of the deans and chapters mentioned in the schedule to 31 & 32 Vict. c. 19 [including *York, Carlisle, Peterborough, Chester, Gloucester, St. Asaph, Worcester, Chichester, Winchester, Salisbury, Bristol, Canterbury, Exeter, Wells, Rochester, St. David's, Llandaff, and Windsor*], and no dean and chapter after the making of any order in council respecting them, in pursuance of this act, shall demise any land vested in them, otherwise than from year to year, or for a term of years in possession not exceeding twenty-one, at the best annual rent that can be reasonably got without fine; and shall not make the lessee punishable for or exempt from liability in respect of waste; and in every such lease such or the like covenants, conditions and reservations shall be entered into, reserved or contained with or for the benefit of the dean and chapter and their successors, as under sect. 1 of 5 & 6 Vict. c. 27, are to be entered into, reserved or contained with or for the benefit of the lessor and his successors in a lease granted under that section, or as near thereto as the circumstances admit (*n*).

SECT. 15.—By Universities and Colleges.

They are Civil Corporations. The universities of Oxford and Cambridge are regarded as civil corporations (*n*); so, of course, are the universities of Durham and London; and the several colleges in all such universities respectively.

Powers of Leasing at Common Law. Like other corporations aggregate, they had at common law power to make such leases of their lands as they thought fit under their common seal, without the consent or confirmation of any other person (*o*), provided such leases were in conformity with their own

(*m*) This enactment will put an end to the custom or practice which has long prevailed of renewals of leases by deans and chapters at the end of each seven years, or on the dropping of each life, upon payment of a large fine, which was

immediately divided between the members for the time being.

(*n*) *Parkinson's case*, Carth. 93; *B. v. V.-C. of Cambridge*, 3 Burr. 1656.

(*o*) Co. Lit. 44 a.

private statutes, charters and bye-laws. But as such power was often much abused by the members for the time being, to the great prejudice and impoverishment of their successors, they have been restrained by divers statutes from leasing their lands, *and especially their church property*, except for limited terms and subject to certain covenants and conditions intended for the protection and benefit of their successors (*p*).

CH. I. SEC. 15.
Leases by Universities and Colleges.
Restraining or Disabling Acts.

Now, by the Universities and College Estates Act, 1858 and 1860 (*q*), the universities of *Oxford*, *Cambridge* and *Durham* and the colleges in those universities respectively (including Christ Church, Oxford), and also the colleges at *Winchester* and *Eton*, have extensive powers (without the consent or control of the Copyhold Commissioners or of the Church Estates Commissioners, or of any other person or persons whomsoever), to grant leases for any term *not exceeding twenty-one years*, subject to certain restrictions and conditions for the protection and benefit of their successors; also to grant building and repairing leases for ninety-nine years, and to enter into previous contracts for any such leases; also to lease running water and way-leaves, and other rights and easements for sixty years; also to grant mining leases for sixty years, and various other powers. The acts must be referred to for details (*r*), but it may be mentioned here that the Act of 1858 authorizes leases containing a proviso against forfeiture without prior action for damages similar to that allowed by the Ecclesiastical Leasing Act, 1842, previously referred to.

Oxford, Cambridge, Durham, Eton and Winchester.

Proviso for Re-entry.

By sect. 30 of the first-mentioned act, "nothing in this act contained shall restrain the said universities or colleges respectively from exercising any powers of sale, enfranchisement, exchange, purchase or borrowing monies, *or from granting any leases*, or making any grants, whother by way of renewal or otherwise, which the said universities, or any such college as aforesaid, might have exercised or granted under the provisions of any public or private act of parliament, or under any other authority, or in any other manner whatsoever in case this act had not been passed" (*s*).

Previous Powers not affected.

By 23 & 24 Vict. c. 59, s. 3, "where any lands belonging to any such university or college as aforesaid shall at any time have been leased at the best and most improved yearly rent, without fine, no

Lands once leased at Rack-rent not thereafter to be leased upon Fines.

(*p*) See 13 Eliz. c. 10, s. 3, ante, 18; 14 Eliz. c. 11, s. 17, ante, 19; 18 Eliz. c. 6, s. 1 (corn rents), ante, 20; 18 Eliz. c. 11, s. 2, ante, 20; *Id.*, ss. 5, 6 (manor of Fifield), ante, 20; 39 & 40 Geo. 3, c. 41, ante, 20; 12 & 13 Vict. c. 26 (defective execution of powers), ante, 23, note (*f*).

(*q*) 21 & 22 Vict. c. 44; 23 & 24 Vict. c. 59.

(*r*) See Chit. Stat. vol. iv. tit. "Lease (Ecclesiastical, College, and Hospital)."

(*s*) See 18 Eliz. c. 11, ss. 5, 6, ante, 20. Under 19 & 20 Vict. c. 88, s. 48, any college at Cambridge or Eton may, with the consent of the Church Estates Commissioners, sell or exchange any lands or hereditaments vested in such college. So, under 19 & 20 Vict. c. 95, the university of Oxford, and the colleges in the said university, and Winchester College, may, with the like consent, sell or exchange lands, &c.

CH. I. SEC. 15. *Leases by Universities and Colleges.* fine, premium or foregift, or anything in the nature thereof, shall hereafter be taken by any such university or college for the grant or renewal of any lease of the same lands."

Mortgages by Demise. The above universities and colleges have also powers to raise monies for certain purposes, *with the consent of the Copyhold Commissioners*, by way of mortgage for a term of years determinable, &c. (t).

31 & 32 Vict. c. 118, s. 24. Eton. By 31 & 32 Vict. c. 118, s. 24, the new governing body of Eton may make a scheme for running out their leases, so that their property may be let at rack-rent instead of on leases renewable on payment of fines.

London University and Colleges. The university of London and colleges not within the Acts of 1858 and 1860, must lease according to their own private statutes, charters and bye-laws, and on demising any church property must conform to the restrictions and conditions imposed by such of the Disabling or Restraining Statutes as may be applicable (u).

SECT. 16.—By Parish Officers.

59 Geo. 3, c. 12. *Leases of small Pieces of Parish Land.* The act 59 Geo. 3, c. 12, s. 13, provides "that for the promotion of industry amongst the poor, it shall be lawful for the churchwardens and overseers of the poor of any parish, *with the consent of the inhabitants in vestry assembled* (x), to let any portion or portions of such parish lands as aforesaid, or of the land to be so purchased or taken on account of the parish (y), to any poor and industrious inhabitant of the parish, to be by him or her occupied and cultivated on his or her own account, and for his or her own benefit, and at such reasonable rent and for such terms as shall by the inhabitants in vestry be fixed and determined."

Previous Law. Before this act a person, who held under a lease granted by parish officers, was only a tenant from year to year (z).

Leases under the above Act, how made. In the making of leases under this act, the terms of it must be strictly observed; therefore a memorandum not signed by all the parish officers, or by their order, is not a lease pursuant to the statute (a); not only the churchwardens, but also the overseers, must join in the lease (b). An invalid lease made by some of the parish

(t) 21 & 22 Vict. c. 44, ss. 27, 28; 23 & 24 Vict. c. 59, s. 1.

(u) Ante, 29, note (p).

(x) The consent of the Local Government Board does not appear to be necessary. See the concluding proviso in 4 & 5 Will. 4, c. 76, s. 21.

(y) As mentioned in sect. 12, not exceeding twenty acres.

(z) *Doe d. Higgs v. Terry*, 4 A. & E.

274; *Doe d. Hobbs v. Cockell*, Id. 478.

(a) *Doe d. Landwell v. Gover*, 17 Q. B. 589; 21 L. J., Q. B. 57.

(b) *Woodcock v. Gibson*, 4 B. & C. 462; *Phillips v. Pearce*, 5 B. & C. 433; *Doe d. Jackson v. Hiley*, 10 B. & C. 885; *Allason v. Stark*, 9 A. & E. 255; *Att.-Gen. v. Lewin*, 8 Sim. 366; *Rumball v. Munt*, 8 Q. B. 382; *St. Nicholas, Drptford v. Sketchley*, Id. 394.

officers, coupled with possession thereunder, will determine a previous tenancy at will, and enable the new lessee to maintain trespass (*c*). CH. I. SEC. 16.

The above enactment does not apply to copyhold land (*d*).

*Leases by
Parish Officers.*

Copyholds.
Cottage
Allotments.

Where, in parishes inclosed under acts of parliament, allotments are made for the benefit of the poor, it is provided by 2 & 3 Will. 4, c. 42, and 8 & 9 Vict. c. 118, s. 109, as amended by the Poor Allotment Management Act, 1873 (36 Vict. c. 19), that a committee appointed by the allotment trustees and parish officers, or by the "allotment wardens," as the case may be, may let the allotments to "industrious cottagers" or "poor inhabitants of the parish," as the case may be. A year's rent may be required to be paid in advance. It was provided by 2 & 3 Will. 4, c. 42, that no allotment should be made of less than one quarter of an acre, but this provision is repealed by the 10th section of the Act of 1873 above referred to (*e*).

SECT. 17.—*By Trustees of Settled Estates.*

By sect. 4 of the Settled Estates Act, 1877 (*f*), "it shall be lawful for the Court" (i. e. the Chancery Division of the High Court), "if it shall deem it proper and consistent with a due regard for the interests of all parties entitled under the settlement (*g*), and subject to the provisions and restrictions in that act contained, to authorize leases of any settled estates (*g*), or of any rights or privileges over or affecting any settled estates, for any purpose whatsoever, whether involving waste or not," provided five specified conditions be observed, viz. :— Order of
Court under
Settled
Estates Act.

1. The lease must take effect in possession at or within one year next after the making thereof, and be for a term of years not exceeding for an agricultural or occupation lease, twenty-one years; for a mining lease, or a lease of water mills, wayleaves, waterleaves or other rights or easements, forty years; for a repairing lease, sixty years (*h*); and for a building lease, ninety-nine years; but, except in the case of agricultural leases, where the court shall be satisfied that it is the usual custom in the district and beneficial to the inheritance to grant leases for longer terms, then for such term as the court shall direct (*i*). 2. The best rent must be reserved that can be reasonably obtained, to be made payable half-yearly or oftener, without taking any fine or other benefit in the nature of a fine. 3. If the lease be Five Condi-
tions.

(*c*) *Wallis v. Delmar*, 29 L. J., Ex. 276.

(*d*) *Doe d. Bailey v. Foster*, 3 C. B. 215.

(*e*) See further as to these acts, and the power to recover the demised premises by proceedings before justices, Chap. XXII., Sect. 3 (*b*), post.

(*f*) 40 & 41 Vict. c. 18. This act consolidates the original Settled Estates Act,

1856 (19 & 20 Vict. c. 120), with four amending acts, all being repealed by the schedule.

(*g*) The words "settlement" and "settled estates" are defined by sect. 2.

(*h*) Taken from 21 & 22 Vict. c. 77, s. 2.

(*i*) Taken from 21 & 22 Vict. c. 77, s. 4.

CH. I. SEC. 17. of minerals, &c., a certain portion of the rent must be set aside and invested. 4. The felling of trees, except so far as is necessary, must not be authorized. 5. "Every such lease shall be by deed, and the lessee shall execute a counterpart thereof, and every such lease shall contain a condition for re-entry on non-payment of the rent for a period of twenty-eight days after it becomes due, or for some less period to be specified in that behalf" (k).

Leases by Trustees of Settled Estates.

Proviso for Re-entry.

Peppercorn Rent.

With reference to the second condition, that "the best rent shall be reserved," the same 4th section provides, that "in the case of a mining lease, a repairing lease, or a building lease, a peppercorn rent, or any smaller rent than the rent to be ultimately made payable, may, if the court think fit so to direct, be made payable during all or any part of the first five years of the term of the lease" (l).

Special Covenants.

The 5th section provides, that, "subject and in addition to the conditions hereinbefore mentioned, every such lease shall contain such covenants, conditions and stipulations as the court shall deem expedient with reference to the special circumstances of the demise."

The court cannot authorize a lease under this act, if any one of the parties interested under the settlement opposes the application (m). Leases granted by trustees under the provisions of this act must be settled in judge's chambers (n). Where any settlement, whether made before or after 1856, does not contain the usual powers to grant leases, &c., and it is expedient and for the benefit of all parties interested in the settled estate that a lease of all or any part thereof should be granted, an application may be made to the Chancery Division of the High Court pursuant to the provisions of this act; whereas it was, before 1856, necessary to obtain a private act of parliament, at a much greater expense. Even now that may sometimes be necessary; and in such case the court will make a declaratory decree that it is fit and proper that an application should be made to parliament to extend the leasing powers affecting a settled estate (o).

Leases under Powers in Settlements.

Where any settlement made by deed, will, or otherwise, before or after the passing of the Settled Estates Act, 1856, contains powers to the trustees for the time being (with or without the consent of the tenant for life in possession, or of any other person) to grant leases for any limited term, or building, repairing or mining leases, &c., subject to certain restrictions and conditions, any such lease may be granted strictly in accordance with the power (p), without applying to the court under the Settled Estates Act, 1877, that act being only intended to remedy the omission of any such powers in the settle-

(k) Note, that the condition for re-entry does not apply to breaches of covenant generally. See p. 114, post.

(l) Suggested apparently by *Cust v. Middleton*, 3 De G. F. & J. 33.

(m) *In re Merry*, 36 L. J., Ch. 168; 15 W. R. 307.

(n) *In re Proctor*, 26 L. J., Ch. 464.

(o) *Savil v. Bruce*, 29 Beav. 557.

(p) See post, Sect. 31.

ment. Where lands are devised to trustees in fee upon trusts or with powers which, in their execution, require the exercise of judgment and discretion, such as granting leases, and the trustees disclaim, so that the estate in fee descends to the testator's heir-at-law, such powers or trusts cannot be exercised or carried into execution by the heir, although he holds the estate subject to the trusts of the will (g). Where the heir of a surviving trustee is the proper party to demise, a lease granted by the executors of such trustee is void, and not cured by 12 & 13 Vict. c. 26 (r).

CH. I. SEC. 17.
*Leases by
Trustees of
Settled Estates.*

When an appointment by way of demise is made in pursuance of a power of leasing contained in a settlement, it will take effect in preference and priority to any long term of years limited in the settlement for providing any jointure or portions for younger children or the like. The leasing power is considered as controlling and superseding such term, until it is called into action, after which the leasing power will be put an end to (s). The person entitled under the settlement, whose estate is displaced or superseded *pro tanto* by any such lease, is considered as the immediate reversioner upon such lease, and may sue for any breach of covenant therein contained (t), and may sue or distrain for the rent thereby reserved (u).

Effect of
Leases under
Powers.

Before the Settled Estates Act, 1856 (19 & 20 Vict. c. 120), a trustee having the legal estate in lands might have made leases which would have been valid, provided they were justified by the quantity of his estate although no express power of leasing was vested in him by the settlement. But a party taking a lease from a trustee, with notice of the trust, and without the concurrence of the cestui que trust, was subject to the control of equity (x). There was no general rule as to what leases might be granted by trustees, but they were authorized to do what was reasonable in each particular case (y). No lease could be safely taken from them without the concurrence of the cestui que trust, or the sanction of the Court of Chancery (z). Since the above act it has become more dangerous than ever for trustees to grant, or persons to take from them, any lease not warranted by some express power contained in the settlement, nor authorized by the court. But such leases would be valid if warranted by the estate of the trustees, and could not be set aside in equity at the instance of any cestui que trust who concurred therein. A lease from year to year, or for a short term at rack-rent, without any fine or premium, may therefore be granted by

Leases by
Trustees not
in pursuance
of Settled
Estates Act
nor of a
Power.

- (g) *Robson v. Flight*, 34 L. J., Ch. 226; *Carpenter v. Parker*, 3 C. B., N. S. 231.
13 W. R. 393. (t) *Isherwood v. Oldknow*, 3 M. & S. 382.
(r) *Ex parte Cooper, Re North London R. Co.*, 34 L. J., Ch. 373. (u) *Rogers v. Humphreys*, 4 A. & E. 290.
(s) *Doe d. Courtail v. Thomas*, 9 B. & C. 288, 293; *Doe d. Rogers v. Rogers*, 5 B. & Ad. 784; *Rogers v. Humphreys*, 4 A. & E. 299; *Maundrell v. Maundrell*, 10 Ves. 246; 2 Chance on Powers, s. 1410; (x) Platt on Leases, 345.
(y) *Att.-Gen. v. Owen*, 10 Ves. 555.
(z) Platt on Leases, 347; *Malpas v. Ackland*, 3 Russ. 373.

CH. I. SEC. 17. *Leases by Trustees of Settled Estates.* trustees out of their legal estate (especially with the concurrence of the person for the time being entitled to the rents and profits) without any application to the court under the Settled Estates Act, where the expense of such application would be utterly disproportioned to the transaction.

SECT. 18.—*By Trustees of Charities.*

Charitable
Trusts Acts.

The estates of charities are subject to the provisions of "The Charitable Trusts Act, 1853" (16 & 17 Vict. c. 137), as amended by 18 & 19 Vict. c. 124, 23 & 24 Vict. c. 136, and 32 & 33 Vict. c. 110.

16 & 17 Vict.
c. 137, s. 26.
Leases, &c.
authorized by
a Board of the
Charity Com-
missioners.

By 16 & 17 Vict. c. 137, s. 26, "the leases, sales, exchanges and other transactions authorized by such board (a) under the powers of this act shall have the like effect and validity as if they had been authorized or directed by the express terms of the trust affecting the charity."

18 & 19 Vict.
c. 124, s. 15.
Official
Trustees of
Charity Lands
constituted.

By 18 & 19 Vict. c. 124, s. 15, "the secretary for the time being of the board shall be a corporation sole, by the name of 'The Official Trustee of Charity Lands,' for taking and holding charity lands and by that name (instead of the name of 'Treasurer of Public Charities') shall have perpetual succession; and all lands or estates or interests in land now vested in the 'Treasurer of Public Charities' by that name shall become, upon the passing of this act, and by virtue thereof, vested in like manner and upon the same trusts in 'The Official Trustee of Charity Lands,' and all provisions of the principal act which have reference to 'The Treasurer of Public Charities' shall operate as if the name of 'The Official Trustee of Charity Lands' had been used therein instead of the name of 'Treasurer of Public Charities.'"

Sect. 16.
Power to
Acting Trust-
tees to grant
Leases.

By sect. 16, "the acting trustees of every charity, or the majority of them, provided that such majority do not consist of less than three persons, shall have at law and in equity power to grant all such leases or tenancies of land belonging thereto, and vested in the official trustee of charity lands, as they would have power to grant in the due administration of the charity if the same land were legally vested in themselves; and all covenants, conditions and remedies contained in or incident to any lease or tenancy so granted shall be enforceable by and against the trustees or persons acting in the administration of the charity for the time being, and their alienees or assigns, in like manner as if such lands had been legally vested in the trustees granting such lease or tenancy at the time of the execution thereof,

(a) Any two of the Charity Commissioners for England and Wales sitting as a Board; sect. 6.

and had legally remained in or had devolved to such trustees or administrators for the time being, their alienees or assigns, subject to the same lease or tenancy.”

CH. I. SEC. 18.
Leases by Trustees of Charities.

By 23 & 24 Vict. c. 136, s. 16, “a majority of two-thirds of the trustees of any charity assembled at a meeting of their body duly constituted, and having power to determine on any sale, exchange, partition, mortgage, *lease* or other disposition of any property of the charity, shall also have a legal power on behalf of themselves and their co-trustees, and also of the official trustee of the charity lands, where his concurrence would be otherwise required, to do, enter into and execute all such acts, deeds, contracts and assurances as shall be requisite for carrying any such sale, exchange, partition, mortgage, lease or disposition into legal effect; and all such acts, deeds, contracts or assurances shall have the same legal effect as if the same were respectively done, entered into or executed by all the acting trustees for the time being, and by the said official trustee.”

23 & 24 Vict.
c. 136.
Majority of
Two-thirds of
Charity Trustees may lease
Charity Property.

Before the above act trustees of charities might have granted leases of the lands belonging to the charities, provided they were such in all their circumstances as were beneficial to the interests of the charities; but if otherwise, the Court of Chancery would have set them aside at any distance of time (*b*), until protected by the Statute of Limitations (*c*). Where it was necessary to grant a large number of building leases of charity lands in nearly the same form, under the provisions of an act of parliament, and one lease had been settled in chambers, the Court of Chancery allowed the charity to grant other building leases from time to time in the same form, without reference to chambers, the model lease being appended to the order (*d*). Trustees of a charity have been authorized to grant building leases for 600 years, such being the custom of the neighbourhood, and it appearing beneficial (*e*).

SECT. 19.—*By Infants.*

At common law leases made by infants are not absolutely void, but voidable on their attaining their majority (*f*), and that notwithstanding the rent reserved is not the best obtainable (*g*). The lessee can

At Common Law leases by Infants are not void, but voidable.

(*b*) 4 Jarm. Byth. 269, 3rd ed.; *Att.-Gen. v. Cross*, 3 Mer. 540; *Att.-Gen. v. Owen*, 10 Ves. 555; *Att.-Gen. v. Brooke*, 18 Ves. 320; *Att.-Gen. v. Lord Hotham*, 3 Russ. 415.

(*c*) 3 & 4 Will. 4, c. 27, ss. 24, 25, 26, 27, which extend to charities; *Att.-Gen. v. Davey*, 19 Beav. 521; 4 De Gex & J. 136; *Att.-Gen. v. Payne*, 27 Beav. 168; *Att.-Gen. v. Magdalen College, Oxford*, 6 H. L. Cas. 189, 206; 26 L. J., Ch. 620.

(*d*) *Att.-Gen. v. Christ Church, Oxford*, 3 Giff. 514; 8 Jur., N. S. 989.

(*e*) *In re Cross*, 27 Beav. 592.

(*f*) *Ketsey's case*, Cro. Jac. 320; *Ashfield v. Ashfield*, Sir W. Jon. 157; Plowd. 418; *Slator v. Brady*, 14 Ir. Com. L. R. 61; *Slator v. Trimble*, Id. 342; Simpson on Infancy (A.D. 1875), p. 27.

(*g*) *Slator v. Brady*, 14 Ir. Com. L. R. 61.

Zouch v. Parsons.

CH. I. SEC. 19. in no case avoid the lease on account of the infancy of the lessor (*h*).
Leases by Infants. The lease is voidable by the infant when he becomes of age (*i*) but not before (*j*); or by his heir if he die under age (*k*). To avoid a lease by an infant under which the lessee is in possession upon the lessor attaining twenty-one, some act of notoriety, ex. gr., ejectment, entry, or demand of possession is requisite: the mere execution of a new lease to another lessee is not sufficient to divest the estate created by the first lease (*l*). If when of age he receives any rent payable after he became of age, he thereby ratifies the lease from the day of its execution (*j*). A mortgage of the land to the lessee by a deed reciting the lease amounts to a ratification (*m*). Subject to the above qualification, all gifts, grants or deeds made by infants, by matter in deed, or in writing, which take effect by delivery of his hand, are voidable by himself, by his heirs, and by those who have his estate (*n*). The words "take effect" are the essential part of the definition, and exclude letters of attorney, or deeds which delegate a mere power and convey no interest (*o*). An infant cannot appoint an agent, and therefore his next friend cannot bind him. An infant appointing an agent to make a lease is not bound by such lease, nor by his ratification of it. The lease of an infant, to be good, must be his own personal act (*p*).

Leases in Gavelkind.

By the custom of gavelkind an infant seised of land in socage may at the age of fifteen years make leases for years, which bind him after he comes of age, inasmuch as the custom makes the age of fifteen his full age for that purpose (*q*).

Leases by Infants under the Direction of the Court.

The difficulties which have arisen as to leases by infants at common law (*r*), have lost much of their importance by virtue of the Act 11 Geo. 4 & 1 Will. 4, c. 65, under which (ss. 16 and 17) infants are empowered to grant renewals of leases under the direction of the Chancery Division of the High Court (*s*); and the court is authorized to direct leases of land belonging to infants when it is to the benefit of the estate (*t*).

By sect. 31 of the act, leases granted under it are as valid as if the infant had been of full age. The court has power under the act to

(*h*) *Zouch d. Abbot v. Parsons*, 3 Burr. 1806.

(*i*) *Slator v. Brady*, 14 Ir. Com. L. R. 61.

(*j*) *Slator v. Trimble*, 14 Ir. Com. L. R. 342. The doctrine laid down in *Maddon v. White*, 2 T. R. 169, that a lease for the benefit of the infant binds him, seems to be exploded. See Platt on Leases, Vol. I., p. 31.

(*k*) 4 Cruise, 74, s. 67.

(*l*) *Slator v. Brady*, 14 Ir. Com. L. R. 61; *Slator v. Trimble*, Id. 342.

(*m*) *Storry v. Johnson*, 2 Y. & O. 386.

(*n*) Perk. chap. i. sect. 12; Bac. Abr. tit. *Leases* (B.); *Baylis v. Dineley*, 3 M. & S. 477; 2 Prest. Conv. 248.

(*o*) *Zouch d. Abbot v. Parsons*, 3 Burr. 1804.

(*p*) *Doe d. Thomas v. Roberts*, 16 M. & W. 778.

(*q*) Co. Lit. 45 b.

(*r*) See Smith, L. & T., 2nd ed., p. 61; Platt on Leases, Vol. I., p. 29.

(*s*) Judicature Act, 1873, s. 34.

(*t*) *Re Spencer*, 37 L. J., Ch. 18; 17 L. T., N. S. 200.

sanction a building lease of an infant's freehold estate when he is seised in fee simple in reversion after a life estate by the courtesy vested in his father (*u*). CH. I. SEC. 19.
Leases by Infants.

Where an infant is interested in any settled estates, of which neither the trustee nor any other person have express power to grant leases, an application may be made to the Chancery Division to order leases to be made pursuant to the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), s. 49. By that section, all powers given by the act, and all applications to the court under the act, may be made by guardians on behalf of infants, a special direction of the court being necessary in the case of infant tenants in tail. It had previously been held that a guardian must be appointed for the purpose of consenting (*v*).

By the Trustee Act, 1850 (13 & 14 Vict. c. 60), s. 5, the Chancery Division has power to make an order vesting land of which an infant is possessed on trust or mortgage in such person as the court may direct, and such person may demise the land in the same manner as if the infant had been of full age and conveyed them to him. Infant Trustees and Mortgagees.

SECT. 20.—*By Guardians.*

For the purposes of this work guardians may be considered under six heads, viz.:—1. Guardians in socage or by the common law; 2. Testamentary guardians or by statute; 3. Guardians by nature; 4. Guardians for nurture; 5. Guardians by election; 6. Guardians appointed by the Chancery Division of the High Court. Division of the Subject.

1. A guardian *in socage*, or by the common law, is a person appointed, not by any special designation of the party, but by the law, in respect of the lands descended to the infant, so that where no lands descend there can be no such guardian (*x*): and this guardianship devolves upon such of the next of kin to whom the inheritance cannot descend (*y*). The father may also supersede the authority of the guardian in socage by appointing a guardian by will under the 12 Car. 2, c. 24. Leases by Guardians in Socage.

To enable guardians in socage to take especial care of the infant and his authority, the law has invested them, not with a *bare authority* only, but also with an *interest*, till the guardianship ceases (*z*); and to prevent their abuse of this authority and interest, the law has made them accountable to the infant, either when he comes to the age of fourteen

(*u*) *Re Letchford*, L. R., 2 Ch. D. 719; 45 L. T., Ch. 530.

(*v*) *Re Robert James, deceased*, L. R., 5 Eq. 334.

(*x*) *Bac. Abr. tit. Leases* (I. 9); *Shopland v. Ryoler*, Cro. Jac. 55, 99; 1 Blac. Com. 461.

(*y*) 1 Blac. Com. 461; *Cole Ejec.* 582.

(*z*) *Co. Lit.* 87 b; *Hutt.* 16, 17; *R. v. Oakley*, 10 East, 494; *Eyre v. Countess of Shaftesbury*, 2 P. Wms. 108; *R. v. Sherrington*, 3 B. & Ad. 714; *R. v. Sutton*, 3 A. & E. 597; *Cole Ejec.* 582.

CH. I. SEC. 20.
Leases by
 Guardians.

years, at which time the authority of the guardians terminates, or at any time after, as the infant thinks fit; and therefore their authority and interest extend only to such things as may be for the benefit and advantage of the infant, and whereof they may give an account. During the time the guardianship exists, a guardian in socage may make leases for years in his own name, as any other who has an interest in lands may do; for he is *quasi dominus pro tempore* and the lessee may maintain ejectment on such leases (a). If he makes leases for years to continue beyond the time of his guardianship, such leases seem not to be absolutely void by the infant's coming of age, but only voidable by him if he thinks fit; consequently the infant, when he comes of age, may by acceptance of rent, or other act, make such leases good and unavoidable (b). The lease will be determined by the death of the infant, and also by the death of the guardian in socage (c).

By Testamen-
 tary Guar-
 dians.

2. A testamentary guardian, or one appointed pursuant to 12 Car. 2, c. 24, ss. 8, 9, 10, 11, is the same in office and interest as a guardian in socage, his authority continuing until the infant attains the age of twenty-one years (d); and it seems clear that a lease by him stands on the same footing as a lease by a guardian in socage, with the additional advantage to the lessor that the period of minority is extended from fourteen to twenty-one years (e). Special guardians, by custom of London and other places, do not fall within the statute (f).

By Guardians
 by Nature.

3. Guardians by nature are the father, and in some cases the mother, of the child, until it attains twenty-one years (g). They may perhaps possess the power of leasing at will, but not for a term (h).

By Guardians
 for Nurture.

4. Where no testamentary guardian is appointed, the father or mother is guardian for nurture until the infant attains the age of fourteen years (i). A guardian for nurture cannot make any leases for years, either in his own name, or in the name of the infant, for he has only the care of the person and education of the infant; for there may be such guardian, though the infant has no lands at all, although in such a case there cannot be a guardian in socage: but such guardian, it seems, may make leases at will (k).

By Guardians
 by Election.

5. An infant seised of socage lands, and being unprovided with a testamentary guardian, may, on attaining fourteen years, elect a

(a) *Wade v. Baker*, 1 Ld. Raym. 131; Hutt. 16; *Osborn v. Carden*, Plowd. 293; Bac. Abr. tit. *Leases* (I. 9); *Willis v. Whitewood*, 1 Leon. 322; *R. v. Oakley*, 10 East, 494; Keilw. 46 b; Cole Ejec. 582.

(b) Bac. Abr. tit. *Leases* (I. 9).

(c) *Balder v. Blackburn*, Brownl. 79.

(d) 1 Blac. Com. 462; *Bedell v. Constable*, Vaugh. 179; *Roe d. Parry v. Hodgson*, 2 Wils. 129; Cole Ejec. 583.

(e) *Smith, L. & T.* 59; *Roe v. Hodgson*, 2 Wils. 129, so far as it is an authority to the contrary, is not law. See Platt on

Leases, Vol. I., p. 376.

(f) Sect. 10.

(g) 1 Blac. Com. 461; *R. v. Thorp*, Carth. 384.

(h) *Pigot v. Garnish*, Cro. Eliz. 678, 734.

(i) 1 Blac. Com. 461; *Roach v. Garvan*, 1 Ves. 158; 3 Co. R. 38.

(k) *Willis v. Whitewood*, Owen, 45; 1 Leon. 322; *Shopland v. Radlen*, Owen, 115; Cro. Jac. 55, 98; Godb. 143; 4 Leon. 238; *Pigot v. Garnish*, Cro. Eliz. 678; Bac. Abr. tit. *Leases* (I. 9).

guardian to act until he attains twenty-one (*l*). This guardianship, like that of socage, involves a similar power of leasing the estate of the infant (*m*). CH. I. SEC. 20.
Leases by Guardians.

6. Guardians appointed by the Chancery Division of the High Court may, by virtue of 11 Geo. 4 & 1 Will. 4, c. 65, s. 17, but not otherwise (*n*), make such leases as the court shall direct without fine, which leases may be made to extend beyond minority (*o*). If the estate be settled, the better course would seem to be to apply under the Settled Estates Act, 1877 (40 & 41 Vict. c. 18). By Guardians appointed by High Court.

SECT. 21.—By Husband and Wife.

(a) *As to Wife's Freeholds.*

By the Act for the Abolition of Fines and Recoveries (*p*), married women, being tenants in fee, in tail, for life or for years, may make leases by deed for any term consistent with their estates, provided the husband concurs in the deed, and it be acknowledged by the wife before a judge or before two perpetual commissioners, as directed by that act (*q*), or before a county court judge (*r*). Any such lease may be granted upon such terms, and subject to such covenants and conditions as the parties thereto may mutually agree on (*s*). No such lease requires enrolment in Chancery unless the wife is a tenant in tail, and the lease is not one of those excepted in sect. 41. Under Fines and Recoveries Abolition Act.

By the Settled Estates Act, 1877 (40 & 41 Vict. c. 18), s. 46, a husband seised in right of his wife of any *settled estates* for an estate for her life, or for a term of years determinable with her life, or for any greater estate (unless the settlement contain a declaration to the contrary), and also a husband "entitled to the possession or to the receipt of the rents and profits of any *unsettled estates* as tenant by the courtesy, or *in right of a wife who is seised in fee*," may, *without any application to the High Court*, "demise the same or any part thereof, except the principal mansion house and the demesnes thereof and other lands usually occupied therewith, from time to time for any term *not exceeding twenty-one years*, to take effect in possession: provided, that every such demise be made by deed, and the best rent that can reasonably be obtained be thereby reserved, without any fine or other benefit in the nature of a fine, which rent shall be incident to the immediate reversion; and provided that such demise be not Under Settled Estates Act, by Husband alone.

Term not to exceed 21 Years; Lease to be by Deed, and to contain a Proviso for Re-entry on Non-payment of Rent.

(*l*) 1 Blac. Com. 462; Co. Lit. 87 b; 2 Atk. 624; 1 Ves. 91.

(*m*) Bac. Abr. tit. *Leases* (I. 9); *Pitcairn v. Ogbourne*, 2 Ves. 375.

(*n*) See *Simpson on Infancy*, p. 333.

(*o*) *Anstey v. Hobson*, 1 Sm. & G. 505.

(*p*) 3 & 4 Will. 4, c. 74, ss. 77—88; Id. s. 40.

(*q*) Sects. 79, &c.

(*r*) 19 & 20 Vict. c. 108, s. 73.

(*s*) *Greenwood v. Tyber*, Cro. Jac. 563.

CH. I. SEC. 21. *Leases by Husband and Wife.* made without impeachment of waste, and do contain a covenant for payment of the rent, and such other usual and proper covenants as the lessor shall think fit, and also a condition of re-entry on non-payment of the rent for a period of twenty-eight days after it becomes due, or for some less period to be specified in that behalf; and provided a counterpart of every deed of lease be executed by the lessee" (*u*). By sect. 47, "every demise authorized by the last preceding section shall be valid against the person granting the same, and all other persons entitled to estates subsequent to the estate of such person under or by virtue of the same settlement if the estates be settled, and in the case of unsettled estates against the wife of any husband granting such demise of estates to which he is entitled in right of such wife (*v*), and against all persons claiming through or under the wife or husband (as the case may be) of the person granting the same." By sect. 48, "the execution of any lease by the lessor or lessors shall be deemed sufficient evidence that a counterpart of such lease has been duly executed by the lessee as required by this act."

Validity of Lease.

Counterpart.

Long Leases of Wife's Settled Estates.

When it is desirable to grant leases of *settled* estates in which the wife has only a life interest, for any longer term than twenty-one years, either for building, repairing or mining purposes, an application must be made to the Chancery Division of the High Court to authorize any such leases, pursuant to the Settled Estates Act (*x*), unless indeed the settlement contains some *express power* authorizing any such leases to be granted, in which latter case, leases may be granted in pursuance of such power, without the leave or authority of the Court.

Other Leases by Husband and Wife by Deed.

A lease *by deed* made by the husband and wife of the wife's freeholds, not in pursuance of any or either of the above-mentioned statutes, nor of any express power, is good during the coverture (*y*). Upon the death of the husband in the wife's lifetime it becomes *voidable* by her; and may be confirmed by her acceptance of rent becoming due after the husband's death, or the like (*z*). Her executors may sue for such rent (*a*). If the husband survive his wife and become tenant by the curtesy, the lease will be good as against him during his life or until the end of the term, which shall first happen. But if he do not become tenant by the curtesy (not having ever had any issue by his wife which might by possibility have inherited), the lease will, upon the wife's death, become *void* as against her heir at

(*u*) The section (32) of the Act of 1856, for which this is substituted, required that the proviso for re-entry should apply to breach of covenants generally.

(*v*) Taken from 21 & 22 Vict. c. 77, s. 8.

(*x*) 40 & 41 Vict. c. 18.

(*y*) *Wiscot's case*, 2 Cro. R. 61 b; *Baleman v. Allen*, Cro. Eliz. 438; Bac. Abr. tit. *Leases* (C. 1); 2 Wms. Saund. 180, note (9); *Toler v. Slater*, L. R., 3 Q. B.

42; 37 L. J., Q. B. 33.

(*z*) *Henstead's case*, 5 Co. R. 10; Co. Lit. 55 b; *Anon.*, 2 Dyer, 159, pl. 36; 1 Roll. Abr. 349; *Greenwood v. Tyber*, Cro. Jac. 563; *Jackson v. Mordant*, Cro. Eliz. 112; *Doe d. Collins v. Weller*, 7 T. R. 478; *Parry v. Hindle*, 2 Taunt. 180; 2 Wms. Saund. 180, note (9).

(*a*) *Toler v. Slater*, L. R., 3 Q. B. 42; 37 L. J., Q. B. 33.

law and all other persons lawfully claiming through or under her. CH. I. SEC. 21.
 When the husband does not become tenant by the curtesy, he cannot Leases
by Husband
and Wife.
 distrain or sue for the rent which becomes due after his wife's death, under a demise made by them both or by him on her behalf (*b*). If husband and wife, in right of the wife, are joint tenants with A., and by deed demise their moiety for years, it operates as a severance of the joint tenancy; unless indeed the wife survives the husband and enters to avoid the lease: until then it is good as against the joint tenant (*c*). A lease purporting to be made by husband and wife of the wife's freeholds, but executed under a power of attorney for them, operates as a lease made by the husband alone (*d*).

A lease by husband and wife *without deed* is void as against the surviving wife, for it cannot be said to be her lease (*e*), but it will be good during the coverture if the term continue so long (*f*). The term must not exceed three years (*g*). Without Deed.

If a husband seised of lands in right of his wife make a lease for years by deed, the term does not become void on his death, but only voidable by the entry of the widow (*h*). By Husband alone.

Leases made by a wife without the concurrence of her husband and not in pursuance of an express power, are, at common law, absolutely void, and cannot be confirmed (*i*). But a wife may, in exercise of an express power, grant valid leases without the concurrence of her husband. By Wife alone.

By the Married Women's Property Act, 1870 (33 & 34 Vict. c. 93), Married Women's Property Act, 1870.
 s. 1, any property acquired by a married woman, after the passing of that act, "in any employment, occupation, or trade in which she is engaged or which she carries on separately from her husband," or "through the exercise of any literary, artistic, or scientific skill," with all investments of such property, becomes "property held and settled to her separate use," and may be demised by her independently of her husband accordingly. By sects. 7 and 8 of the same act, any personal or freehold property coming to the wife, after the passing of the act, as next of kin or one of the next of kin of intestate, belongs to her for her separate use, "subject and without prejudice to the trusts of any settlement affecting the same," and may be demised by her accordingly.

(*b*) *Howe v. Scarrott*, 4 H. & N. 723; 28 L. J., Ex. 325; *Hill v. Saunders*, 2 Bing. 112; *S. C.* (in error), 4 B. & C. 529.

(*c*) *Smallman v. Agborow*, Cro. Jac. 417; 3 Bulst. 272.

(*d*) *Gardiner v. Norman*, Cro. Jac. 617.

(*e*) *Walsal v. Heath*, Cro. Eliz. 656;

Greenwood v. Tyber, Cro. Jac. 564; *Dyer*, 91 b, 146 b; 2 Wms. Saund. 180 a, n.

(*f*) *Bateman v. Allen*, Cro. Eliz. 438; 2

Co. R. 61 b.

(*g*) 29 Car. 2, c. 3, ss. 1, 2; 8 & 9 Vict. c. 106, s. 3.

(*h*) *Jordan v. Wykes*, Cro. Jac. 332; *Smallman v. Agborow*, Id. 417; 3 Bulst. 272; *Browning and Beeston's case*, Plowd. 65.

(*i*) *Goodright d. Carter v. Straphan*, Cowp. 201; Lofft, 763.

CH. I. SEC. 21.

*Leases
by Husband
and Wife.*

At Common
Law.

(b) *As to the Wife's Leasholds.*

At common law a husband may dispose of all his wife's interest in any chattel real by grant or demise: so he may dispose of the interest in a term which they have jointly (*k*). He may also dispose of part of his wife's interest: thus he may demise for a part of the term rendering rent, and the rent will go to his executor or administrator, though his wife survives (*l*), notwithstanding the reversion survives to the wife (*m*); but as to the residue of the term, whereof the husband makes no disposition in his lifetime, the wife, if she survive, will be entitled to it: because as to that, the law is left to take effect, as it would have done for the whole, if he had not prevented it by such his disposition of part (*n*). If the husband die before the wife, he cannot bequeath her chattels real by will (*o*), but if he survive her they become his own absolute property (*p*). If the husband, having an interest in his wife's real estate during their joint lives, creates a term out of that interest, the reversion is in him only, and not in his wife also (*q*).

The husband may demise his wife's leasholds, and thereby confer an immediate interest and possession, or he may underlot for a term to commence even after his death (*r*); and it will be good though the wife survive; for having an interest to dispose of in his life, he may dispose of all the term, so as to bind the wife; so, when he has disposed, by any act executed in his life, of the interest of the term, and has created a term in the interest, it is as good as if he had granted all the term (*s*).

Leases where
the Wife is
Executrix.

A man possessed of a term of years in right of his wife, as executrix of another person, has power to grant and convey the same: for the husband may administer in right of his wife without her consent, though she cannot administer without the consent of her husband; and if the husband can administer *jure uxoris* without her consent, it is incident to the power of administration to sell or dispose of a term of years (*t*).

Execution of
Leases by
Husband and
Wife.

A lease made by a husband and wife of the lands of the wife, and delivered by letter of attorney in both their names, will support an ejectment by the husband alone; for the delivery by attorney being void as to the wife, it is the lease of the husband only (*u*).

(*k*) Com. Dig. tit. *Baron and Feme* (E. 2).

(*l*) *Id.*; Co. Lit. 46 b, 351 a; 1 Roll. 343, l. 16; *Blaxton v. Heath*, Poph. 145.

(*m*) *Sym's case*, Cro. Eliz. 33.

(*n*) Bac. Abr. tit. *Baron and Feme* (C. 2); *Sym's case*, Cro. Eliz. 33.

(*o*) Plowd. 418.

(*p*) Co. Lit. 300 a, 351 a, n. (1).

(*q*) *Harcourt v. Wyman*, 3 Exch. 817.

(*r*) *Anon.*, Poph. 4; *Herbin v. Chard*, Poph. 96; *Grute v. Locroft*, Cro. Eliz. 287.

(*s*) *Grute v. Locroft*, Cro. Eliz. 287; *Anon.*, Poph. 4; Bac. Abr. tit. *Baron and Feme* (C. 2); 1 Roll. Abr. 344; *Herbin v. Chard*, Poph. 96.

(*t*) *Thrustout d. Levick v. Coppin*, 3 Wils. 277; 2 W. Blac. 801; post, 47.

(*u*) *Gardiner v. Norman*, Cro. Jac. 617.

By 11 Geo. 4 & 1 Will. 4, c. 65, s. 16, powers are given, under the direction of the Chancery Division of the High Court, to surrender and renew leases, which *femes covert*s would, except for their disability, be compellable to renew.

CH. I. SEC. 21.

*Leases
by Husband
and Wife.*

The Fines and Recoveries Abolition Act (3 & 4 Will. 4, c. 74), to which we have already referred (*x*), applies to leaseholds as well as to freeholds.

Renewal of
Leases by
Wife.

Under Fines
and Reco-
veries Act,
1833.

We have also seen that the 1st, 7th and 8th sections of the Married Women's Property Act, 1870, allow independent demises by the wife of "property." The 1st section clearly includes leaseholds in the term "property." The 7th and 8th sections employ the terms "*personal* and freehold property;" and leaseholds being undoubtedly personal property in law, seem to be comprehended in those sections also.

Under Mar-
ried Women's
Property Act,
1870.

SECT. 22.—*By Lunatics and their Committees.*

Leases made by idiots, or persons non compos mentis, are *prima facie* binding, but may be avoided (*y*). Generally speaking, a contract made by a lunatic is binding on him, unless it be proved that the other party knew of his insanity and took some unfair advantage of it (*z*). A lease made during a lucid interval cannot be impeached on the ground of previous or subsequent insanity (*a*).

By Idiots and
Lunatics.

By 16 & 17 Vict. c. 70, s. 113, the committee of a lunatic may make, surrender and renew leases in the name and on the behalf of the lunatic, under the direction of the Lord Chancellor. So he may execute conveyances, mortgages and other deeds and contracts in the name and on behalf of the lunatic, as the Lord Chancellor shall order (*b*). So he may in like manner make leases or underleases for years, for the erection of buildings or for repairing existing buildings, or otherwise improving the property, or for *farming* or other purposes (*c*); and "every surrender, lease, agreement, deed, conveyance, mortgage or other disposition granted, accepted, made or executed by virtue of this act shall be valid and legal to all intents and purposes, as if the person in whose name or on whose behalf the same was granted, accepted, made, or executed, had been of sound mind, and had granted, accepted, made or executed the same" (*d*). It seems to be the practice in every case, first to obtain the approval of a master

By Com-
mittees of
Lunatics.

(*x*) Ante, 39.

(*y*) Co. Lit. 247 a; *Beverley's case*, 4 Co. R. 123; *Yates v. Boon*, 2 Stra. 1104.

(*z*) *Brown v. Joddrell*, 1 Moo. & M. 105; *Molton v. Camroux*, 2 Exch. 487; 4 Exch. 17; *Beavan v. M'Donnell*, 9 Exch. 309; 10 Exch. 181; 23 L. J., Ex. 94, 326; *Elliott v. Ince*, 7 De G., M. & G. 475.

(*a*) 1 Dow, Parl. Cas. 177; Fry, ss. 161, 162.

(*b*) Sects. 116—138.

(*c*) Sect. 129; 18 & 19 Vict. c. 13; General Order in Lunacy, 7th November, 1853, No. 54.

(*d*) Sect. 139; Cole Ejec. 581.

CH. I. SEC. 22. *Leases by Lunatics and their Committees.* in lunacy to the proposed lease, and then an order of the Lords Justices confirming the master's report, and directing the lease, as settled and approved of by the master, to be executed by the committee, upon the lessee executing a counterpart. In *Wynne, In re (e)*, however, eighteen months' possession under an agreement for a lease with the agent of the committee was held sufficient to entitle the tenant to specific performance, although the sanction of the master in lunacy had not been applied for.

Repairs and Allowances. By 15 & 16 Vict. c. 48, committees of lunatics may direct repairs and improvements of or upon the land of lunatics, or make allowance to the tenant executing the same.

SECT. 23.—By Persons under Duress or Intoxicated.

By Persons under Duress. All deeds, bonds or grants made by persons under duress are voidable by the parties themselves that make them, or others that have their estates, &c. Duress of imprisonment is defined to be where one is manifestly imprisoned or restrained of his liberty contrary to law, until he executes a bond or deed to another (*f*). The imprisonment must be illegal, otherwise there is no duress (*g*). Duress of goods (especially under a distress) is not sufficient (*h*).

By Persons in a State of Intoxication. Intoxication is a good defence in an action on a deed, lease or grant, or on an agreement, provided the party was in such a state of intoxication as not to know what he was doing (*i*). But the contract is voidable only and not void, and therefore may be ratified when the party becomes sober (*k*). If through the contrivance and management of the party obtaining the deed the grantor is thrown into intoxication for the purpose of prevailing on him to execute the deed, relief may be administered, on the ground of fraud (*l*), by the Chancery Division of the High Court (*m*).

SECT. 24.—By Convicts.

Felons. At common law, on a conviction for felony, real estate became forfeited to the crown, but not without attainder (*n*). Under a

(*e*) L. R., 7 Ch. 229; 26 L. T. 406; 20 W. R. 348.

(*f*) *Knight and Norton's case*, 3 Leon. 239.

(*g*) 2 Inst. 482; 11 Q. B. 117.

(*h*) *Skeats v. Beale*, 11 A. & E. 983; *Gulliver v. Cozens*, 1 C. B. 788; *Kearns v. Durell*, 6 C. B. 596; 6 D. & L. 357.

(*i*) *Gore v. Gibson*, 13 M. & W. 623; *Pitt v. Smith*, 3 Camp. 34; *Butler v. Mul-*

vihill, 1 Bligh, 137.

(*k*) *Matthews v. Baxter*, L. R., 8 Ex. 132; 42 L. J., Ex. 73.

(*l*) *Johnson v. Medlicott*, 3 P. Wms. 139; *Cory v. Cory*, 1 Ves. 19; *Nagle v. Baylor*, 3 Dru. & W. 60; *Say v. Barwick*, 1 V. & B. 196; *Butler v. Mulvihill*, 1 Bligh, 127.

(*m*) Judicature Act, 1873, s. 34, subs. 3.

(*n*) Cole Ejec. 573.

demise, therefore, by a felon after attainder, the lessee had a good title against all but the crown and the lord of whom the land was held (o); and the crown was said to be entitled to hold during the felon's life (p). The crown's right of entry might be exercised or enforced without any inquisition being taken or office being found, or actual re-entry (q). An assignment by a felon just before trial, without consideration or value, was void as against the crown (r). But a bonâ fide assignment made before the day of trial (even after the commission day), in consideration of a pre-existent debt or other good consideration, was valid (s).

CH. I. SECT. 24.
*Leases by
Convicts.*

The property of persons who have been convicted of treason or felony is now entirely regulated by an act passed on the 4th July, 1870 (33 & 34 Vict. c. 23), by which forfeiture to the crown is abolished. By sect. 1 of this act "no confession, verdict, inquest, conviction or judgment of or for any treason or felony or *felo de se*, shall cause any attainder or corruption of blood, or any forfeiture or escheat." By sect. 9 the crown may commit the custody and management of the property of any convict, *i. e.* "any person against whom judgment of death or penal servitude shall have been pronounced or recorded upon any charge of treason or felony" (t), to an administrator, upon whose appointment "all the real and personal property, including choses in action, to which the convict was at the time of his conviction, or shall afterwards while he shall continue subject to the operation of the act, become or be entitled, shall vest in such administrator for all the estate and interest of such convict therein" (sect. 10). By sect. 8 the convict is disabled to sue or alienate property, and by sect. 12 "the administrator shall have absolute power to let, mortgage, sell, convey and transfer any part of such property as to him shall seem fit." By sect. 18 the property reverts to the convict or his representatives on the completion of his sentence, pardon or death. By sect. 21 an interim curator may, if there be no administrator, be appointed by justices; and by sect. 24 such interim curator may bring and defend actions, and may "receive and give legal discharges for all rents," &c. Property acquired by a convict "during the time which he shall be lawfully at large under licence" is, by sect. 30, exempted from the operation of the act.

Regulation of
Felon's Prop-
erty under
33 & 34 Vict.
c. 23.

A lease made by an outlaw before an inquisition taken will prevent the title of the crown, if it be made bonâ fide and upon good con-

Outlaws

(o) *Doe d. Evans or Griffiths v. Pritchard*, 5 B. & Ad. 765; *Cole Ejeo*, 573.

(p) *Chamb. L. & T.* 46.

(q) 22 & 23 Vict. c. 21, s. 25.

(r) *Morewood v. Wilks*, 6 C. & P. 144; *Shaw v. Bran*, 1 Stark. R. 319; *In re Saunders*, 4 Giff. 179; 32 L. J., Ch. 224.

(s) *Perkins v. Bradley*, 1 Hare, 219;

Whitaker v. Wisbey, 12 C. B. 44; *Chowne v. Baylis*, 31 Beav. 351.

(t) Sect. 6. Persons not comprised within this definition are exempted from forfeiture by the act, but are otherwise unaffected by its provisions relating to the administration of property.

CH. I. SEC. 24. *Leases by Convicts.* sideration, but not if it be in trust for the outlaw only (*u*). The grant of a person outlawed in a personal action was good against all but the crown (*x*); but outlawry in civil proceedings, which had long been obsolete, was abolished by the Civil Procedure Acts Repeal Act, 1879 (42 & 43 Vict. c. 59). The Act of 1870, above mentioned (see sect. 1), does not affect “the law of forfeiture consequent upon outlawry in criminal proceedings.”

SECT. 25.—*By Trustees of Bankrupts.*

A trustee of a bankrupt seised in fee may demise to the same extent as the bankrupt could. A trustee of a bankrupt lessee, if he do not disclaim the lease, and if the lease contain no clause of forfeiture on bankruptcy of the lessee, has a similar power (*y*).

SECT. 26.—*By Executors and Administrators.*

A lease is personal property.

A lease for a term of years, however long, is personal property in the hands of the lessee by the law of England, and as such vests in the executor. In Scotland, however, it is otherwise. By the law of Scotland a lease vests in the heir of the lessee at his death (*z*).

Lease by Executor.

Executors and administrators may dispose absolutely of terms of years vested in them in right of their testators or intestates, or may lease the same for any fewer number of years; and the rents reserved on such leases are assets in their hands, and go in a course of administration (*a*). They should take care not to enter into any informal agreement for a lease which cannot be enforced; otherwise they may perhaps be charged with any loss, as arising from a wilful default (*b*). An executor may demise before probate, because his appointment, estate and power are derived from the will, of which the probate is merely evidence (*c*); but an administrator cannot make a lease until he has obtained letters of administration (*d*). A lease by one of several executors is as efficacious as their joint demise (*e*), although it purport to be the grant of all (*f*); and the same rule

(*u*) *Att.-Gen. v. Freeman*, Hardr. 101; *Hammond's case*, Id. 176; 2 Roll. Abr. 808, pl. 7; *King d. Poe v. Ball*, Ridg. Lap. & Scho. 94.

(*x*) *Shep. Touch.* 232.

(*y*) See Ch. VII., Sect. 8, post.

(*z*) See *Bain v. Brand*, L. B., 1 App. Ca. 762.

(*a*) *Bac. Abr. tit. Leases* (I. 7).

(*b*) *Connolly v. Connolly*, 17 Ir. Ch. R.

208, M. R.

(*c*) *Roe d. Bendall v. Summerset*, 2 W. Blac. 692; Roll. Abr. tit. *Executors* (A.); 1 Wms. Exors. 291, 595 (6th ed.).

(*d*) *Wankford v. Wankford*, 1 Salk. 301; *Hudson v. Hudson*, 1 Atk. 461; 1 Wms. Exors. 595 (6th ed.).

(*e*) *Pannell v. Fenn*, Cro. Eliz. 347; *Doe d. Hayes v. Sturges*, 7 Taunt. 217.

(*f*) *Simpson v. Gutteridge*, 1 Madd. 616.

applies to administrators (*g*). It seems that if three executors demise to one of them at a fixed rent, such rent may be distrained for (*h*). CH. I. SEC. 26.

Previous to a party taking a lease from an executor, he should ascertain whether the property has been specifically bequeathed by the will; and if so, whether the executor has assented to such bequest, for if so his right to grant the lease is gone, and the legal interest in the property is vested in the legatee; and, consequently, as the executor has nothing to grant, the lease will be void, and the legatee may maintain ejectment (*i*). It is well settled, however, that assent to a bequest for life of a lease is an assent to the bequest over (*k*). Lease
by Executor.
Assent to
specific Be-
quest of
Lease by
Executors.

If a lease be specifically bequeathed to an executor for his own use his assent to the bequest is still necessary, and if his acts are referable to his character of executor, they are no evidence of assent (*l*), which must be shown by some act referable to his character of beneficial owner, as by a disposition of the lease in his own will (*m*). Where a party possessed of a term as administrator makes a lease and appoints an executor and dies, his executor is entitled to the rent, and not the administrator de bonis non of the intestate (*n*). Assent of
Executor to
specific Be-
quest to
himself.

The husband of a woman who is an executrix has a joint interest with her in all the effects of the deceased; and is enabled by law to assume the whole administration, and to act in it to all purposes without her consent; but the wife cannot do any act as executrix or administratrix without her husband's concurrence. A demise by her alone, therefore, cannot be supported; and in all leases made in respect of such executorship and administration the husband must be the demising party (*o*). Leases by an
Executrix
who is a Mar-
ried Woman.

SECT. 27.—By Mortgagors and Mortgagees.

Leases granted by a mortgagor before the mortgage are valid as against the mortgagee, who is only an assignee of the reversion and its incidents (*p*). The tenants under such leases may safely continue to pay their rents to the mortgagor until they receive notice of the mortgage, and are requested to pay their rent to the mortgagee (*q*). Leases before
the Mortgage.

Upon giving notice of his mortgage, and requesting the rent to be paid to him, the mortgagee becomes entitled to all the arrears of rent Mortgagee
entitled to
Rent on
Rent on notice
of Mortgage.

(*g*) *Jacob v. Harwood*, 2 Ves. sen. 265.

(*h*) *Cowper v. Fletcher*, 6 B. & S. 464; 34 L. J., Q. B. 187.

(*i*) *Paramour v. Yardley*, Plowd. 539; *Young v. Holmes*, 1 Stra. 70; *Doe d. Lord Say and Sele v. Guy*, 3 East, 120; 4 Esp. 164; *Johnson v. Warwick*, 17 C. B. 516; *Fenton v. Clegg*, 9 Exch. 680; *Doe d. Sturges v. Tatchell*, 3 B. & Ad. 675.

(*k*) *Stevenson v. Mayor of Liverpool*, L. R., 10 Q. B. at p. 84.

(*l*) *Doe d. Hayes v. Sturges*, 7 Taunt. 717.

(*m*) *Fenton v. Clegg*, 9 Exch. 680.

(*n*) *Drew v. Bayly*, 2 Lev. 100; *Norton v. Harvey*, 1 Vent. 259.

(*o*) *Cham. on Leases*, 35; *Arnold v. Bidgood*, Cro. Jac. 318; *Thrustout d. Le- vick v. Coppin*, 2 W. Blac. 801.

(*p*) *Rogers v. Humphreys*, 4 A. & E. 299, 313; *Cole Ejec.* 473.

(*q*) 4 Ann. c. 16, s. 10; *Cook v. Moylan*, 1 Exch. 67; 5 D. & L. 701; *Trent v. Hunt*, 9 Exch. 14.

Moss v. Galli- more.

CH. I. SEC. 27. Leases by Mortgagors and Mortgagees. which became due after his mortgage, and which then remain unpaid, and also to all subsequent rent (*r*).

Where a mortgagor after execution of an agreement for a lease, under which the tenant has entered, mortgages the premises, the mortgagee may maintain use and occupation for the enjoyment of them subsequently to the mortgage, and notice thereof (*s*). Where a mortgage was made after a letting from year to year, and subsequently the mortgagor, on making some improvements, agreed with the tenant for an increased rent; it was held that the mortgagee, after notice to the tenant of the mortgage, might recover, in an action for use and occupation, arrears of the improved rent due at the time of the notice, as well as subsequent accruing rent (*t*). Where a mortgage was made after a letting, and it was subsequently arranged between the mortgagor, the mortgagee and the tenant, that the latter should pay the interest to the mortgagee, and the remainder of his rent to the mortgagor; it was held that after this arrangement the tenant was not justified, after a mere notice so to do, in paying the whole rent to the mortgagee (*u*). In ejectionment by landlord against tenant for a forfeiture, it is a good defence that the landlord, after the execution of the lease, conveyed away his title to the premises by way of mortgage; although it be not shown that any interest on the mortgage is in arrear, or that the mortgagee has made any claim, or otherwise enforced his rights as against either landlord or tenant (*x*).

Leases after the Mortgage.

Where lands already in mortgage are to be demised, both the mortgagee and mortgagor ought to concur in the lease, to render the tenant secure (*y*); and the covenants of the lessee should be made with the mortgagee, with a view to their running with the land (*z*). The proviso for re-entry should be reserved to the mortgagee, and not to the mortgagor (*a*). So also the covenant for quiet enjoyment should be made by the mortgagee, and not by the mortgagor, otherwise it will not run with the land. The deed may contain a proviso that the mortgagor shall receive the rents until the mortgagee shall give notice to the contrary to the tenants, and a power to the mortgagor to give sufficient receipts for the rent, and a power to the mortgagor to distrain for the rent when in arrear (*b*).

(*r*) *Moss v. Gallimore*, 1 Doug. 279; 1 Smith, L. C. 629 (7th ed.); *Pope v. Briggs*, 9 B. & C. 246; *Rogers v. Humphreys*, 4 A. & E. 299, 313.

(*s*) *Rawson v. Eicke*, 7 A. & E. 451. See Form of Notice, post, Appendix C., Nos. 15, 16.

(*t*) *Burrowes v. Gradin*, 1 D. & L. 213.

(*u*) *Whitmore v. Walker*, 2 C. & K. 615.

(*x*) *Doe d. Marriott v. Edwards*, 5 B. & Ad. 1065.

(*y*) *Doe d. Barney v. Adams*, 2 C. & J. 232; *Doe d. Hughes v. Bucknell*, 8 C. & P. 566; *Carpenter v. Parker*, 3 C. B., N. S. 206; *Franklin v. Ball*, 34 L. J., Ch. 153.

(*z*) *Webb v. Russell*, 3 T. R. 393; *Stokes v. Russell*, Id. 679; *Russell v. Stokes* (in error), 1 H. Blac. 562.

(*a*) *Doe d. Barney v. Adams*, 2 C. & J. 232; *Saunders v. Merryweather*, 3 H. & C. 902; 35 L. J., Ex. 115.

(*b*) See Form, Appendix B., Sect. 17.

So long as the equity of redemption is not foreclosed, the mortgagee cannot alone demise, so as to bind the mortgagor in equity, unless to avoid an apparent loss and merely of necessity (e). On the other hand, the legal estate being in the mortgagee, and not in the mortgagor, the latter alone cannot grant a lease which shall be valid as against the mortgagee, who may at any time enter and eject the lessee, without any previous notice to quit, or demand of possession, treating him as a mere trespasser (d). But sometimes the mortgage deed contains an express power to the mortgagor to grant leases under certain restrictions, in which case the mortgagor alone may effectually demise, pursuant to the power, and that even to a trustee for himself (e).

CH. I. SEC. 27.

Leases by Mortgagors and Mortgagees.

Not by Mortgagee alone.

Not by Mortgagor alone; *Keech v. Hall*.

Unless under an express Power.

If without any such express power the mortgagor alone grants a lease (which is sometimes done), the tenant will be thereby estopped (f) during his possession under the lease from disputing the mortgagor's right to demise (g); although the tenant himself may be ejected at any time by the mortgagee, and lose all his growing crops, fixtures, &c. (h).

Leases by Estoppel.

But although the mortgagee may treat the tenants of the mortgagor as trespassers in the case of a lease made after the mortgage, he cannot distrain or sue for rent, or for use and occupation (i), unless a new tenancy has been created as between him and the tenant in possession, by an attornment or otherwise (k). A mere notice of the mortgage, with a request to the tenant to pay his rent to the mortgagee (not assented to by the tenant) is insufficient to create between them the relation of landlord and tenant (l). Where a tenant, after notice given to him of the mortgage, pays rent to the mortgagee under a distress, it does not constitute a tenancy by relation back, so as to entitle the mortgagee to distrain for a previous half-year's rent (m). But if the tenant expressly attorns as from a previous day at a fixed rent, all such rent, when in arrear, may be

Mortgagee cannot distrain or sue for Rent, unless new Tenancy created.

Rogers v. Humphreys.

(e) *Hungerford v. Clay*, 9 Mod. 1; Powell on Mortg. 183; *Franklin v. Ball*, 34 L. J., Ch. 153.

(d) *Keech v. Hall*, 1 Doug. 21; 1 Smith L. C. 579 (7th ed.); *Thunder d. Weaver v. Belcher*, 3 East, 449, 451.

(e) *Bevan v. Hadgood*, 1 Johns. & H. 222; 30 L. J., Ch. 107; Sug. Pow. 717, pl. 21, 22 (8th ed.).

(f) See *Webb v. Austin*, 7 M. & G. 701.

(g) *Alchorno v. Gomme*, 2 Bing. 54; *Morton v. Woods*, L. R., 3 Q. B. 658; 37 L. J., Q. B. 242; *Doe d. Leeming v. Skirrow*, 7 A. & E. 167.

(h) *Walmesley v. Milne*, 7 C. B., N. S. 115, 133.

(i) *Rogers v. Humphreys*, 4 A. & E. 299, 313; *Partington v. Woodcock*, 6 A. &

E. 690; *Evans v. Elliott*, 9 A. & E. 342; *Turner v. Cameron's Coalbrook Steam Canal Co.*, 5 Exch. 932; *Lichfield v. Ready*, 5 Exch. 939.

(k) *Brown v. Storey*, 1 M. & G. 117; 126; *Roberts v. Hayward*, 3 C. & P. 432; *Doe d. Whitaker v. Hales*, 7 Bing. 322; *Doe d. Hughes v. Bucknell*, 8 C. & P. 566; *Doe d. Higginbotham v. Barton*, 11 A. & E. 307; *Doe d. Bowman v. Lewis*, 13 M. & W. 241.

(l) *Rogers v. Humphreys*, 4 A. & E. 299; *Partington v. Woodcock*, 6 A. & E. 690; *Evans v. Elliott*, 9 A. & E. 342; *Doe d. Higginbotham v. Barton*, 11 A. & E. 307; *Hickman v. Machin*, 4 H. & N. 716.

(m) *Evans v. Elliott*, 9 A. & E. 342.

CH. I. SEC. 27.
*Leases by
 Mortgagors and
 Mortgagees.*

distraigned for (n). Where a mortgagee gave notice of the mortgage to a tenant of the mortgagor, and required him to pay all rent due and to become due in respect of the premises, and the tenant acquiesced, it was held to be evidence from which a jury might infer a yearly tenancy, as between the mortgagee and the tenant (o). The result of the cases seems to be that a bare notice by the mortgagee to a subsequent tenant of the mortgagor to pay him the rent (not assented to by the tenant) will not create any new tenancy; but that a notice acquiesced in by payment of rent or otherwise is evidence from which a jury may infer a new contract of tenancy from year to year as between the mortgagee and the tenant in possession (p). The mere receipt by the mortgagee from the mortgagor of interest due on the mortgage will not preclude the mortgagee from ejecting the mortgagor's tenant (q). The fact of the mortgagee being allowed to see improvements made to the property by the lessee of the mortgagor, does not raise an implied tenancy between the mortgagee and the lessee, and is not a recognition of his holding (r). A mortgagee out of possession, who gives notice of the mortgage to the tenant who has become tenant since the mortgage, cannot maintain trespass for mesne profits against the tenant for the rents accrued due since the date of the mortgage, by mere entry upon the land after the notice, the doctrine of relation not applying to such a case (s). If the mortgagor of a house lets it furnished, and afterwards the tenant receives notice from the mortgagee to pay the rent to him, which he does, the mortgagor may still recover against the tenant for the use of the furniture, for either the rent may be apportioned, or a new agreement may be inferred to take the house of the mortgagee, and to pay the mortgagor for the use of the furniture (t). Where a mortgagor after mortgage demised part of the land, and then made a second mortgage, and the tenant paid rent to the second mortgagee, who demised another part of the land to a different tenant and then notice was given to both tenants of the first mortgage, who accordingly paid their rents to the first mortgagee; it was held in ejectment by the second mortgagee, that the tenants might both show the prior mortgage and the notice (u). A., seised, in fee, mortgaged in fee to B., and afterwards leased to the defendant for thirty-one years. The plaintiff bought the legal estate from B., the mortgagee, and also the

Letting of
 furnished
 House by
 Mortgagor.

(n) *Gladman v. Plumer*, 15 L. J., Q. B. 80; 10 Jur. 109.

(o) *Brown v. Storey*, 1 M. & G. 117; *Doe d. Hughes v. Bucknell*, 8 C. & P. 566.

(p) *Powseley v. Blackman*, Cro. Jac. 659; *Brown v. Storey* and *Doe d. Hughes v. Bucknell*, *supra*; *Rogers v. Humphreys*, 4 A. & E. 299; *Doe d. Higginbotham v. Barton*, 11 A. & E. 307; *Hickman v.*

Machin, 4 H. & N. 716; 21 L. J., Ex. 310.

(q) *Doe d. Rogers v. Cadwallader*, 2 B. & Ad. 473.

(r) *Doe d. Parry v. Hughes*, 11 Jur. 698.

(s) *Litchfield v. Ready*, 5 Exch. 939.

(t) *Salmon v. Matthews*, 8 M. & W. 827.

(u) *Doe d. Higginbotham v. Barton*, 11 A. & E. 307.

equitable estate from a party who derived it from A., the mortgagor, which party also joined in the conveyance of the legal estate: it was held, that the plaintiff, although he had received rent from the defendant, was not bound by the mortgagor's lease to him, but might recover in ejectment after the expiration of a notice to quit or sue him for use and occupation after the payment and receipt of rent (*r*). Where a person who had bought premises which had not been conveyed to him, let his son into possession as tenant at will, paying no rent, afterwards had the property conveyed to him, and then mortgaged it: it was held, that if the mortgage had any operation on the tenancy at will, there was no new tenancy between the son and the mortgagee, so as to prevent the operation of the Statute of Limitations (*x*). Where a mortgagor gave an authority to the mortgagee to receive the rent of a tenant, under a demise subsequent to a mortgage, and the mortgagee received the rent for some time; after which the authority was countermanded, and the tenant refused to pay to either, and the mortgagor distrained, it was held that the relation of landlord and tenant was not created between the tenant and the mortgagee (*y*). A tenant holding under the mortgagor may show that the lease was made after the mortgage, and that he, the tenant, was compelled to pay the rent to the mortgagee, and such payment will operate as a discharge of the rent to the mortgagor, and may be proved under a special or common plea of payment (*z*). If a mortgagor sues for rent after notice given to the tenant of the mortgage, the tenant may, at his own expense, obtain relief under the Interpleader Act (*a*).

The mortgagee cannot before foreclosure of the equity of redemption make a lease for years of property in mortgage which will bind the mortgagor, unless to avoid an apparent loss and merely of necessity (*b*). If a mortgagee accepts a person as a tenant, to whom the mortgagor has granted a lease for years since the mortgage, that makes him only tenant from year to year to the mortgagee (*c*). Such new tenancy will be subject to the terms and conditions of the lease, so far as the same are applicable to and not inconsistent with a yearly tenancy (*d*). But payment of the rent will not relate back to the date or service of the notice of the mortgage, so as to make the new tenancy commence from that time (*e*). For the purpose of a notice

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*Leases by
Mortgagors and
Mortgagees.*

*Leases by
Mortgagees.*

(*v*) *Doe d. Ld. Doune v. Thompson*, 9 Q. B. 1037.

(*x*) *Doe d. Goody v. Carter*, 9 Q. B. 863.

(*y*) *Wheeler v. Branscombe*, 5 Q. B. 373; *Wilton v. Dunn*, 17 Q. B. 294.

(*z*) *Johnson v. Jones*, 9 A. & E. 809; *Waddilove v. Barnett*, 2 Bing. N. C. 538;

4 Dowl. 347; *Pope v. Biggs*, 9 B. & C. 245; *Whitmore v. Walker*, 2 C. & K. 615.

(*a*) 1 & 2 Will. 4, c. 58, s. 1; *Murdoch v. Taylor*, 6 Bing. N. C. 293.

(*b*) *Hungerford v. Clay*, 9 Mod. 1; *Franklin v. Ball*, 34 L. J., Ch. 153; *Powell on Mort.* 188.

(*c*) *Doe d. Hughes v. Bucknell*, 8 C. & P. 566; *Doe d. Prior v. Ongley*, 10 C. B. 25 (3rd point); *Carpenter v. Parker*, 3 C. B., N. S. 232, 235.

(*d*) *Doe d. Thomson v. Amey*, 12 A. & E. 476; *Doe d. Davenish v. Moffatt*, 15 Q. B. 257, 265; *Cole Eject.* 476.

(*e*) *Evans v. Elliott*, 9 A. & E. 342.

CH. I. SEC. 27. to quit, the new tenancy will be deemed to have commenced from the same day in the year as the original term (*f*). Where a tenant attorns expressly as from a previous specified day, at a fixed rent a distress may be made for the rent calculated from that day (*g*). When a new tenancy from year to year has been created as between the mortgagee and the tenant, the mortgagee is thenceforth the landlord, and may sue or distrain for the rent (*h*), or maintain an action for use and occupation (*i*). But he cannot maintain an ejectment against the tenant until the new tenancy has been determined by notice to quit, surrender, forfeiture or otherwise (*k*), although afterwards he may (*l*).

Leases by
Mortgagor
and Mort-
gagee.

Where lands in mortgage are to be leased, the mortgagor and mortgagee ought to concur in granting the lease (*m*). A joint action of covenant is not maintainable against a mortgagor and a mortgagee on an implied covenant, if the latter has demised, and the former, who had merely an equitable interest, has confirmed the lease (*n*). A mortgagor and mortgagee for a term joined in a deed, by which the former leased and the latter confirmed the premises to a third party for the remainder of the term, at a rent reserved to the mortgagor, his executors, &c. The deed declared that nothing therein should abridge, defeat, alter, &c. the interest of the mortgagee in the premises, which was to remain a security for his principal and interest: the mortgagee was held entitled to the rent (*o*). A mortgagor agreed to sell premises held by a tenant under a lease granted by him after the mortgage, without the concurrence of the mortgagee, who however was willing to concur in the sale; it was held that the mortgagor was able to make a good title (*p*).

SECT. 28.—*By Tenants by Elegit, &c.*

Their Power
to lease gene-
rally.

Leases by tenants under executions, as tenants by elegit, statute-merchant, statute-staple, &c., are conditional, and may be determined by payment or satisfaction of the debt and costs (*q*). Until so determined they remain as valid as any other demises (*r*). Where a fieri facias has issued against the property of a debtor, his term for years remains in him until the sheriff has actually assigned it; therefore

(*f*) *Doe d. Collins v. Weller*, 7 T. R. 478; *Cole Ejec.* 476.

(*g*) *Gladman v. Plumer*, 15 L. J., Q. B. 80; 10 Jur. 109.

(*h*) *Rogers v. Humphreys*, 4 A. & E. 299; *Brown v. Storey*, 1 M. & G. 117, 126.

(*i*) *Doe d. Id. Downe v. Thompson*, 9 Q. B. 1037.

(*k*) *Cole Ejec.* 474, 477.

(*l*) *Doe d. Id. Downe v. Thompson*,

supra; *Pole v. Davis*, 1 F. & F. 284.

(*m*) *Ante*, 48.

(*n*) *Smith v. Pocklington*, 1 C. & J. 445.

(*o*) *Edwards v. Jones*, 1 Coll. 247.

(*p*) *Webb v. Austin*, 7 M. & G. 701; *Sturgeon v. Wingfield*, 15 H. & W. 224.

(*q*) *Price v. Varney*, 3 B. & C. 733; *Cole Ejec.* 566.

(*r*) But see *Doughty v. Stiles*, Rep. temp. Finch, 115.

until such assignment the purchaser of the term cannot make a valid lease of it (s). With respect to leases made by the debtor before the execution of a writ of elegit, the tenant by elegit (*i. e.* the execution creditor) is a mere assignee of the reversion, and may, without any attornment, sue or distrain for the rent which becomes due after the filing of the writ and the inquisition thereon (t), provided the inquisition be valid, but not otherwise (u). He cannot eject a previous tenant until after his term expires or becomes forfeited, or is determined by notice to quit or otherwise (x).

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*Leases by
Tenants by
Elegit, &c.*

SECT. 29.—By Receivers.

Receivers appointed by the High Court cannot demise without the authority and direction of the court (y). They are bound to obtain the best terms (z). A lease under seal granted by a receiver in a cause wherein A. B. is plaintiff and C. D. is defendant, for a term of fourteen years, and reserving rent to the receiver and to any future receiver in the cause, would create a tenancy by estoppel as between him and the lessee, and give a right to distrain for rent (a).

*Leases by Re-
ceivers in
Chancery.*

An attornment to a receiver creates a tenancy by estoppel between the tenant and the receiver, which the court applies to the purpose of collecting and securing the rents till a decree can be pronounced, taking care that the tenant shall be protected, both while the receiver continues to act, and when by the authority of the court he is withdrawn (b). It does not operate as an attornment to the parties interested so as to enable any of them to distrain, for thereby the object of the court in appointing the receiver would often be effectually defeated (c).

*Effect of At-
tornment to a
Receiver.*

(s) *Playfair v. Musgrove*, 14 M. & W. 239; 3 D. & L. 72; *Doe d. Hughes v. Jones*, 9 M. & W. 372; 1 Dowl., N. S. 352; *Cole Ejec.* 569.

(t) *Ramsbottom v. Buckhurst*, 2 M. & S. 566; *Lloyd v. Davies*, 2 Exch. 103; *Cole Ejec.* 566.

(u) *Arnold v. Ridge*, 13 C. B. 745.

(x) *Doe d. Da Costa v. Wharton*, 8 T. R. 2; *Cole Ejec.* 566.

(y) *Morris v. Elme*, 1 Ves. jun. 139. A receiver may be appointed by any Division of the High Court (Judicature Act, 1873, s. 24).

(z) *Wygne v. Ld. Newborough*, 1 Ves. jun. 164.

(a) *Dancer v. Hastings*, 4 Bing. 2; cited in *Morton v. Woods*, L. R., 3 Q. B. 668, 668.

(b) *Hughes v. Hughes*, 1 Ves. jun. 161; *Evans v. Mathias*, 7 E. & B. 602; 26 L. J., Q. B. 309; *Jolly v. Arbutnot*, 4 De G. & J. 224; 28 L. J., Ch. 547; *Ames v. Birkenhead Docks Trustees*, 20 Beav. 332; 24 L. J., Ch. 540.

(c) *Evans v. Mathias*, 7 E. & B. 590; see *White v. Small*, 22 Beav. 72; 26 Id. 191; *Barton v. Rock*, 22 Beav. 81.

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*Leases by
Lords of
Manors and
Copyholders.*

By the Lord.

SECT. 30.—*By Lords of Manors and Copyholders.*

Every one having a lawful interest in a manor may make voluntary grants of copyholds escheated or come to his hands, as well as admittances, according to the custom of the manor, rendering the ancient rents and services, which bind him who has the inheritance (*d*). But voluntary grants of copyhold, by the lord, can only be made according to the custom of the manor (*e*). Where there is no custom for that purpose the lord of a manor cannot make a new grant of copyhold (*f*). The ancient rent and services must be reserved: any alteration therein will make the grant void as against the lord's successor (*g*).

*Leases of the
Wastes.*

By 13 Geo. 3, c. 81, s. 15, lords of manors, with the consent of three-fourths of the commoners, may demise for not more than four years any part of the wastes and commons, not exceeding one-twelfth part, for the best rent that can be obtained by auction, the same to be applied in draining, fencing and improving the residue. So by custom the lord may have power to demise parcels of the waste (*h*), but a custom for the lord to grant leases of the waste, without restriction, is bad, as amounting to a power of destroying the right of common altogether (*i*). A copyhold, to which a right of common was annexed, having by the custom of the manor vested in the lord by forfeiture, and he having regranted it as a copyhold tenement with the appurtenances; it was held, that having always continued demisable whilst in the hands of the lord, it was a customary tenement, and, as such, was entitled to the right of common (*k*).

*By Copy-
holders.*

A copyholder cannot make a lease for more than one year without a licence or by special custom, without thereby incurring a forfeiture of his estate (*l*). In most manors a copyholder may demise for one year or less without any licence of the lord (*m*); but this is by custom of the manor (*n*). A lease for one year, and so from year to year during ten years, being in effect a lease for ten years, is a forfeiture; but otherwise of a lease for one year, with a covenant for the holding it for a longer time at the will of the lessor (*o*). A lease for one year and so from year to year for the life of the lessee, being a lease for

(*d*) *Badger v. Forde*, 3 B. & A. 153.

(*e*) *Rex v. Welby*, 2 M. & S. 504; Cole Ejec. 632.

(*f*) *Rex v. Hornchurch*, 2 B. & A. 189; Cole Ejec. 632.

(*g*) *Doe d. Rayner v. Strickland*, 2 Q. B. 792.

(*h*) *Ld. Northwick v. Stanway*, 3 Bos. & P. 346.

(*i*) *Badger v. Forde*, 3 B. & A. 153; *Arlett v. Ellis*, 7 B. & C. 346; but see

Lascelles v. Lord Onslow, 36 L. T. 459.

(*k*) *Badger v. Forde*, *supra*.

(*l*) Scriven, 329, 330 (5th ed.); *Anon.*, Moor. 184; *East v. Harding*, Cro. Eliz. 498; *Jackman v. Hoddesden*, Id. 351; Cole Ejec. 615, 627.

(*m*) Scriven Cop. 329 (5th ed.); Cole Ejec. 627; *Fronel v. Welsh*, Cro. Jac. 403; *Mathews v. Whetton*, Cro. Car. 233; *Goodwin v. Longhurst*, Cro. Eliz. 536; *Erish v. Rives*, Id. 717.

(*n*) *Turner v. Hodges*, Hetley, 126; Lit. Rep. 233; Cole Ejec. 627.

(*o*) *Lady Montague's case*, Cro. Jac. 301; Cole Ejec. 615.

two years at least, is not good (*p*). So if it be for a year except one day, and so on from year to year, excepting one day in every year; for it is a certain lease for two years excepting two days, which is a lease in effect for more than one year; and although there be the intermission of a day, yet there is a mere evasion and not material (*q*). So if a copyholder make three leases together, each to commence within two days after the expiration of the other, it is a mere evasion of the custom, and therefore not good (*r*). So a lease for more than one year, though intended only as a collateral security, is bad, if it amounts to a present demise (*s*). A lease for years, without licence from the lord, is not good without a special custom, though the lease be made by parol, or be not in possession, but to commence in futuro; and such lease is a forfeiture if it be a good lease as between the parties (*t*).

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*Leases by
Lords of
Manors and
Copyholders.*

By special custom, a copyholder may make leases for more than one year, or for life, and a certain number of years after, without licence from the lord (*u*). A custom for copyholders in fee to lease for any number of years without licence, on condition of the term ceasing on the lessor's death, is a good custom (*x*). The powers granted by the Settled Estates Act (*y*), include powers to the lords of settled manors to give licences to their copyhold and customary tenants to grant leases of lands held by them of such manors, to the same extent, and for the same purposes, as leases may be granted of freehold hereditaments under the act (*z*). The granting of a licence is entirely in the discretion of the lord, and the court will not compel him to grant a licence, even where there is a custom to pay a certain sum for every year of the term (*a*).

Under Special
Custom to
lease.

Powers of
Lord to grant
Licences.

A copyholder having licence to demise, ought not to exceed the licence, otherwise the lease is bad (*b*): but he may lease for fewer years than his licence allows (*c*). If the lord license his copyholder for life, to make a lease for three years, if he so long live, a lease for three years absolutely is good (*d*); because a lease by a copyholder for life determines by his death. If the lord license upon condition, the condition is void: for he gives nothing, but only dispenses with the forfeiture (*e*). A tenant at will of a manor cannot grant a copy-

Under Licence
from the Lord.

(*p*) *Luttrell v. Weston*, Cro. Jac. 308; Cole Ejec. 31, 442.

(*q*) *Lady Montague's case*, Cro. Jac. 301.

(*r*) *Mathews v. Whetton*, Cro. Car. 233.

(*s*) *Morris v. Twist*, 2 Mod. 79.

(*t*) Com. Dig. tit. *Copyhold* (K. 3).

(*u*) *Scriven Cop.* 330 (5th ed.).

(*x*) *Turner v. Hodges*, Hutt. 101.

(*y*) Ante, 5.

(*z*) 40 & 41 Vict. c. 18, s. 9.

(*a*) *Reg. v. Hale*, 9 A. & E. 339.

(*b*) *Haddon v. Arrowsmith*, Owen, 73; Cro. Eliz. 461; *Jackson v. Neal*, Cro. Eliz. 394; *Scriven Cop.* 332 (5th ed.);

Com. Dig. tit. *Copyhold* (K. 3); *Doe d. Robinson v. Bousfield*, 6 Q. B. 492; 1 C. & K. 558.

(*c*) *Goodwin v. Longhurst*, Cro. Eliz. 535; *Wortledge v. Benbury*, Cro. Jac. 437; *Isherwood v. Oldknow*, 3 M. & S. 382; *Easton v. Pratt*, 2 H. & C. 676; 33 L. J., Ex. 233; Cole Ejec. 615.

(*d*) *Wortledge v. Benbury*, Cro. Jac. 436; Cole Ejec. 615; *Scriven Cop.* 332, 5th ed.

(*e*) *Haddon v. Arrowsmith*, Cro. Eliz. 461; *Doe d. Wood v. Morris*, 2 Taunt. 52; Cole Ejec. 623.

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*Leases by
Lords of
Manors and
Copyholders.*

*What Lease
by a Copy-
holder is a
Forfeiture.*

holder a licence to alien for years; and if a tenant for life of a manor grants a licence to alien for years, it determines at his death (*f*).

A lease without licence, and contrary to the custom, in order to amount to a forfeiture, must be a complete demise; therefore, where a copyholder demised his copyhold for a year, and agreed to grant a further term of twenty-one years, provided he could obtain of his lord a licence for that purpose, the licence was held to be a condition precedent, and therefore that no forfeiture was incurred (*g*). If the interest actually granted be within the period allowed by the custom of the manor, although the lessor covenants that the lessee shall enjoy the land for a longer period, no forfeiture is incurred; the distinction being between an interest actually granted and a matter which rests entirely in contract (*h*). No one can take advantage of the forfeiture, except the party who was lord at the time it occurred. The remainderman or reversioner, after the death of the lord without entry or seizure for the forfeiture, has no such right (*i*). The admittance of a copyholder after a forfeiture has been incurred, is a waiver of such forfeiture; and any act equally solemn will operate in the same manner. A waiver does not operate as a new grant, but the tenant is in of his old title (*k*). If a copyholder, after a lease by licence, forfeit his copyhold, the lord cannot avoid the lease (*l*).

*Effect of
Leases by
Copyholders.*

A lease by a copyholder not warranted by the custom, and without the licence of the lord, is good against the parties themselves and against every one but the lord (*m*); and as against the lord it is only a ground of forfeiture, which he may waive (*n*). If a copyholder make a lease by licence, the lessee may assign without licence, or make an under-lease, for the lord by his licence has parted with his interest: so if the lessor after a lease by licence die without heir, the lessee shall have it for his term against the lord; for the licence is a confirmation of the lord (*o*).

(*f*) Com. Dig. tit. *Copyhold* (C. 3); *Scriven Cop.* 331 (5th ed.).

(*g*) Bac. Abr. tit. *Leases* (I. 6); *Price v. Birch*, 4 M. & G. 1; 1 Dowl. N. S. 720; *Lenthall v. Thomas*, 2 Keb. 267; *Pester v. Cater*, 9 M. & W. 315; *Cole Ejec.* 615.

(*h*) *Lady Montague's case*, Cro. Jac. 301; *Lenthall v. Thomas*, 2 Keb. 267; *Doe d. Coore v. Clare*, 2 T. R. 739; *Richards v. Ceely*, 3 Keb. 638; *Cole Ejec.* 615.

(*i*) *Lady Montague's case*, *supra*; *East-court v. Weeks*, 1 Salk. 186; *Margaret Podger's case*, 9 Co. R. 107 a; 1 Brownl. 181; 2 Id. 134, 153; *Cole Ejec.* 615; *Scriven Cop.* 325 (5th ed.).

(*k*) *Doe d. Tarrant v. Hellier*, 3 T. R. 171.

(*l*) Com. Dig. tit. *Copyhold* (C. 3); *Clarke v. Arden*, 16 C. B. 227; *Cole Ejec.* 616.

(*m*) *Salisbury d. Cooke v. Hurd*, Cowp. 481; *Wells v. Partridge*, Cro. Eliz. 469; *Ashfield v. Ashfield*, Sir W. Jon. 157; *Doe d. Tressider v. Tressider*, 1 Q. B. 416; *Doe d. Robinson v. Bousfield*, 1 C. & K. 558; 6 Q. B. 492; *Downingham's case*, Owen, 17; *Cole Ejec.* 627.

(*n*) *Doe d. Robinson v. Bousfield*, 6 Q. B. 492; 1 C. & K. 558.

(*o*) *Johnson v. Smart*, 1 Roll. Ab. 508, pl. 14.

SECT. 31.—*By Persons acting under Powers (p).*

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*Leases by
Persons acting
under Powers.*

General De-
scription of
Powers.

Powers are modifications of the uses of estates: a power may indeed be defined to be an authority enabling one person to dispose of the interest which is vested in another (q). When powers to lease are given, it is usually required that the best rent shall be reserved; that the leases shall be in possession and not in reversion: that all the usual and proper covenants shall be inserted: that there shall be a proviso for re-entry for breach of any of the covenants: and, lastly, that the lessee shall execute a counterpart or duplicate. The creation, execution and construction of powers depend on the words used and the substantial intention and purpose of the parties: the intent of the parties who gave the power ought to govern every construction (r); and such intention is to be collected from the words of the instrument, according to their ordinary and common acceptance, and not according to any legal or technical meaning of them (s), nor from parol evidence.

In many cases defective leases under powers will operate as valid contracts in equity for such leases as might have been granted pursuant to the powers (t).

Curing of de-
fective Leases
under Powers.

SECT. 32.—*By Agents and Bailiffs.*

(a) *Agents.*

An agent having sufficient authority may bind his principal by leases and agreements for leases made for him and in his name and on his behalf (u). If the lease or agreement be under seal, the agent's authority to execute it must also be under seal (x). But if the lease or agreement be not under seal, the agent's authority need not be under seal, nor even in writing, notwithstanding the 4th section of the Statute of Frauds (y). The agent should not exceed his authority, otherwise the principal will not be bound, and the agent will incur a personal liability (z). The authority of the agent to sign the particular

Authority of
Agents to exe-
cute Leases.

(p) See post, Chap. V., Sect. 19.

(q) *Goodhill v. Brigham*, 1 B. & P. 196.

(r) *Rew d. Hall v. Bulkeley*, 1 Doug. 203, 574; *Taylor d. Atkins v. Horde*, 1 Burr. 60, 120; 2 Smith L. C. 529 (6th ed.); *Pomeroy v. Partington*, 3 T. R. 665.

(s) *Griffith v. Harrison*, 4 T. R. 737; *Smith v. Doe d. Earl of Jersey*, 3 Bligh, 290; 7 Price, 281; 2 Brod. & B. 474; *Jegon v. Vivian*, L. R., 2 C. P. 422; 36 L. J., C. P. 145; L. R., 3 H. L. Cas. 285; 37 L. J., C. P. 313.

(t) 12 & 13 Vict. c. 26, amended by 13 Vict. c. 17. See post, Appendix A., "Statutes," Sects. 2, 3.

(u) *Hamilton v. Earl Clanricarde*, 1 Bro. P. C. 341; *Ridgway v. Wharton*, 3 De G., M. & G. 677, 688; 6 H. L. Cas. 238.

(x) 3 Bac. Abr. 408; Com. Dig. tit. *Attorney* (C. 1), (C. 5); *Harrison v. Jackson*, 7 T. R. 207; *Horsley v. Rush*, Id. 209.

(y) 29 Car. 2, c. 3; *Coles v. Trecothick*, 9 Ves. 234, 250; *Cloun v. Cooke*, 1 Sch. & Lef. 22; *Dyas v. Cruise*, 2 Jon. & Lat. 461; *Clarke v. Fuller*, 16 C. B., N. S. 34; *Forster v. Rowland*, 7 H. & N. 103; *Heard v. Pilley*, L. R., 4 Ch. Ap. 548.

(z) *Fenn v. Harrison*, 3 T. R. 758; *Hamilton v. Earl Clanricarde*, 5 Bro. P. C. 547; *Spedding v. Nevell*, L. R., 4 C. P. 212.

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✓ *Leases by Agents and Bailiffs.*

Subsequent Ratification.

Agent should sign the Name of his Principal.

Form of Signature, &c.

Implied Warranty of Authority.

If Agent executes in his own Name only, he will be personally liable.

contract, or such a contract, must be proved, if disputed, in an action or suit against the principal (*a*). A steward or land agent has no authority as such to enter into contracts for leases (*b*). A farm bailiff with authority to let from year to year on the usual terms and to receive rents, has no implied authority to let on unusual terms, or to make any special stipulations without the express authority of his principal (*c*). If an agent acts without sufficient authority, his acts may be subsequently adopted and ratified in writing by his principal (*d*), or even without any writing (*e*). Even where an agent executes a deed on behalf of his principal, but without sufficient authority, the latter may adopt and ratify the deed by re-delivering it, or by anything tantamount to a re-delivery (*f*). An authority created by deed may be revoked without deed (*g*).

An agent, who has sufficient authority, whether by deed or otherwise, should execute any lease or agreement in the name of his principal, and not in his own name only (*h*). Thus, "A. B. (seal) by E. F., his attorney," to which may be added "by power of attorney herunto annexed or a copy whereof is hereunto annexed or hereupon indorsed." If the writing be not under seal, it should be signed thus,—“A. B. by E. F. his attorney,” or “Per pro. A. B., E. F., or to that effect (*i*).

If an agent executes a lease or agreement professedly as attorney or agent for another, he thereby impliedly warrants and promises that he has sufficient authority from his principal to execute such contract on his behalf, and an action will lie against him personally or against his representatives, for the breach of such warranty or promise, if he really has no such authority (*k*).

If an agent executes a lease or agreement in his own name only, whether under seal (*l*) or not under seal (*m*), he will be personally liable as a principal, although in the body of the instrument he is described as agent for A. B., and is therein stated to make it for

(*a*) *Blore v. Sutton*, 3 Mer. 237; *Ridgway v. Wharton*, 3 De G., M. & G. 677, 686; 27 L. J., Ch. 46; 6 H. L. Cas. 238; *Firth v. Greenwood*, 1 Jur., N. S. 806; *Turner v. Hutchinson*, 2 F. & F. 185; *Spedding v. Nevell*, L. R., 4 C. P. 212.

(*b*) *Collen v. Gardiner*, 21 Beav. 640; *Mortal v. Lyons*, 8 Ir. R. Ch. 112; *Ridgway v. Wharton*, *supra*.

(*c*) *Turner v. Hutchinson*, 2 F. & F. 185. As to House Agent, see post, 59.

(*d*) *Fitzmaurice v. Bayley*, 6 E. & B. 868; reversed in error on another point, 8 E. & B. 664; 9 H. L. Cas. 78.

(*e*) *Rodmell v. Eden*, 1 F. & F. 542.

(*f*) *Shep. Touch*, 57; *Tupper v. Foulkes*, 9 C. B., N. S. 797; 30 L. J., C. P. 214.

(*g*) *Re v. Wuit*, 11 Price, 508; *Manser v. Back*, 6 Hare, 443.

(*h*) *Combe's case*, 9 Co. R. 77 a; *White v.*

Cuyler, 6 T. R. 177; *Wilks v. Bach*, 2 East, 142; *Appleton v. Binks*, 5 East, 148; *Tanner v. Christian*, 4 E. & B. 591; *Parker v. Winlow*, 7 E. & B. 942, 947; *Cooke v. Wilson*, 1 C. B., N. S. 153; 26 L. J., C. P. 15; *Saxon v. Blake*, 29 Beav. 438; *M'Arde v. Irish Iodine Manufacturing Co.*, 15 Ir. C. L. Rep. 146.

(*i*) *Alexander v. Sizer*, L. R., 4 Ex. 102. (*k*) *Collen v. Wright*, 7 E. & B. 301; 8 Id. 647; 27 L. J., Q. B. 215; *Simons v. Patchett*, 7 E. & B. 568; *Pow v. Davis*, 1 B. & S. 220; 30 L. J., Q. B. 257; *Spedding v. Nevell*, L. R., 4 C. P. 212.

(*l*) *Appleton v. Binks*, 5 East, 148.

(*m*) *Tanner v. Christian*, 4 E. & B. 591; *Cooke v. Wilson*, 1 C. B., N. S. 153; 26 L. J., C. P. 15; *Parker v. Winlow*, 7 E. & B. 942, 947; *Saxon v. Blake*, 29 Beav. 438.

and on behalf of A. B.; because an agent may, if he please, contract a personal liability for and on behalf of his principal (*u*). Parol evidence would not be admissible to *exonerate the agent* from such personal liability, for that would contradict the writing (*o*). But it would be admissible to *charge the principal*, and to enable him to sue or be sued on the contract (*p*). To avoid such personal liability the agent should always *sign as agent*, and not with his own name only (*q*).

CH. I. SEC. 32.

Leases by Agents and Bailiffs.

Parol Evidence not admissible to exonerate Agent.

With respect to misrepresentations made by agents on the sale or letting of property, whereby a person is induced to enter into a disadvantageous contract, which otherwise he would not have done, it is material to ascertain whether such misrepresentations were *fraudulently made*. If not, the contract cannot be avoided for "fraud, covin and misrepresentation" (*r*). This was expressly held in *Cornfoot v. Fowke* (*s*). There the plaintiff put a furnished house in the hands of an agent to let at a stipulated rent. The plaintiff knew, but the agent did not know, that the adjoining house was a bawdy-house. That the defendant had been informed by the agent, in answer to an inquiry, that there was no objection to the house, was held not to be a defence to an action for not taking it (*s*). But if the agent made such representations fraudulently, the principal will be liable, although he did not instruct his agent to make any representations on the subject (*t*). So if the principal authorizes any such false representations, or knowingly employs an agent, ignorant of the particular defect or objection, in order that the latter may innocently, but inaccurately answer questions on the subject, it by no means follows that the party defrauded can repudiate and rescind the whole contract, by reason of the fraud practised upon him (*u*), although sometimes that may be done immediately after the fraud is discovered, provided the parties can be replaced *in statu quo*, but not otherwise (*u*). This can seldom if ever happen where an estate has passed, or possession has been taken.

Misrepresentation by Agent.

Cornfoot v. Fowke.

Action for Deceit.

Rescinding Contract for Fraud.

A house-agent letting a house for his employer seems to be liable if he neglects to make reasonable inquiries as to the solvency of the

House-Agent.

(*n*) *Norton v. Herron*, 1 C. & P. 648; *Ry. & Moo.* 229; *Tanner v. Christian*, 4 E. & B. 591; *Cooke v. Wilson*, 1 C. B., N. S. 153; 26 L. J., C. P. 15; *Parker v. Winslow*, 7 E. & B. 942, 947.

(*o*) *Higgins v. Senior*, 8 M. & W. 844; *Humble v. Hunter*, 12 Q. B. 310; *Jones v. Littledale*, 6 A. & E. 486; *Magee v. Atkinson*, 2 M. & W. 440; *Chadwick v. Maden*, 9 Hare, 191; *Fry*, s. 153.

(*p*) *Higgins v. Senior*, *supra*; *Humfrey v. Dale*, 7 E. & B. 266; E., B. & E. 1004.

(*q*) *Green v. Kopke*, 18 C. B. 549; *Clay v. Southern*, 7 Exch. 717; 21 L. J., Ex. 202; *Parker v. Winslow*, 7 E. & B. 942; *Deslands v. Gregory*, 2 E. & E. 602; *Cooke*

v. Wilson, 1 C. B., N. S. 153; *Alexander v. Sizer*, L. R., 4 Ex. 102.

(*r*) *Cornfoot v. Fowke*, 6 M. & W. 358; *Lord Abinger*, C. B., diss. See notes to *Pasley v. Freeman*, 2 Sm. L. C., 8th ed., p. 87, where it is said that *Cornfoot v. Fowke* is "by no means universally admitted as law;" *Feret v. Hill*, 15 C. B. 207.

(*s*) 6 M. & W. 358.

(*t*) See *Barwick v. English Joint Stock Bank*, L. R., 2 Ex. 259, Ex. Ch.

(*u*) *Hunt v. Silk*, 5 East, 449; *Blackburn v. Smith*, 2 Exch. 783; *Feret v. Hill*, 15 C. B. 207; *Clarke v. Dickson*, E., B. & E. 148.

CH. I. SEC. 32.

*Leases by
Agents and
Bailiffs.*House-
Agent.

tenant. In a case where the house-agent introduced a tenant, and charged 5 per cent. commission, it was held to be a question for the jury, in an action brought by his employer in consequence of the tenant's insolvency, whether it was part of the house-agent's duty to make reasonable inquiries into the eligibility of the tenant. The court refused to set aside a verdict for the plaintiff, and the several members of the court expressed strong opinions as to the liability of the house-agent. "What does the house-agent receive his commission for," asked Wightman, J., "except for making inquiries as to the fitness of the tenant?"^(x) It seems doubtful whether a house-agent has implied authority to let persons into possession; but slight evidence will be sufficient to prove that he had express authority^(y).

Must be
licensed.24 & 25 Vict.
c. 21, s. 10.

By 24 & 25 Vict. c. 21, s. 10, "every person who, as an agent for any other person, shall, for or in expectation of fee, gain or reward of any kind, advertise for sale or for letting any furnished house or part of any furnished house, or who shall by any public notice or advertisement, or by any inscription in or upon any house, shop or place used or occupied by him, or by any other ways or means, hold himself out to the public as an agent for selling or letting furnished houses and who shall let or sell, or agree to let or sell, or make, or offer, or receive any proposal, or in any way negotiate for the selling or letting of any furnished house or part of any furnished house, shall be deemed to be a person using and exercising the business, occupation and calling of a house-agent within the meaning of this act and the Schedule (B.) hereto^(z), and shall be licensed accordingly: provided that no person shall be deemed to be such house-agent by reason of his letting or agreeing or offering to let, or in any way negotiating for the letting of any house not exceeding the annual rent or value of twenty-five pounds: provided also, that any story or flat rated and let as a separate tenement shall be considered to be a house for the purposes of this enactment."

House-Agent
—Duration of
Licence.

By sect. 11, "the Commissioners of Inland Revenue, and any person authorized by them, shall after the 5th of July, 1861, grant licence to any person who shall apply for the same to use and exercise the business, occupation and calling of a house-agent, which licence shall also authorize the person to whom it is granted to use and exercise the calling or occupation of an appraiser; and any such licence issued between the 5th of July and the 5th of August in any year shall be dated on the 6th of July, and any such licence issued at any other

^(x) *Heys v. Tindall*, 1 B. & S. 296; 30 L. J., Q. B. 362; 4 L. T. 403; 9 W. R. 664.

^(y) *Slack v. Crewe*, 2 F. & F. 59.

^(z) Schedule B. is as follows:—"Licence to be taken out yearly after the 5th day of July, 1862, by every person who shall use or exercise the business, occupation or calling of a house agent . . . 2l. 0s. 0d."

time shall bear the date of the day on which the same shall be issued, and every such licence shall continue in force from the day of the date thereof until and upon the 5th of July then next following and no longer.”

CH. I. SEC. 32.
*Leases by
Agents and
Bailiffs.*

By sect. 12, “every person who shall use or exercise the business, occupation or calling of a house-agent, without having a licence in force under this act so to do, shall forfeit the sum of twenty pounds.”

Penalty for
acting as
House-Agent
without
Licence.

Sect. 13 provides, “that this act shall not extend to require any agent employed in the management of landed estates, or any attorney, solicitor, proctor, writer to the signet, agent or procurator admitted in any court of law, or any conveyancer who shall as such have taken out his annual certificate, or any auctioneer or appraiser, having in force a licence as such, to take out a licence under this act as a house-agent.”

Saving for
Land-Agent,
licensed Auc-
tioneer, &c.

(b) *Bailiffs.*

A bailiff of a manor cannot, by virtue of his office, make leases for years; for his business is only to collect the rents, gather the fines, look after the forfeitures, and such like: he has no estate or interest in the manor itself, and therefore cannot contract for any certain interest thereout: but the lord of the manor may give him a special power to make leases for years as he may do to any stranger; and then such leases, if they are pursuant to the power, and made in the name of the lord, will be as good as leases by the lord himself. A general bailiff of a manor may make leases *at will* without any special authority, because, having to collect and answer the rents of the manor to his lord, if he could not let leases at will the lord might sustain great prejudice by absence, sickness or other incapacity to make leases when any of the former leases were expired; and such leases at will are for the benefit of the lord, and can be no ways prejudicial to him, because he may determine his will when he thinks fit. Such, however, must be taken to be strict tenancies at will, and not from year to year (a).

Power of
Bailiffs to
grant Leases

(a) *Shopland v. Rydler*, Cro. Jac. 55; *Gybson v. Searls*, Cro. Jac. 81, 176.

CHAPTER II.

TO WHOM TERMS MAY BE GRANTED.

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SECT. 1.—*Generally.*

General rule. EVERY person who is not rendered incompetent by some legal disability is capable of being a lessee.

SECT. 2.—*To Ecclesiastical Persons.*

Ecclesiastical Persons may not hold more than 80 Acres without Bishop's Licence.

By 1 & 2 Vict. c. 106, s. 28, "it shall not be lawful for any spiritual person, holding any cathedral preferment or benefice, or any curacy or lectureship, or who shall be licensed or otherwise allowed to perform the duties of any ecclesiastical office whatever, to take to farm for occupation by himself, by lease, grant, words, or otherwise, for term of life, or of years, or at will, any lands, exceeding eighty acres in the whole, for the purpose of occupying, or using, or cultivating the same, without the permission in writing of the bishop of the diocese, specially given for that purpose under his hand; and every such permission to any spiritual person to take the farm, for the purpose aforesaid, any greater quantity of land than eighty acres shall specify the number of years, not exceeding seven, for which such permission is given: and every such spiritual person, who shall, without such permission, so take to farm any greater quantity of land than eighty acres, shall forfeit for every acre of land above eighty acres, so taken to farm, the sum of forty shillings for each year during or in which he shall so occupy, use or cultivate such land, contrary to the provisions aforesaid." By sect. 124, the word "benefice" is explained to mean benefices with cure of souls, and no others; and to comprehend all parishes, perpetual curacies, donatives, endowed public

Penalty for holding more than 80 Acres.

chapels, parochial chapelries, and chapelries or districts belonging or reputed to belong, or annexed or reputed to be annexed, to any church or chapel.

CH. II. SEC. 2.
Leases to Ecclesiastical Persons.

A lease made contrary to the provisions is not void, but voidable merely on an information brought for holding a quantity of land above eighty acres.

SECT. 3.—*To Trustees for Charitable Uses.*

Leases of land in England or Wales to trustees for charitable uses must (like other conveyances) be made according to the Mortmain Acts (a). They must be by deed, sealed and delivered in the presence of two or more credible witnesses (b), twelve calendar months at least before the death of the grantor, and inrolled in chancery within six calendar months next after the execution thereof, and must be made to take effect in possession for the charitable uses intended immediately from the making thereof, and be without any power of revocation, reservation, trust, condition, limitation, clause or agreement whatsoever for the benefit of the grantor, or of any person or persons claiming under him, other than and except such as are specially permitted by the above-mentioned acts. By 26 & 27 Vict. c. 106, "Every deed or assurance by which any land shall have been demised for any term of years for any charitable use shall, for all the purposes of the said recited acts, be deemed to have been made to take effect for the charitable use thereby intended, if the term for which such land shall have been thereby demised was thereby made to commence and take effect in possession at any time within one year from the date of such deed or assurance." A deed which is merely colourable as to the consideration, and which is framed to evade the provisions of the Mortmain Acts, is fraudulent and void as against the grantor's heir (c). A man demised to his sister lands for twenty years at a peppercorn rent. Three months afterwards he granted the same lands to charitable uses, subject to the lease. Held that such grant was an evasion of the statute and void (d).

The Mortmain Acts.

The Mortmain Acts do not extend to lands in Scotland or Ireland, nor to grants, &c. to the Universities of Oxford or Cambridge, or any colleges or houses of learning therein, or to the Colleges of Eton, Winchester or Westminster. When lands are already in mortmain, a lease thereof to charitable uses is not within the 9 Geo. 2, c. 36 (e).

(a) 9 Geo. 2, c. 36; 9 Geo. 4, c. 85; 24 & 25 Vict. c. 9; 26 & 27 Vict. c. 17; 26 & 27 Vict. c. 106; 27 Vict. c. 13; 29 & 30 Vict. c. 57.

(b) *Wickham v. Marquis of Bath*, 35 L. J., Ch. 5; L. R., 1 Eq. 17; 35 Beav. 69.

(c) *Doe d. Williams v. Lloyd*, 5 Bing. N. C. 741.

(d) *Wickham v. Marquis of Bath*, L. R., 1 Eq. 17; 35 Beav. 69; 35 L. J., Ch. 5.

(e) *Walker v. Richardson*, 2 M. & W. 882; *Att.-Gen. v. Glyn*, 12 Sim. 84; *Ashton v. Jones*, 28 Beav. 460.

CH. II. SEC. 3.

*Leases to
Charity
Trustees.*

Exemption
of Art Build-
ings, &c.
from Mort-
main Act.

By 31 & 32 Vict. c. 44, intituled "An Act for facilitating the acquisition and enjoyment of sites for Buildings for Religious, Educational, Literary, Scientific, and other Charitable purposes," leases, &c. of land not exceeding two acres *bonâ fide* made to trustees of a society for any of the above purposes, for full rent or value, are exempt from the provisions of the Mortmain Acts (9 Geo. 2, c. 36, and 24 & 25 Vict. c. 9, s. 2).

SECT. 4.—*To Infants.*

To Infants,
when void or
voidable.

Leases to infants are not absolutely void, but voidable by them upon attaining their majority. And it would seem that an infant who has taken possession under a lease which is disadvantageous to him, is liable if he has not disclaimed on attaining his full age (*f*). Even during infancy he may be liable for the use and occupation of *necessary* lodgings or apartments suitable to his state and degree (*g*). Where an infant rented a house, and exercised his trade as a barber therein, it was held that it was properly left to the jury to decide whether it was as a necessary of life, or a mere incident to his trade (*h*). In the latter case, as an infant is incapable by law of trading, he would not be liable; in the former case he would (*i*).

Election to
avoid—when
made.

The election to avoid a lease must be made by the infant within a reasonable time after he attains his full age (*j*); and an acquiescence of four months after majority has been held to preclude an infant from afterwards disaffirming a lease (*k*). An acquiescence for so long a period would be evidence from which a jury might infer an affirmation of the lease.

If the infant lessee elect to annul a lease *under which he has occupied*, he cannot recover the premium paid for it, although subsequent events may effect a complete failure of the object for which the premium was paid (*l*). In such a case there would have been only a partial, not a total failure of consideration; if the failure be total the infant can recover (*l*).

Avoidance for
misrepresentation
of age.

If a lease be set aside at the instance of the lessor, on the ground that the lessee is an infant and obtained the lease on the misrepresentation that he was of full age, the lessor cannot recover for use and occupation (*m*).

Infant jointly
interested
with another.

If a person jointly interested with an infant in a lease obtain a renewal to himself only, and the lease prove beneficial, he is held to

(*f*) Bull. N. P. 177; *Kelsey's case*, Cro. Jac. 320; *Baylis v. Dyneley*, 3 M. & S. 477; *Holmes v. Blogg*, 8 Taunt. 35.

(*g*) *Hands v. Slaney*, 8 T. R. 578.

(*h*) *Lowe v. Griffiths*, 1 Scott, 458.

(*i*) See Smith L. & T. 70.

(*j*) See *North Western Rail. Co. v. McMichael*, 5 Ex. 128.

(*k*) *Holmes v. Blogg*, 8 Taunt. 35.

(*l*) *Corpe v. Overton*, 10 Bing. 252; and see *Everett v. Wilkins*, 29 L. T. 846.

(*m*) *Lempriere v. Lange*, L. R., 12 Ch. D. 675; 41 L. T. 378; 27 W. R. 879.

have acted as trustee, and the infant may claim his share of the benefit; but if it do not prove beneficial, he must take it upon himself (u). CH. II. SEC. 4.
Leases to
Infants.

By virtue of 1 Will. 4, c. 65, s. 12, leases to infants may, under the direction of the Chancery Division of the High Court (o), be surrendered and renewed. Renewal of
Leases to
Infants.

SECT. 5.—To Married Women.

A married woman may be a lessee, her husband's express assent to the lease not being necessary, as the estate vests until he signifies his dissent (p). She may, however, avoid it after his death (q). A married woman living separate from her husband may, by taking a lease, bind her separate estate for payment of the rent and performance of the covenants (r). Married
Women may
be Lessees.

If a lease be made to a husband and wife, the wife cannot disagree to it during the life of her husband, and, if she acquiesce after his death, she will be liable for all arrears of rent which accrued during his lifetime, and may be charged with waste during the coverture (s). But it is said, however, that if there be any special covenants inserted in the lease, she is not bound by them after the death of her husband, although she continues tenant by force of the demise (t). Leases to
Husband and
Wife.

By 1 Will. 4, c. 65, s. 12, leases to married women may, under the directions of the Chancery Division of the High Court (o), be surrendered and renewed. Renewal of
Leases to mar-
ried Women.

SECT. 6.—To Lunatics.

Idiots and lunatics may take leases for their benefit (u). Use and occupation cannot be maintained on a written agreement entered into by a lunatic to take a house which is unnecessary, if the lessor was aware of it, and took advantage of the lunatic's situation (x). Liability of.

Committees of lunatics may, by 16 & 17 Vict. c. 70 (y), under the direction of the Lord Chancellor, surrender leases and take new ones for the benefit of the lunatic. Renewal of
Leases.

(u) *Ex parte Grace*, 1 B. & P. 376.

(o) Judicature Act, 1873, s. 34.

(p) *Swaine v. Holman*, Hob. 204; Co. Lit. 3 a.

(q) Co. Lit. 3 a.

(r) *Gaston v. Frankum*, 2 De G. & Sm. 561; Fry, s. 157.

(s) 2 Inst. 303; 2 Roll. 827, 1, 10, 25; Com. Dig. tit. *Baron and Feme* (S. 2).

(t) 1 Roll. Abr. 349, pl. 2; Brownl. 31; Dyer, 13 b.

(u) Co. Lit. 2 b.

(x) *Jhne v. Viscountess Kirkwall*, 8 C. & P. 679.

(y) *Anto*, 43.

CH. II. SEC. 7.

Lease to Felon.

Persons con-
victed of
Treason or
Felony.

SECT. 7.—*To Convicts.*

The leaseholds of a convict come under the operation of the act 33 & 34 Vict. c. 23, which was passed in 1870 to abolish forfeitures for treason or felony. At common law the leaseholds of persons attainted of treason or felony became forfeited, with their other property, to the crown (z). But by the 1st section of the Act of 1870, it is provided that no conviction for treason or felony, or *felo de se*, shall cause any forfeiture or escheat (a).

SECT. 8.—*To Aliens and Denizens.*

Alien Act,
1870.

The rights of aliens to hold property have been regulated by a series of statutes culminating in the Naturalization Act, 1870 (33 Vict. c. 14), which repealed ten previous statutes.

Of the repealed acts, it will be sufficient to refer shortly to two. By 32 Hen. 8, c. 16, s. 13 (b), *leases of dwelling-houses or shops* granted to any stranger artificer were made void. That act did not extend to assignments to aliens of leases previously granted to natural-born subjects (c). By 7 & 8 Vict. c. 66, s. 4, aliens were enabled to hold personal property of all kinds, *except chattels real* [i. e. terms of years], as effectually as natural-born subjects; and by sect. 5 of the same act "every alien being the subject of a friendly state" was enabled to hold lands or houses for the purpose of residence or business for any term of years not exceeding twenty-one years.

Alien may
take Lease in
the same
manner as
natural-born
Subject.

But all statutory restrictions appear to be done away by the Alien Act, 1870 (33 Vict. c. 14), which enacts (sect. 2), that "real and personal property of every description may be taken, acquired, held and disposed of by an alien in the same manner in all respects as by a natural-born British subject;" provided that this section shall not confer any right on an alien to hold real property situate out of the United Kingdom, or to "any right or privilege as a British subject, except such rights and privileges in respect of property as are hereby expressly given to him," and "that this section shall not affect any estate or interest in real or personal property to which any person has or may become entitled, either mediately or immediately, in possession or expectancy, in pursuance of any disposition made before the passing of this act, or in pursuance of any devolution by law on the death of any person dying before the passing of this act."

Alien enemies cannot hold leases for the purpose of habitation or

(z) Co. Lit. 2 b.
(a) See further provisions of this act, 1863.
(b) Repealed, Stat. Law Rev. Act, 1863.
(c) *Wooten v. Steffenoni*, 12 M. & W. 129.

commerce, or for any other purpose (*d*), and this restriction does not appear to be done away by the Act of 1870. CH. II. SEC. 8.

A denizen, i. e. an alien born, who has obtained ex donatione regis letters-patent to make him an English subject (*e*), may be a lessee, like a natural-born subject (*f*), independently of the Alien Acts.

Lease to Aliens.

Alien
Enemies.
Denizens.

SECT. 9.—*To Corporations.*

A corporation aggregate may take any chattel, as a lease, &c., in its corporate capacity, which shall go in succession, because it is always in being (*g*). But regularly no chattel shall go in succession in case of a sole corporation; therefore, if a lease for years be made to a bishop and his successors, and the bishop die, it shall not go to his successors, but to his executors (*h*): by custom, however, it may, as in the instance of the Chamberlain of London (*i*).

Leases to
Corporations.

One individual of a corporation aggregate cannot take a lease from the corporation (*k*). A corporation sole cannot make a lease to himself in his natural capacity (*k*); but there is no objection to such a lease being made in trust for the grantor. One member of a corporation aggregate cannot make a lease of corporate lands to another member; thus, a dean cannot make a lease to his chapter (*k*), nor vice versâ. But a lease may be made by the dean and chapter to one of the prebendaries, as a prebendary is not an integral part of the body politic (*k*). Where land was let to the churchwardens and overseers of the poor, jointly with the surveyors of the highways, and their successors, it was held that it was not within 59 Geo. 3, c. 12, s. 12, though let at a vestry meeting and for the purposes of the poor; and that therefore the parties were individually liable (*l*).

Leases by
Corporations
to their own
Members.

By 21 & 22 Vict. c. 75, s. 3, made perpetual by 23 & 24 Vict. c. 41, canal companies being also railway companies, may not accept a lease of a canal or railway, except under the authority of a special act.

Canal Com-
panies.

SECT. 10.—*To Parish Officers.*

The 9 Geo. 4, c. 7, s. 4, and 59 Geo. 3, c. 12, ss. 8, 9, authorize parishes to purchase or hire houses for the purposes of lodging the poor, and to build workhouses thereon: and to resell what may be

Leases for
Workhouses.

(*d*) See *Alcinous v. Negren*, 4 E. & B. 217.

(*e*) Co. Lit. 129 a; Cole Ejec. 576.

(*f*) 1 Blac. Com. 374; Bendl. 10, pl. 40; 32 Hen. 8, c. 18, s. 13.

(*g*) Bac. Abr. tit. *Corporations* (E. 4).

(*h*) Co. Lit. 46 b.

(*i*) 2 Bac. Abr. 14.

(*k*) *Salter v. Crowenor*, 8 Mod. 303.

(*l*) *Uthwatt v. Elkins*, 13 M. & W. 772.

Cn.II.Sec.10. no longer wanted. Such assurances, if made for value, are not charitable, nor affected by the Statutes of Mortmain (*m*).

*Leases to
Parish Officers.*

For Work-
houses.

Guardians of unions may, by order of the Local Government Board and with consent of ratepayers, hire buildings for union workhouses, &c. pursuant to 4 & 5 Will. 4, c. 76, s. 23.

Temporary
Hirings with-
out Seal.

By 30 & 31 Vict. c. 106, s. 13, "guardians may, with the approval of the Poor Law Board, hire or take on lease, temporarily, or for a term of years not exceeding five, any land or buildings for the purpose of the relief or employment of the poor and the use of the guardians or their officers, without any order of the said board under seal."

Leases of not
more than
Twenty Acres
in the whole.

By 59 Geo. 3, c. 12, s. 12, churchwardens and overseers may, with the consent of the vestry, purchase, *or hire or take on lease* for and on account of the parish, any suitable portion or portions of land within or near to the parish not exceeding twenty acres in the whole, and employ paupers to cultivate the same (*n*). By sect. 17, all such land is to be conveyed, demised and assured to them and their successors, and they are to take and hold the same "in the nature of a body corporate for and on behalf of the parish." Any such assurance should be made to them "and their successors," not to them, their heirs and assigns (*m*). Where land was let to the churchwardens and overseers of the poor, jointly with the surveyors of the highways, and their successors, it was held that it was not a case within the above act though let at a vestry meeting and for the purposes of the poor, and that therefore the parties were individually liable (*o*). A demise to churchwardens and overseers in their name of office would be good, and no acceptance thereof under any common seal need be alleged in pleading (*p*). They are not exactly a corporation, but only a quasi corporate body of a peculiar kind (*q*).

Leases to Over-
seers—for
Offices.

By 24 & 25 Vict. c. 125, "the overseers of any parish in England, the population whereof shall exceed 4,000 persons according to the census for the time being, with the consent of the vestry, called after due notice, and with the consent of the Poor Law Board, signified by an order under their seal, may hire any room, or purchase *or take upon lease* or exchange any land or building, or sell land belonging to such parish, and invest the proceeds of such sale in the purchase of other land and building, or erect a suitable building on any land acquired as aforesaid, for the purpose of an office for the transaction of the business of the parish" (*r*).

(*m*) *Burnaby v. Barsby*, 4 H. & N. 326; 28 L. J., Ex. 326.

(*n*) As to letting such land, see ante, Chap. I., Sect. 16, p. 30.

(*o*) *Uthcatt v. Elkins*, 13 M. & W. 772.

(*p*) *Smith v. Adkins*, 8 M. & W. 362; 1 Dowl., N. S. 129.

(*q*) *Gouldsworth v. Knight*, 11 M. & W. 337.

(*r*) The act contains other clauses for carrying the above into effect.

SECT. 11.—*To Trustees of Friendly Societies.*

CH. II. SEC. 11.

Leases to Trustees of Friendly Societies.

Lease under Friendly Societies Act.

By the Friendly Societies Act, 1875 (38 & 39 Vict. c. 60, s. 16), "a society" [registered under that act, see sect. 8], "or any branch of a society, may, if the rules so provide, hold, purchase or take on lease in the names of the trustees for the time being of such society or branch, in every county where it has an office, any land, and may sell, exchange, mortgage, lease or build upon the same (with power to alter and pull down buildings and again rebuild); and no purchaser, assignee, mortgagee or tenant shall be bound to inquire as to the authority for any sale, exchange, mortgage or lease by the trustees; and the receipt of the trustees shall be a discharge for all moneys arising from or in connection with such sale, exchange, mortgage or lease; and for the purpose of this section no branch of a registered society need be separately registered: provided that nothing herein contained shall authorize any benevolent society" [i.e. a society for any benevolent or charitable purpose, see sect. 8] "to hold land exceeding one acre in extent at any one time." This enactment is considerably wider than the corresponding sect. 63 of the repealed act of 1855 (18 & 19 Vict. c. 63), which allowed land not exceeding one acre to be held for the purpose of building only, the restriction of quantity being general, and not confined to benevolent societies. The Act of 1875 is a consolidating one (s).

Not more than one Acre to Benevolent Society.

SECT. 12.—*To Trustees of Public Baths and Wash-houses.*

By 9 & 10 Vict. c. 74, intituled "An Act to encourage the Establishment of Public Baths and Wash-houses," after providing in what manner the act may be adopted by municipal corporations, or (with the approval of one of her Majesty's principal secretaries of state), by any parish in England not within any such incorporated borough, and for the appointment of commissioners for carrying that act into execution in any such parish; sect. 27 enacts, "that the council of any such borough, and the commissioners, with the approval of the vestry of any such parish, may, if they shall think fit, contract for the purchase or lease of any baths and wash-houses already or hereafter to be built and provided in any such borough or parish, and appropriate the same to the purposes of this act, with such additions or alterations as they shall respectively deem necessary:" and the trustees of any such public baths and wash-houses, with such consent as therein mentioned, are authorized to sell and lease the same to the said council or commissioners (t).

9 & 10 Vict. c. 74. Town Council may take Lease of Baths.

(s) See Davis on Friendly Societies, A.D. 1876.

(t) See also 10 & 11 Vict. c. 34, ss. 136—142.

CH. II. SEC. 12. When a municipal corporation provides baths and wash-houses under the provisions of this act, the property becomes vested in the body corporate with all incidental liabilities, and not in the council (*u*).
Leases to Trustees of Public Baths.

SECT. 13.—*Of Land for Free Public Libraries, Museums, &c.*

Lease to Town Council and Local Board under Public Libraries Act.

By "The Public Libraries Act, 1855" (*x*) (18 & 19 Vict. c. 70, s. 18), "the council of any borough and the board of any district respectively may from time to time, with the approval of her Majesty's treasury," for the purposes of that act, "*rent any lands or any suitable buildings;*" and the council and board and commissioners respectively may, upon any lands so rented, "erect any building suitable for public libraries or museums or both, or for schools for science or art, and may apply, take down, alter and extend any buildings for such purposes, and rebuild, repair and improve the same respectively, and fit up, furnish and supply the same respectively with all requisite furniture, fittings and conveniences."

SECT. 14.—*To Ratepayers for Public Improvements.*

Lease to Ratepayers for Public Improvements.
 23 & 24 Vict. c. 30.

By 23 & 24 Vict. c. 30, intituled "An Act to enable a Majority of Two-Thirds of the Ratepayers of any Parish or District, duly assembled, to rate their District in aid of Public Improvements for general Benefit within their District" (sect. 1), "it shall be lawful for the ratepayers of any parish maintaining its own poor, the population of which, according to the last account from time to time taken thereof by the authority of parliament, exceeds five hundred persons, to purchase or lease lands, and to accept gifts and grants of land, for the purpose of forming any *public walk, exercise or play ground*, and to levy rates for maintaining the same, and for the removal of any nuisances, or obstruction to the free use and enjoyment thereof, and *for improving any open walk or footpath*, or placing convenient *seats or shelters from rain*, and for other purposes of a similar nature." By sect. 2, "this act may be adopted for any borough, or for any parish having a population of five hundred or upwards (according to the last account taken by authority of parliament), in the same manner as the act of the 9 & 10 Vict. c. 74, may be adopted in such borough or parish." By sect. 7, any rate under the act may not exceed sixpence in the pound.

To Inhabit.

A lease cannot generally be made to the inhabitants of a parish or

(*u*) *Cowley v. Mayor, &c. of Sunderland*,
 1 H. & N. 565.

(*x*) Amended by 34 & 35 Vict. c. 71, the
 Public Libraries Act, 1871.

township, because they cannot take *as such*, not being a corporate body (*y*). But a grant from the crown to the inhabitants of a parish, would in effect incorporate them, though for the purposes of such grant only (*z*).

CIT. II. SEC. 14.
*Leases to Rate-
payers for
Public
Improvements.*

ants of a
Parish
generally.

SECT. 15.—*To Trustees of Renewable Leaseholds.*

By 23 & 24 Vict. c. 145, s. 8, "it shall be lawful for any trustees of any leaseholds for lives or years which are renewable from time to time, either under any covenant or contract or by custom or usual practice, if they shall in their discretion think fit; and it shall be the duty of such trustees, if thereunto required by any person having any beneficial interest, present or future or contingent, in such leaseholds, to use their best endeavours to obtain from time to time a renewed lease of the same hereditaments on the accustomed and reasonable terms, and for that purpose it shall be lawful for any such trustees from time to time to make or concur in making such surrender of the lease for the time being subsisting, and to do all such other acts as shall be requisite in that behalf; but this section is not to apply to any case where by the terms of the settlement or will the person in possession for his life or other limited interest is entitled to enjoy the same without any obligation to renew the lease or to contribute to the expense of renewing the same." By sect. 9, money required for renewal of leases, &c. may be raised by mortgage.

Renewal of
Leases by
Trustees.

A trustee, whose duty it was to renew leaseholds out of the rents, applied them to his own use:—Held, that the tenant for life, and not those in remainder, must bear the loss (*a*).

SECT. 16.—*To Agents and Trustees.*

With respect to agents and other persons whose duties are to protect their principals and to prevent the property from being let at an undervalue, Courts of Equity view with considerable jealousy contracts entered into for leases to them. It is incumbent on a person in the situation of an agent to show that the transaction is perfectly fair and reasonable, and that a just consideration has been given by him for a lease obtained from his principal (*b*). The same observation

Leases to
Agents.

(*y*) *Weekly v. Wildman*, 1 Ld. Raym. 405, 407; *Abbot v. Weekly*, 1 Lev. 176; *Lockwood v. Wood* (in error), 6 Q. B. 62; *Constable v. Nicholson*, 14 C. B., N. S. 230; 32 L. J., C. P. 240. But see *Vestry of Bermondsey v. Brown*, 14 W. R. 213.

(*z*) *Willingale v. Maitland*, L. R., 3 Eq.

103, 106; 36 L. J., Ch. 64.

(*a*) *Solley v. Wood*, 29 Beav. 482.

(*b*) *Ld. Kingsland v. Barnwell*, 4 Bro. P. C. 154; *Ld. Hardwicke v. Vernon*, 4 Ves. 411; *Lady Ormond v. Hutchinson*, 16 Ves. 94; *Grosvenor v. Sherratt*, 28 Beav. 659; post, Chap. IX., Sect. 4.

CH. II. SEC. 16. also applies to persons in the situation of debtor and creditor, solicitor and client, and mortgagor and mortgagee (c).

*Leases to
Agents and
Trustees.*

Lease to
Trustee.

If a lease be made to a trustee, he is personally liable for the rent and covenants (d), and the lessor has no remedy at law against the cestui que trust in respect thereof. The trustee, however, except in case of personal default, would seem to have a right to be indemnified out of the trust fund (e).

If there be personal default on the part of the trustee, he would seem to have no right to be indemnified.

A lease by a trustee to himself seems to stand on the same footing as a sale by trustee to himself; i.e. it is a transaction of the greatest nicety, and one which the courts will watch with the greatest jealousy (f).

(c) *Gubbins v. Creed*, 2 Sch. & Lef. 214;
Webb v. Rorke, Id. 661; Fisher, s. 873;
post, Ch. IX., Sect. 4.

(d) *Walters v. Northern Coal Mining Co.*,
5 De G., M. & G. 629; 25 L. J., Ch. 633.

(e) Lewin on Trusts, 7th ed. p. 217.

(f) See Lewin on Trusts, 7th ed. pp.
438—451; citing *Ex parte Hughes*, 6 Ves.
617; *Att.-Gen. v. Earl of Clarendon*, 17
Ves. 491.

CHAPTER III.

OF WHAT TERMS MAY BE GRANTED.

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SECT. 1.—*Corporeal and Incorporeal Hereditaments.*

LEASES for life, or for years, or from year to year, may be made of anything corporeal or incorporeal which lies in livery or grant (*a*). Corporeal hereditaments consist wholly of substantial and permanent objects, as land, houses, &c., and were, before the 8 & 9 Vict. c. 106, said to lie in livery; but, by sect. 2 of that act, “all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery.”

Leases of Corporeal Hereditaments.

An incorporeal hereditament is a right issuing out of a thing corporeal (whether real or personal), or concerning, or annexed to, or exercisable within the same (*b*). Incorporeal hereditaments are principally these: viz., advowsons, tithes and tolls, commons and estovers, ways, offices, franchises, corrodies and pensions, and annuities (*c*). They are, generally speaking, capable of being demised; but such demise, even for less than three years, must be by deed, for they lie in grant and not in livery (*d*). But a right of way appurtenant to land will pass by a parol demise of the land (*e*), and so will a right to dig turf, or other easement, although not specially mentioned (*f*); so a market, with a right to take the tolls, may be demised without deed (*g*). Where there is a demise of premises, and an entire rent reserved, if any part of the premises cannot be legally demised, the whole is void (*h*).

Definition of Incorporeal Hereditaments.

SECT. 2.—*Advowsons.*

An advowson (advocatio) is the right of presentation to a church or ecclesiastical benefice. Although it has been said that an advow-

Lease of Advowsons.

(*a*) Shep. Touch. 268.

(*b*) Co. Lit. 19 b, 20 a.

(*c*) *Rex v. Alresford*, 1 T. R. 358; *Musgrave v. Cave*, Willes, 323; 1 Inst. 9.

(*d*) *Mayfield v. Robinson*, 7 Q. B. 486; *Wood v. Leadbitter*, 13 M. & W. 839.

(*e*) *Skull v. Glenister*, 16 C. B., N. S. 81; 32 L. J., C. P. 185.

(*f*) *Dobbin v. Somers*, 13 Ir. Com. L. Rep., N. S. 293.

(*g*) *Bridgland v. Shapter*, 5 M. & W. 375.

(*h*) *Doe d. Griffith v. Lloyd*, 3 Esp. 78.

CH. III. SEC. 2. *Lease of Advowsons.* son cannot properly be the subject of a demise, on the ground that as no profit is permitted to accrue, no rent can be reserved, nor any services performed to the proprietor (*i*); yet this does not seem to be quite correct; for a lease may be made not only of lands, but of all other hereditaments (*k*), such as advowsons, tithes, offices not concerning the administration of justice, and the like (*l*); and the lessee of tithes, advowsons, or any incorporeal hereditament, would be liable to an action for the rent agreed upon (*m*). An advowson is a tenement (*n*). Where a lessee for years of an advowson was presented to the benefice by the lessor, it was adjudged to be a surrender of his term (*o*).

SECT. 3.—*Tithes and Tolls.*

5 Geo. 3, c. 17. *Leases of Tithes.* By 5 Geo. 3, c. 17, persons having any spiritual or ecclesiastical promotions are enabled to grant leases of tithes, tolls or other incorporeal inheritances, solely and without any lands or corporeal hereditaments, for one, two or three life or lives, or for any term not exceeding twenty-one years, which shall be "as good and effectual in law against such archbishop, bishop, masters and fellows, or other heads and members of colleges or halls, deans and chapters, precentors, prebendaries, masters and guardians of hospitals, and other persons so granting the same, and their successors and every of them, to all intents and purposes, as any lease or leases already made or to be made by any such archbishop, &c.," by virtue of the stat. 32 Hen. 8, c. 28, or any other statute then in being; and actions of debt may be brought by such lessors for rent in arrear, as in the case of any other landlord or lessor. Leases of tithes must be by instrument under seal, as incorporeal hereditaments only lie in grant (*p*). A parson may grant his tithes for years (*q*), so he may lease them for so long a term as he shall continue parson (*r*); and rent may be reserved on such lease (*s*); or the parson may demise them without any rent, if he pleases (*t*). Under the settlement of an estate with a power to the tenant in possession to let all or any part of the premises, so as the usual rents be reserved, a lease of tithes which had never been let before was held void (*u*).

(*i*) Com. Dig. tit. *Advowson* (C. 2).
 (*k*) Bac. Abr. tit. *Leases* (A.).
 (*l*) 2 Cruise, ss. 22, 24; *Bousher v. Morgan*, 2 Anstr. 404; *Coz v. Brain*, 3 Taunt. 95.
 (*m*) 2 Woodd. 69; Rog. Ecc. L. 17; Co. Lit. 119 b.
 (*n*) *Kensley v. Langham*, Cas. temp. Talbot, 144; Co. Lit. 19, 20; 2 Blac. Com. 17; *Robinson v. Tongue*, 3 P. Wms. 461.

(*o*) *Gybson v. Searle*, Cro. Jac. 84, 176.
 (*p*) *Gardiner v. Williamson*, 2 B. & Ad. 336.
 (*q*) *Shep. Touch.* 241.
 (*r*) *Brewer v. Hill*, 2 Anstr. 413.
 (*s*) 5 Geo. 3, c. 17.
 (*t*) *Walker v. Wakeman*, 1 Ventr. 294; 2 Lev. 160; 3 Keb. 597.
 (*u*) *Pomery v. Partington*, 3 T. R. 665.

By the Tithe Commutation Act (6 & 7 Will. 4, c. 71), the lessees of tithes commuted to rent-charges may surrender and avoid their leases, on certain terms, as to compensation and apportionment of rent, to be settled by the commissioners. Until they do so, they continue liable to pay the rent reserved by their leases (*x*).

CH. III. SEC. 3.
*Leases of
Tithes and
Tolls.*

Tolls may be let or mortgaged (*y*).

*Leases of
Tolls.*

By 3 Geo. 4, c. 126, s. 57, all contracts or agreements for letting of turnpike tolls, signed by the trustees or their clerk, and the lessee or farmer, and his sureties, shall be valid notwithstanding the same may not be by deed or under seal. It has been held that an agreement for the letting of tolls signed by the clerk of the trustees and by the lessee or farmer of the tolls was valid, and therefore could be enforced by the trustees notwithstanding it had not been signed by the sureties; their execution of the agreement being a formality for the benefit of the trustees, which they might waive without prejudice to their rights against the lessee or farmer of the tolls (*z*). Where a lessee of turnpike tolls compounded with a person using the road for tolls for three years, it was held that such agreement was not prohibited by 3 Geo. 4, c. 126, s. 55 (*a*).

SECT. 4.—*Commons and Estovers.*

Rights of common may be demised by deed (*b*). With respect to commons, the 13 Geo. 3, c. 81, s. 15, empowers the lord of any manor, with the consent of three-fourths of the persons having right of common upon the wastes and commons within the manor, at any time to demise or lease, for any term or number of years not exceeding four years, any part of such waste and commons not exceeding a twelfth part thereof, for the best and most improved yearly rent that can by public auction be got for the same; and directs that the clear net-rents shall be applied to drain, fence and otherwise improve the residue of the waste and commons.

*Leases of
Commons.*

Where the lord of the manor conveys away a part of the wastes to a third person, though the right of ownership of the soil changes hands, the right of common still subsists in the commoners as well over that part of the wastes that the lord has conveyed away, as over that part which he retains in his own hands (*c*). A common will not pass without express words (*d*).

(*x*) *Tasker v. Bullman*, 3 Exch. 351.

(*y*) *Fairtitle d. Mytton v. Gilbert*, 2 T. R. 169; 3 Geo. 4, c. 126; 4 Geo. 4, c. 95, s. 51; *Bell v. Nixon*, 9 Bing. 393; *Pearse v. Morrice*, 3 B. & Ad. 396; *Obyed v. Crampton*, 4 Bing., N. C. 24; *Shepherd v. Hodaman*, 18 Q. B. 316; *Markham v. Stanford*, 14 C. B., N. S. 376; *Gunning on*

Tolls, 140.

(*z*) *Markham v. Stanford*, 14 C. B., N. S. 376.

(*a*) *Stott v. Clegg*, 13 C. B., N. S. 619; 32 L. J., C. P. 102.

(*b*) *Sury v. Brown, Latch*, 99.

(*c*) *Benson v. Chester*, 8 Tr. 396, 401.

(*d*) *Clark v. Cogge*, Cro. Jac. 170, 190.

CH. III. SEC. 4. Estovers may be leased; the grantee, therefore, of house-bote, or hay-bote, may let it to another (*e*). Estovers to be burned on land demised will not pass without express words (*f*).

Leases of
Estovers.

SECT. 5.—*Ways*.

Leases of
Ways.

A right of way legally appurtenant to land is demisable with the land (*g*), and will pass with it without being expressly mentioned (*h*), even by a parol demise (*i*); so will a right to dig turf, or other pre-existing easement (*k*). But after a way or other easement has been extinguished by unity of ownership, it cannot be revived by a grant or lease of the dominant tenement containing general words, such as "rights, members, easements and appurtenances thereunto belonging or appertaining" (*l*). But it may pass by the words "or therewith usually held, occupied or enjoyed" (*m*). And if it be a way of necessity it will pass with the principal subject-matter of the grant or demise, without any mention of ways or appurtenances (*n*). So will a watercourse or other *necessary* easement (*o*).

SECT. 6.—*Franchises and Corrodies*.

Leases of
Franchises.

Franchises may be demised by deed (*p*), except indeed in some few particular cases (as where the franchise is a personal immunity, &c.); thus a fair or market, either with or without the right of taking toll, either there or at any other public places, as at bridges, wharfs, or the like, may be demised (*q*). A market, with a right to take the tolls, may be demised without deed (*r*). A franchise granted to one cannot be bestowed on another to the prejudice of a former grant (*s*). Every fair is a market, but every market is not a fair (*t*). A market which is held on the wrong day (Saturday instead of Friday) is not a market "legally established" (*u*). The right to a market may be barred by the Statute of Limitations (*x*).

(*e*) Shep. Touch. 222; Bac. Abr. tit. *Leases* (A.).

(*f*) *Clark v. Cogge*, Cro. Jac. 170, 190.

(*g*) *Osborne v. Wise*, 7 C. & P. 761.

(*h*) *Clark v. Cogge*, Cro. Jac. 170, 190; *Staple v. Heydon*, 6 Mod. 1, 3; *Horton v. Fearson*, 8 T. R. 50, 56; Bac. Abr. tit. *Offices* (H.).

(*i*) *Skull v. Glenister*, 16 C. B., N. S. 81; 32 L. J., C. P. 185.

(*k*) *Dobbyn v. Somers*, 13 Ir. Com. L. Rep., N. S. 293.

(*l*) *Barlow v. Rhodes*, 1 Cr. & M. 439, 448.

(*m*) *James v. Plant* (in error), 4 A. & E.

749; *Kooysra v. Lucas*, 5 B. & A. 830; *Bradshaw v. Eyre*, Cro. Eliz. 570.

(*n*) *Morris v. Edgington*, 3 Taunt. 24; *Davies v. Sear*, L. R., 7 Eq. 427.

(*o*) *Sury v. Pigot*, Popham, 166.

(*p*) *Duke of Somerset v. Fogwell*, 5 B. & C. 875.

(*q*) 2 Inst. 221, 406.

(*r*) *Bridgland v. Shapter*, 5 M. & W. 375.

(*s*) 2 Roll. Abr. 191.

(*t*) 2 Inst. 221, 406.

(*u*) *Benjamin v. Andrews*, 5 C. B., N. S. 299.

(*x*) *Holcroft v. Steel*, 1 Bos. & P. 400.

A corrody is a right of sustenance, originating in the endowment of lands: in lieu of which, especially when due from ecclesiastical persons, a pension or sum of money was sometimes substituted; and these were chargeable on the person of the owner of the inheritance in respect thereof (*y*). A corrody was either certain or uncertain, and might not only be for life or years, but in fee. If one had a corrody for life, he might let it to another, or to the grantor himself (*z*).

CH. III. SEC. 6.
Leases of
Franchises.
Leases of Cor-
rodies.

SECT. 7.—Annuities.

An annuity is an annual sum of money granted to another in fee, for life, or years, which charges the person of the grantor only; or it may be due by prescription, which always implies a grant. Such annuity may be demised by way of assignment (*a*). Rents may also be granted by way of lease (*b*).

Leases of
Annuities.

SECT. 8.—Right of Sporting.

A demise of an incorporeal hereditament can only be valid by deed (*c*), unless granted with some corporeal hereditament as appurtenant thereto (*d*). The right of hunting, shooting, fishing, &c. is an interest in the realty, and a grant of it is a licence of a profit à prendre (*e*). Such rights can be granted or demised only by deed. But if the lessee has actually used, occupied and enjoyed such rights under a parol agreement, he must pay for such enjoyment, and may be sued in an action for use and occupation (*f*). A corporation aggregate may maintain an action for use and occupation of tolls, although they did not grant them by any instrument under their common seal (*g*).

Right of
Sporting.

SECT. 9.—Chattels.

Goods and chattels may be let for years, though the terms "landlord" and "tenant" are inapplicable to such letting, interest of the lessee therein differs from the interest which he has in lands. If a

Leases of
Chattels.

(y) 2 Blac. Com. 40.

(z) Bac. Abr. tit. *Leases* (A.); *R. v. Nicholson*, 12 East, 330; *Peter v. Kendal*, 6 B. & C. 703; *Beere v. Windebanke*, Sid. 80.

(a) Co. Lit. 144 b; Com. Dig. tit. *Annuity* (A. 1).

(b) Bac. Abr. tit. *Leases*; *Thomas v. Fredericks*, 10 Q. B. 775; Co. Lit. 144 b; Com. Dig. tit. *Annuity* (A. 1), (E.).

(c) *Duke of Somerset v. Fogwell*, 5 B. & C. 875, 882, 886; *Bird v. Higginson*, 2 A.

& E. 696; 6 A. & E. 824.

(d) See *post*, Chap. XVIII., Sect. 6, "Game."

(e) *Escart v. Graham*, 7 H. L. Cas. 331; 29 L. J., Ex. 88.

(f) *Thomas v. Fredericks*, 10 Q. B. 775; *Holford v. Pritchard*, 3 Exch. 793; *post*, Chap. XIV.

(g) *Mayor, &c. of Carmarthen v. Lewis*, 6 C. & P. 608; *Drury Lane Theatre Co. v. Chapman*, 1 C. & K. 14.

CH. III. SEC. 9. *Leases of Chattels.* man lease for years a stock of live cattle, such lease is good, and the lessee has the use and profits of them during the term; but he cannot destroy, kill, sell or give them away without, it seems, being liable to an action of trespass (*h*). The lessor, however, has not any reversion in them, as in the case of lands, to grant over to another either during the term or after, till the lessee has re-delivered them to him; for the lessor has only a possibility of property in case they all outlive the term; for if any of them die during the term, the lessor cannot have them replaced after the term; and during the term he has nothing to do with them, and consequently of such as die the property vests absolutely in the lessee. So, whether they live or die, yet all the young ones coming of them, as lambs, calves, &c., belong absolutely to the lessee as profits arising and severed from the principal, since otherwise the lessee would pay his rent for nothing; and therefore this differs from a lease of dead goods and chattels, for there, if anything be added for the repairing, mending or improving thereof, the lessor shall have the improvements and additions, together with the principal, after the lease ended, because they cannot be severed without destroying or spoiling the principal (*i*).

Leases of Furniture.

A mixed payment of rent for land and goods is held to issue out of the land alone, and the rent may be distrained for (*k*).

(*h*) Lit. s. 71; *Doe d. Griffith v. Lloyd*, *Harding*, Cro. Eliz. 606.

3 Esp. 78.

(*k*) *Newman v. Anderton*, 2 B. & P. 224;

(*i*) Bac. Abr. tit. *Leases* (A.); *Collins v. Selby v. Greaves*, L. R., 3 C. P. 594.

CHAPTER IV.

THE AGREEMENT FOR A LEASE.

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SECT. 1.—*An Agreement for a Lease must be in Writing.*

WE shall see presently (*a*) that, by the combined operation of the Statute of Frauds and 8 & 9 Vict. c. 106, s. 3, a lease for more than three years is void unless made by deed, and that leases for three years or less may be made by parol. But although a lease for three years may be made by parol, an agreement for a lease for however short a term must, in order to be sued upon as such, be in writing signed by the party to be sued. For by the 4th section of the Statute of Frauds, it is enacted that "no action shall be brought whereby to charge any person upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them, or upon any agreement that is not to be performed within the space of one year from the making thereof, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith, or some other person by him lawfully authorized" (*b*).

Stat. Frauds,
s. 4.

An agreement for a lease is a contract for an interest in lands within the meaning of sect. 4, and has always been so treated both at law (*c*) and in equity (*d*). We shall see presently, however, that

(*a*) Post, Chap. V.

(*b*) Not saying "by writing," as in sects. 1, 3.

(*c*) See especially *Edge v. Stafford*, 1 Tyr. 295; 1 Cr. & J. 391. And see also

Bailey v. Fitzmaurice, 8 E. & B. 664; *Bailey v. Sweeting*, infra; Smith L. & T. 93.

(*d*) Story Eq. vol. 1, s. 754. It may be doubted whether the word "action" in

CH. IV. SEC. 1.
Agreement for
Lease must be
in Writing.

effect has been frequently given both at law and in equity to parol agreements. At law a party entering as a tenant, and evidencing his intention to continue such, has always been treated as a tenant from year to year upon the terms of the agreement; while in equity a "part performance" by the one party has frequently entitled him to a specific performance by the other.

What is an
 Interest in
 Land.
 Lodgings.

The words "any interest in land" are very wide, and include an interest however small for a term however short, provided that the tenant is to have exclusive possession. An early decision to this effect, in which the statute was held to apply to a contract to let lodgings (*e*), was emphatically affirmed by the leading case of *Edge v. Strafford* (*f*), where the defendant had agreed by parol to take the ready-furnished lodgings of the plaintiff for two or three years, and the Court held that no action could be maintained for breach of the agreement. But where the contract was for board and lodging at a boarding-house, but in no specific rooms, it was held that although the contract was unwritten, an action lay for the breach (*g*); and the two cases are clearly distinguishable on the ground that exclusive possession was bargained for in one but not in the other.

Contract to
 procure Lease

A contract to procure a lease must also be in writing, although it is entered into by a person who has no interest in the lease himself (*h*).

"Collateral"
 Agreement.

If the agreement be to let and do something else for the intending tenant, it must be in writing, unless the two parts of it are severable. Thus in *Meechlen v. Wallace* (*i*), the tenant promised to become such in consideration that the landlord would send in more furniture. The landlord did not send in the furniture, but the tenant failed to recover, on the ground that the agreement to send in furniture was an inseparable part of the contract for the lease. Similarly, where the plaintiff agreed to let a house to the defendant, and to sell him the furniture and fixtures, it was held that this was a contract which must be in writing (*k*).

Angell v. Duke.

But in *Angell v. Duke* (*l*), the court held that an agreement that the landlord should do repairs and send in furniture was collateral to the main agreement to let, so as not to require to be in writing within the statute, although the tenant ultimately failed to recover upon it

the 4th section of the Statute of Frauds included "suit;" but, however this may be, courts of equity, even before the statute, would not execute a parol agreement, not in part performed, and it is said by Story (*ubi supra*) to be obvious that courts of equity are bound as much as courts of law by the provisions of the statute.

(*e*) *Inman v. Stamp*, 1 Stark. 12.

(*f*) 1 Tyr. 295; 1 Cr. & J. 391.

(*g*) *Wright v. Stavert*, 2 E. & E. 721; 29 L. J., Q. B. 161.

(*h*) *Horsey v. Graham*, L. R., 5 C. P. 191; 39 L. J., C. P. 68; 23 L. T. 495. In this case the contract was to procure the assignment of a lease, but the principle is the same.

(*i*) 7 A. & E. 49 (decided on demurrer).

(*k*) *Vaughan v. Hancock*, 3 C. B. 766.

(*l*) L. R., 10 Q. B. 174; 44 L. J., Q. B. 78; 32 L. T. 25. And see *Morgan v. Griffiths*, L. R., 6 Ex. 70; 40 L. J., Ex. 46; 23 L. T. 783; 19 W. R. 957; *Erskine v. Adeane*, L. R., 8 Ch. 756; 42 L. J., Ch. 849; 29 L. T. 234; 21 W. R. 802.

on the ground that parol evidence is inadmissible to vary a written agreement (*m*). CH. IV. SEC. 1.
*Agreement for
Lease must be
in Writing.*

In *Adams v. Hagger*, the plaintiff agreed to grant to the defendant a lease at a certain rent for 99 years of a piece of land so soon as the defendant should have erected a house upon it, and the defendant undertook until the execution of the lease to "hold the said piece of land and other the premises at the rent and subject to the conditions to be contained" in the lease. It was held by the Court of Appeal that the defendant was liable to pay the rent, although he had not entered upon or taken possession of the piece of land (*n*). "Collateral"
Agreement to
pay Rent till
Lease exe-
cuted.
Adams v. Hagger.

An agreement after lease granted that the landlord shall enlarge the premises, and the tenant pay 10% per cent. on the landlord's outlay, is not within the statute (*o*); nor is an agreement to let land rent free on condition that the landlord should have a moiety of the two succeeding crops (*p*).

The 4th section of the Statute of Frauds does not absolutely require the contract itself to be in writing, but allows the alternative of some written "memorandum or note thereof" properly signed; and the memorandum or note need not be prepared at the time, nor be intended as a contract, or even as evidence thereof. A letter written by the defendant to the plaintiff, which mentions all the material terms of the contract, may be sufficient, although the defendant thereby attempts to deny or repudiate his liability (*q*). A correspondence between the defendant and his own agent, which mentions all the material terms of the contract, may be sufficient (*r*). A letter to a third person, mentioning all the material terms of the agreement, may be sufficient (*s*); but if any material term of the contract be unsettled and disputed the writing will not be sufficient (*t*). The bare entry of a steward in the lord's contract book with his tenants is not an evidence of itself that there is an agreement for a lease between the landlord and tenant (*u*). Contract itself
need not be in
Writing.

(a) *What the Agreement for a Lease must state.*

The agreement, or the memorandum or note thereof (as the case may be) *must state all the material terms of the contract* (*x*), *ex. gr.* : Writing must
state all ma-
terial Terms,
e. g. Names.

(*m*) *Angell v. Duke*, 32 L. T. 320.

(*n*) *Adams v. Hagger*, L. R., 4 Q. B. D. 480; 27 W. R. 402—C. A.

(*o*) *Holz v. Roebuck*, 7 Taunt. 157; *Donellan v. Read*, 3 B. & Ad. 899; *Lambert v. Norris*, 2 M. & W. 333.

(*p*) *Foulter v. Killingbeck*, 1 B. & P. 397; *Bristow v. Waddington*, 2 Id. 452.

(*q*) *Bailey v. Sweeting*, 9 C. B., N. S. 843; *Wilkinson v. Evans*, L. R., 1 C. P. 407; 35 L. J., C. P. 224 (these cases were under sect. 17); *Jackson v. Oglander*, 2 H. & M. 465; 13 W. R. 936.

(*r*) *Gibson v. Holland*, 35 L. J., C. P. 5.

(*s*) *Welford v. Beazley*, 3 Atk. 503; *Child v. Cumber*, 3 Swins. 423, n.; *Seagood v. Medley*, Prec. Ch. 560; *Barkworth v. Young*, 1 Drew. 1, 13.

(*t*) *Forster v. Rowland*, 7 H. & N. 103; 30 L. J., Ex. 396.

(*u*) *Charlewood v. Duke of Bedford*, 1 Atk. 497.

(*x*) *Clarke*, app., *Fuller*, resp., 16 C. B., N. S. 24; 12 W. R. 671. See *Fry* on Specific Performance, p. 98.

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*Agreement for
 Lease must be
 in Writing.*

1. The name of the lessor or his agent (*y*); and 2. The name of the lessee or his agent (*z*): but in each of these cases such a description of the contracting parties that there cannot be any fair dispute as to their identity is as good as naming them. Such (*a*) seems to be the effect of the numerous cases (*b*) in which a contract for the sale of land describing but not naming the vendor, has been held good; and, as a lease is a sale pro tanto, these cases would seem to be equally applicable to an agreement for a lease.

3. The writing must state the name or other description of the property to be demised (*c*); but the property need not be so described as to identify it; parol evidence being always admissible upon the question of "parcel or no parcel" (*d*). "Mr. Ogilvie's house," may be sufficient (*e*). "The property in Cable Street," coupled with parol evidence of identity, may be sufficient (*f*), and so may "the mill property, including cottages in *Esher* village" (*g*), and "the lease and everything" for 60*l.*, coupled with parol evidence to show what lease was intended, and with a previous memorandum showing what "everything" meant (*h*). "Two seams of coals, known as the two-feet coal and the three-feet coal, lying under lands hereafter to be defined in the Bank End Estate," has been held sufficient, the latter words being construed to refer only to the boundaries of the estate, and not to the seams of coal agreed to be demised (*i*). But where the agreement was indefinite as to the area over which the ironstone was to be worked, the court (for that and other reasons) refused a specific performance (*k*). An agreement by an incumbent to demise his glebe, containing about 437 acres, "except thirty-seven acres thereof" (which were not specified), was held sufficient, as the lessor, it was said, might elect which thirty-seven acres should be excepted (*l*). A description of the property by reference to preceding deeds, wherein it is described, is sufficient (*m*).

(*y*) *Warner v. Willington*, 3 Drew. 523; 25 L. J., Ch. 652; *Allen v. Bennett*, 3 Taunt. 169; *Cooper v. Smith*, 15 East, 103; *Jacob v. Kirk*, 2 Moo. & R. 221; *Hughes v. Parker*, 8 M. & W. 244; 1 Dowl., N. S. 80; *Hood v. Lord Barrington*, L. R., 6 Eq. 218; *Williams v. Jordan*, L. R., 6 Ch. D. 517; 26 W. R. 230.

(*z*) *Squire v. Whitton*, 1 H. L. Cas. 333; *Williams v. Lake*, 2 E. & E. 349; 29 L. J., Q. B. 1; *Skelton v. Cole*, 1 Do Gex & J. 587; *Hughes v. Parker*, 8 M. & W. 244.

(*a*) See *Potter v. Duffield*, L. R., 18 Eq. 4; 43 L. J., Ch. 472; 22 W. R. 585, per Jessel, M. R., in which "vendor" was held to be not of itself sufficient.

(*b*) See *Rossiter v. Miller*, L. R., 3 App. Cas. 1124; 48 L. J., Ch. 10; 39 L. T. 173; 26 W. R. 855; ("proprietors" held sufficient description of vendors); *Catling v. King*, L. R., 5 Ch. D. 660; 46 L. J., Ch. 384; 38 L. T. 526; 26 W. R. 550—C. A.; *Commins v. Scott*, L. R., 20 Eq. 11; 44 L. J., Ch. 563; 32 L. T. 420; 23 W. R. 498; *Sale v. Lambert*, L. R., 18 Eq. 1; 43 L. J.,

Ch. 740. In *Thomas v. Brown*, L. R., 1 Q. B. D. 714, the point also arose, but was not decided.

(*c*) *Stewart v. Alliston*, 1 Mer. 33; *Ogilvie v. Foljambe*, 3 Mer. 53; *Kennedy v. Lee*, 3 Mer. 441, 451; *Daniels v. Davison*, 16 Ves. 249; *Price v. Griffith*, 1 Do Gex, M. & G. 80; *Haywood v. Cope*, 25 Beav. 140.

(*d*) *Fry*, s. 209; *Bleakley v. Smith*, 11 Sim. 150; *Owen v. Thomas*, 3 Myl. & K. 353; *Price v. Griffith*, 1 Do Gex, M. & G. 80.

(*e*) *Ogilvie v. Foljambe*, 3 Mer. 61.

(*f*) *Bleakley v. Smith*, 11 Sim. 150.

(*g*) *McMurray v. Spicer*, L. R., 5 Eq. 527; 37 L. J., Ch. 505.

(*h*) *Horsey v. Graham*, L. R., 5 C. P. 191.

(*i*) *Haywood v. Cope*, 25 Beav. 140; but see *Lancaster v. De Trafford*, 31 L. J., Ch. 554; 8 Jur., N. S. 873.

(*k*) *Lancaster v. De Trafford*, *supra*.

(*l*) *Jenkins v. Green*, 27 Beav. 437; 28 L. J., Ch. 817.

(*m*) *Owen v. Thomas*, 3 Myl. & K. 353.

A mere difference in quantity has never been held a bar to specific performance;—the Court of Chancery always draw a distinction between the essential and non-essential terms of a contract, and allowed the incapacity to perform it in non-essential terms, to be made the subject of compensation. In *McKenzie v. Hesketh* (n), for instance, the plaintiff offered to take a lease of a farm of the defendant at a rent of 500*l.* per annum, specifying in his tender the closes which he wished to take, with acreage, amounting to 249 acres. The defendant's agent desired to let only 214 acres with his farm, but he accepted the plaintiff's offer without looking at the acreage, although he had in fact let one of the closes to another person. Another tender had been made by a former tenant for the same farm, as comprising 235 acres, and the defendant's agent admitted that he thought that the plaintiff had tendered for the same quantity as such former tenant. The plaintiff sued for specific performance, but was willing to take a lease of 214 acres at a proportionately reduced rent, and Fry, J., held that the defendant was bound to grant a lease of 214 acres, at a rent reduced from 500*l.* in the proportion of 214 to 235 (n).

CH. IV. SEC. 1.
Agreement for Lease must be in Writing.

Difference in Quantity.

McKenzie v. Hesketh.

The writing must state the term to be granted (o), and particularly the time from which the term is to commence (p), but an agreement to let for a term not specifying such time, has been held a valid agreement to let for a term commencing on the date of the agreement (q), and, in the case of an agreement for a 99 years' lease, from the commencement of the rent (r). It seems, too, that the court will execute an agreement to grant a lease for three lives unnamed (s).

Writing must state the Term to be granted.

An agreement by a lessee to grant a sublease (not describing it as a sublease) to an intending tenant at any period he might feel disposed "and not to molest, disturb, or raise the rent" of the intending tenant after he had laid out money on the premises, was held, by the Court of Appeal, to entitle the intending tenant to a sublease for the residue of the term of the lessee, if the intending tenant should so long live (t); but it has been held, also, that a somewhat similar agreement is merely personal between the parties, and does not bind

Agreement not to disturb Tenant.

(n) *McKenzie v. Hesketh*, L. R., 7 Ch. D. 675; 47 L. J., Ch. 231; 38 L. T. 471.

(o) *Bayley, Bart. v. Fitzmaurice* (in error), 8 E. & B. 664; 9 H. L. Cas. 78; *Clinan v. Cooke*, 1 Sch. & Lef. 22; *Gordon v. Trevelyan*, 1 Price, 64; *Hughes v. Parker*, 8 M. & W. 244; 1 Dowl., N. S. 80; *Clarke, app., Fuller, resp.*, 16 C. B., N. S. 24; *Baumann v. James*, L. R., 3 Ch. Ap. 508; *Dolling v. Evans*, 36 L. J., Ch. 474; 16 W. R. 394.

(p) *Blore v. Sutton*, 3 Mer. 237; *Cor v. Middleton*, 2 Drew. 209; *Hersey v. Giblett*, 18 Beav. 174; Fry, s. 222; *Clarke, app.,*

Fuller, resp., and *Dolling v. Evans*, supra. And see *Nesham v. Selby*, L. R., 7 Ch. 406; *Cartwright v. Miller*, 36 L. T. 398.

(q) *Jaques v. Millar*, L. R., 6 Ch. D. 153; 47 L. J., Ch. 544; 38 L. T. 99; 26 W. R. 368, per Fry, J.

(r) *Wesley v. Walker*, 38 L. T. 284, per Fry, J.

(s) *Fitzgerald v. Vicars*, 2 Dru. & W. 298; *Dart v. P.* 661.

(t) *Kusel v. Watson*, L. R., 11 Ch. D. 129. "Construing this agreement," observed Bramwell, L. J., "is mere guess work."

Cn. IV. SEC. 1. a subsequent purchaser of the landlord's interest, with or without notice (*u*).
Agreement for Lease must be in Writing.

Rent.

The writing must also state the premium or fine (if any) agreed to be paid (*x*), and the rent to be paid (*y*), and whether payable quarterly, half-yearly or otherwise. If there be no stipulation on that point, it will be payable only at the end of each year of the term (*z*).

Special Covenants.

Any special or unusual covenants or stipulations actually agreed on should be stated (*a*), and accurately expressed (*b*). If the tenant agrees to improve the premises, the particulars of what he is to do (being a material part of the contract) must be sufficiently specified, so that a proper covenant may be inserted in the lease; otherwise the contract will be too uncertain to be specifically enforced (*c*). An agreement, however, for the tenant to do certain specified works and "other works" upon the property, estimated at from 150*l.* to 200*l.*, was held not too uncertain to prevent a decree for specific performance, inasmuch as the specified works would cost nearly that sum (*d*). Vagueness in the language of an agreement may sometimes be cured by evidence of the surrounding circumstances, and of the subsequent conduct of the parties (*e*). Sometimes an "&c." will not render the contract too uncertain to be specifically enforced (*f*); but if the construction of the agreement depends on the meaning of an "&c.," the court can make no decree (*g*).

It seems that the common and usual covenants and provisoes need not be mentioned (*h*). They are implied as part of the contract, and may be added at chambers.

(b) *How Agreement must be signed.*

Usual Covenants.

An agreement for a lease must, by virtue of the 4th section of the Statute of Frauds above referred to, be signed *by the party to be*

(*u*) *Roberts v. Tregaskis*, 38 L. T. 176, decided shortly before, but not cited in *Kusel v. Watson*, from which, however, it seems to be distinguishable.

(*x*) *Martin v. Pycroft*, 2 De Gex, M. & G. 785; *Wood v. Searth*, 2 K. & J. 33; *Clifford v. Turrell*, 1 You. & Coll. C. C. 138; *Blagden v. Bradbear*, 12 Ves. 466; *Elmore v. Kingscote*, 5 B. & C. 583.

(*y*) *Woolam v. Hearn*, 7 Ves. 211; *Morphett v. Jones*, 1 Swans. 172; *Gregory v. Mighell*, 18 Ves. 328; *Meynell v. Surtees*, 19 Jur. 80, 742; *Powell v. Lovegrove*, 8 De Gex, M. & G. 357; *Baumann v. James*, L. R., 3 Ch. Ap. 508.

(*z*) *Coomber v. Howard*, 1 C. B. 440; *Collett v. Curling*, 10 Q. B. 785; *Giraud v. Richmond*, 2 C. B. 835.

(*a*) *Fry*, ss. 221, 222; *Brodie v. St. Paul*, 1 Ves. jun. 326.

(*b*) *Doe d. Marquis of Bute v. Guest, Bart.*, 15 M. & W. 160; *Doe d. Marquis*

of Bute v. Thompson, 13 M. & W. 494.

(*c*) *Gardner v. Fooks*, 15 W. R. 888, M. R.

(*d*) *Baumann v. James*, L. R., 3 Ch. Ap. 508.

(*e*) *Oxford v. Procard*, L. R., 2 P. C. C. 135; *Coupland v. Arrowsmith*, 18 L. T. 755.

(*f*) *Parker v. Tuswell*, 2 De G. & J. 559; 27 L. J., Ch. 812; *Cooper v. Hood*, 26 Beav. 299; *Powell v. Lovegrove*, 8 De Gex, M. & G. 357.

(*g*) *Price v. Griffith*, 1 De Gex, M. & G. 80; and see *Tatham v. Platt*, 9 Haro, 660; *Stuart v. London and North Western R. Co.*, 1 De Gex, M. & G. 721.

(*h*) *Fry*, ss. 225, 227; *Ricketts v. Bell*, 1 De Gex & Sm. 335; *Cosser v. Collinge*, 3 Myl. & K. 283; *Smith v. Capron*, 7 Hare, 185; *Church v. Brown*, 15 Ves. at p. 265. See further as to "Usual Covenants," Sect. 7, post.

charged therewith, or his agent thereunto lawfully authorized. It need not be signed by both parties (i). A court of equity will decree the specific performance of a contract not signed by the plaintiff, inasmuch as by bringing the action he binds himself and creates a mutuality (k). The signature to a contract may be in almost any part of the writing (l): provided it is so placed as to govern and authenticate every material and operative part of the instrument; but not where it applies only to the particular part where it is introduced (m). A signature in pencil (n), or by initials (o), or by print (p), seems to be sufficient, and so does the signature of a marksman (q).

CIL. IV. SEC. 1.
Agreement for
Lease must be
in Writing.
Signature.

A signature by an agent, thereunto "lawfully authorized," is sufficient, by the very terms of the 4th section of the Statute of Frauds, and such authority need not be in writing (r). But the authority of the agent to sign such contract must be proved, if disputed (s). Such authority is revoked by the death of the principal, although the agent does not know of the death (t). Proof of a subsequent ratification will be sufficient evidence of a prior authority (u). On the other hand, an oral revocation of any such authority may be proved (v): unless the agent was appointed by deed; and perhaps even then (y). An agent who contracts in his own name may sometimes be compelled specifically to perform the contract (z).

Signature by
Agent.

✓ An agreement, note or memorandum, which is defective in some or one of the above particulars, may sometimes be perfected by a subsequent letter or other writing, which sufficiently refers to it, and supplies the defect (a). But where the plaintiff in a suit for specific performance put in two letters of the defendant, the first showing all the terms of a proposed agreement for a lease, but omitting the date at which the occupation was to commence, and the second referring to

Defects in the
Writing supplied by a
subsequent
Writing. ✓

(i) *Boys v. Ayerst*, 6 Madd. 323; *Seton v. Slade*, 7 Ves. 265; 2 Tudor L. C., Eq. 429 (2nd ed.); *Laythorp v. Bryant*, 2 Bing. N. C. 735; *Gosbell v. Archer*, 2 A. & E. 500; *Liverpool Borough Bank v. Eccles*, 4 H. & N. 139.

(k) *Butler v. Powis*, 2 Coll. 161; *Boys v. Ayerst*, 6 Madd. 323.

(l) Fry, ss. 347, 348, 349; *Property v. Parker*, 1 Russ. & Myl. 625; *Bleakley v. Smith*, 11 Sim. 150.

(m) *Caton v. Caton*, L. R., 2 H. L. Cas. 127; 36 L. J., Ch. 886.

(n) *Lucas v. James*, 7 Hare, 410.

(o) *Selby v. Selby*, 3 Mer. 2; Sug. V. & P., Chap. III., Sect. 4.

(p) *Scheider v. Norris*, 2 M. & S. 286.

(q) See *Baker v. Denning*, 8 A. & E. 94.

(r) *Coles v. Trecothick*, 9 Ves. 234, 250; *Clinan v. Cooke*, 1 Sch. & Lef. 22; *Dyas v. Cruise*, 2 Jon. & Lat. 461; *Heard v. Pilley*, L. R., 4 Ch. Ap. 648; *Smith L. & T.* 82, 93 (2nd ed.).

(s) *Blore v. Sutton*, 3 Mer. 237; *Ridg-*

way v. Wharton, 3 De Gex, M. & G. 677; 27 L. J., Ch. 46; 6 H. L. Cas. 238; *Firth v. Greenwood*, 1 Jur., N. S. 866; *Forster v. Rowland*, 7 H. & N. 103; 30 L. J., Ex. 396; *Clarke*, app., *Fuller*, resp., 16 C. B., N. S. 24, 36; *Business v. Fencing*, 35 L. J., Ex. 191.

(t) *Carr v. Livingston*, 35 Beav. 41.

(u) Fry, s. 355; *Maclean v. Dunn*, 4 Bing. 722; *Ridgway v. Wharton*, 6 H. L. Cas. 238, 296; *Bayley*, *Bart.* v. *Fitzmaurice*, 8 E. & B. 664; 9 H. L. Cas. 78.

(v) *Manser v. Back*, 6 Hare, 443; *Rex v. Wait*, 11 Price, 508; *Venning v. Bray*, 2 B. & S. 502; 31 L. J., Q. B. 181.

(y) *Venning v. Bray*, supra.

(z) *Saxon v. Blake*, 29 Beav. 438.

✓ (a) *Warner v. Wellington*, 3 Drew. 523; 25 L. J., Ch. 662; *Ridgway v. Wharton*, 6 H. L. Cas. 238; 3 De Gex, M. & G. 677; 27 L. J., Ch. 46; *Norris v. Cooke*, 7 Ir. Com. L. R. 37; *Dobell v. Hutchinson*, 3 A. & E. 355; *Kennedy v. Lee*, 3 Meriv. 441; *Boydell v. Drummond*, 11 East, 152.

CH. IV. SEC. 1. the first as applying to a term to begin from "Michaelmas next," but adding several terms to which the plaintiff did not assent, the court refused specific performance, although there was undisputed evidence that a complete verbal agreement had been made on the terms of the first letter, with the additional term of "Michaelmas next," and James, L. J., observed that the court "had gone quite far enough in enforcing specific performance upon the evidence of letters when one party is bound and the other not" (b). Generally speaking parol evidence is inadmissible to connect two writings which do not of themselves sufficiently refer to each other (c); but sometimes it may be admitted to negative the existence of any other writings on the subject, from which their relation to each other may be inferred (d). Sometimes when a defective writing cannot be perfected in this manner, it may be taken out of the operation of the Statute of Frauds by a sufficient part performance (e). The existence of a signed but incomplete agreement is no obstacle in the way of proving the additional terms by parol where there has been a part performance; for the whole might have been proved by parol (f).

Effect of subsequent Alterations by parol.

On the other hand, where there is a sufficient writing to satisfy the statute, but some of the terms of it are altered afterwards by parol, a specific performance of the agreement as altered will not be decreed (g). The reason is, that contracts within the fourth section of the Statute of Frauds must be wholly proved by writing (h). To allow such a contract to be proved partly by writing and partly by oral testimony, would let in all the mischiefs which it was the object of the statute to exclude (i). But if the new terms were merely intended to modify the original agreement, and were inoperative for that purpose, it seems that a specific performance of the original agreement may be decreed (k). Where a plaintiff alleges a written agreement, with a parol variation in favour of the defendant, and offers to perform the agreement with the variation, the court will enforce specific performance, although the defendant insists on the statute (l). In such case the court will decree specific performance with the variations, if the defendant elect to take

(b) *Nesham v. Selby*, 41 L. J., Ch. 551; L. R., 7 Ch. 406.

(c) *Skelton v. Cole*, 1 Do Gex & J. 587; *Clinan v. Cooke*, 1 Sch. & Lef. 22.

(d) *Baumann v. James*, L. R., 3 Ch. Ap. 508; 16 W. R. 877.

(e) Post, Sect. 4 (a), p. 92.

(f) *Sutherland v. Briggs*, 1 Hare, 26, 35; *Powell v. Lovegrove*, 8 Do Gex, M. & G. 357; *Morphett v. Jones*, 1 Swans. 172; *Fry*, s. 420; see, too, *Stewart v. Eddowes*, L. R., 9 C. P. 311, where parol evidence was held admissible to show that certain interlineations had been assented to.

(g) *Jordan v. Sawking*, 1 Ves. jun. 402; 3 Bro. C. C. 388; *Price v. Salusbury*, 32 Beav. 446; 32 L. J., Ch. 441; affirmed

Dom. Proc., 14 L. T. 110.

(h) *Foquet v. Moor*, 7 Exch. 1870; *Goss v. Lord Nugent*, 5 B. & Adol. 58; *Harvey v. Grabham*, 5 A. & E. 61; *Stoucell v. Robinson*, 3 Bing. N. C. 928.

(i) *Stead v. Dawber*, 10 A. & E. 57.

(k) *Price v. Dyer*, 17 Ves. 356; *O'Connor v. Spaight*, 1 Sch. & Lef. 305; *Stead v. Dawber*, 10 A. & E. 57; *Marshall v. Lynn*, 6 M. & W. 109; *Moore v. Campbell*, 10 Exch. 323; *Noble v. Ward*, L. R., 1 Ex. 117; 35 L. J., Ex. 81; but see *Clarke v. Moore*, 1 Jon. & Lat. 723—729; *Fry*, ss. 685, 690.

(l) *Martin v. Pycroft*, 2 Do Gex, M. & G. 785; *Dart v. P. 663, 666.*

advantage of them; or otherwise of the original agreement (*m*). It is to be observed, that the Statute of Frauds does not say in distinct terms that all contracts or agreements concerning the sale of lands shall be in writing; all that it enacts is, that no action shall be brought unless they are in writing; and as there is no clause in the act which requires the dissolution of such contracts to be in writing, it should seem that a written contract concerning the sale of lands may still be waived and abandoned by a new agreement not in writing, and so as to prevent either party from recovering on the contract which was in writing (*n*).

CH. IV. SEC. 1.
*Agreement for
Lease must be
in Writing.*

SECT. 2.—*The Stamping of the Agreement for a Lease.*

It is material to observe that the Stamp Act, 1870, which is a consolidating act, imposes the same stamp upon an agreement for a lease as it imposes upon a lease itself (except in the case where the term exceeds 35 years), and imposes upon a lease made in conformity with an agreement duly stamped, the duty of sixpence only (*o*).

*Agreement
for Lease not
more than 35
Years must be
stamped as
Lease.*

It seems that a written proposal accepted orally need not be stamped as an agreement (*p*). But it is otherwise with respect to a document signed by one party only, but intended either as a contract, or as evidence of a contract, and not as a mere proposal (*q*). When an oral proposal is accepted in writing, such acceptance must be stamped as an agreement (*r*).

SECT. 3.—*Remedies for Breach of Agreement.*

Questions frequently arose before the passing of the act 8 & 9 Vict. c. 124, whether a particular instrument is to be construed as an actual lease or as an agreement for a lease. A few of the numerous cases upon the subject will be noticed presently (*s*). The general result of them may be taken to be that the intention of the parties, as expressed in the instrument, is to be looked to, and that where a document cannot by law operate as a lease, the leaning of the courts is to construe it, if possible, as an agreement (*t*).

*Lease or
Agreement.*

(*m*) *Robinson v. Page*, 3 Russ. 114; *Dart V. & P.* 728.

(*n*) *Goss v. Lord Nugent*, 5 B. & Adol. 64; but see *Carrington v. Roots*, 2 M. & W. 248; *Reade v. Lamb*, 6 Exch. 130; 2 L. M. & P. 67.

(*o*) 33 & 34 Vict. c. 97, s. 96. See the act verbatim, post, Appendix A., Sect. 7. The former law, 23 Vict. c. 15, excepted leases for not more than seven years from a similar provision.

(*p*) *Drant v. Brown*, 3 B. & C. 665; *Edgar v. Blick*, 1 Stark. 464; *Faughan v. Brine*, 1 M. & G. 359; *Vollans v. Fletcher*,

1 Exch. 20; *Hudspeth v. Yarnold*, 9 C. B. 625; *Smith v. Neale*, 2 C. B., N. S. 79; *Laing v. Smith*, 3 F. & F. 97.

(*q*) *Chanter v. Dickinson*, 5 M. & G. 253; 2 Dowl., N. S. 838; *Hegarty v. Milne*, 14 C. B. 627.

(*r*) *Atherstone v. Bostock*, 2 M. & G. 511; *Chanter v. Dickinson*, supra; *Hegarty v. Milne*, supra.

(*s*) Chap. V., Sect. 4, post. And see them discussed in Davidson on Conveyancing, vol. v., pt. 1, pp. 1—16.

✓(*t*) *Tidey v. Mollett*, 16 C. B., N. S. 298.

CHAP. IV.—AGREEMENT FOR LEASE.

CII. IV. SEC. 3. There are two remedies for breach of a *valid* contract or agreement for a lease, either of which, but not both, may generally be adopted by the intended landlord, or by the intended tenant, as the case may require, viz.:—1. An action to recover damages for the breach (*u*).
Remedies for Breach of Agreement.

Two Remedies for Breach of Agreement for Lease.

2. An action to compel a specific performance of the agreement.

An intended tenant may, in an action for damages, recover back any premium paid by him (*x*). Even where the agreement is verbal, money expended by an intending tenant in pursuance of it, ex. gr. money laid out upon alteration of the premises agreed to be demised, is recoverable as upon a failure of consideration (*y*).

Breach by actual Lease to another Party.

Ford v. Tiley.

If the intending landlord disables himself from granting the lease agreed upon by making an actual and inconsistent lease to another party before the day arrives for the granting of the lease agreed upon, he may be sued at once by the intending tenant for a breach of contract in making the actual lease (*z*).

Insufficiency of Title.

At common law the intending lessor, by agreeing to grant a lease, impliedly contracted that he had title to grant the lease, and if he had not, he was liable to an action at the suit of the intended lessee (*a*), although the intended lessee, by a contract for sale of the agreement, was bound by no implied condition that the intended lessor had title (*b*). By the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), s. 2, it is enacted that “under a contract to grant or assign a term of years, whether derived or to be derived out of a freehold or leasehold estate, the intended lessee or assign shall not be entitled to call for the title to the freehold.” This enactment does away with the common law rule where the intended landlord is a freeholder, but if the contract be for a sublease the intended mesne landlord, although he is free from inquiry as to the title of the ground landlord, still warrants his own title to grant the sublease.

Intended Lessee may not call for Title to Freehold.
V. & P. Act, 1874.

Defences to Action for Breach.

It is a good defence to an action for breach of an agreement to let premises that the intending tenant intended to use them for a purpose forbidden by law, ex. gr. for the delivery of lectures in contravention of the Blasphemy Act (*c*).

In what Court Action for Damages.

The action for damages may be brought in any division of the High Court, but if it be tried before a judge with a jury, the trial

(*u*) *By LANDLORD, &c.*—*Bond v. Rosling*, 1 B. & S. 371; 30 L. J., Q. B. 227; *Foster v. Rowland*, 7 H. & N. 103; 30 L. J., Ex. 396; *Collins v. Willmott*, 13 W. R. 204; *De Medina v. Norman*, 9 M. & W. 820; 2 D. & L. 239; *Souter v. Drake*, 5 B. & Adol. 992; *Kintrea v. Perston*, 1 H. & N. 357; 25 L. J., Ex. 287; *Cocking v. Ward*, 1 C. B. 858; Bullen & L. Pl. 245—253 (3rd ed.). *By TENANT, &c.*—*Rollason v. Leon*, 7 H. & N. 73; 31 L. J., Ex. 96; *Hayward v. Parker*, 16 C. B. 295; *Jinks v. Edwards*, 11 Exch. 775; *Hell v. Betty*, 4 M. & G. 410.

(*x*) *Wright v. Colls*, 8 C. B. 150; 19 L. J., C. P. 60.

(*y*) *Pitbrook v. Lawes*, L. R., 1 Q. B. D. 284; 45 L. J., Q. B. 17; 34 L. T. 95.

(*z*) *Ford v. Tiley*, 6 B. & C. 325; see, too, *Frost v. Knight*, L. R., 7 Ex. 111.

(*a*) *Stranks v. St. John*, L. R., 2 C. P. 376; 36 L. J., C. P. 118; 16 L. T. 283; 15 W. R. 678.

(*b*) *Kintrea v. Perston*, 1 H. & N. 357; 25 L. J., Ex. 287.

(*c*) *Cowan v. Milbourn*, L. R., 2 Ex. 230; 36 L. J., Ex. 124.

will be had before a judge of the Queen's Bench, Common Pleas, or Exchequer Division (*d*). If the plaintiff claim 50*l.* or less as damages, the action may be brought in the County Court (*e*).

CH. IV. SECT. 3.
*Remedies for
Breach of
Agreement.*

SECT. 4.—*The Action for Specific Performance.*

Actions for the specific performance of contracts for leases are by sect. 34 of the Judicature Act, 1873, assigned to the Chancery Division of the High Court. If a defendant claim specific performance by way of counter-claim in an action brought in a division other than the Chancery Division, the action will probably be transferred to that division (*f*). If the value of the property agreed to be demised do not exceed 500*l.*, the action for specific performance may be brought in the County Court (*g*).

In what Court
Action for
Specific Per-
formance.

It is material to observe that while the common law divisions of the High Court would in general give damages only, and transfer the action to the Chancery Division if a specific performance were prayed, the Chancery Division has an express power (in addition to its ordinary power as a Division of the High Court) to combine the two remedies. For by 21 & 22 Vict. c. 27, s. 2, it was enacted, that "in all cases in which the Court of Chancery had jurisdiction to entertain an application for an injunction against a breach of any covenant, contract or agreement, or against the commission or continuance of any wrongful act or for the specific performance of any covenant, contract or agreement (*h*), it should be lawful for the same court, if it should think fit, to award damages to the party injured, either in addition to, or in substitution for, such injunction or specific performance." Under this act it was held that a court of equity could give damages only where it could decree specific performance or grant an injunction (*i*), and that when the plaintiff failed to establish any covenant, contract, or agreement, of which specific performance could be directed, the court had no jurisdiction to grant relief in damages (*k*).

Combination
of Damages
with Specific
Performance.
21 & 22 Vict.
c. 27, s. 2.

(*d*) Judicature Act, 1873, ss. 29, 37; *Warner v. Murdock*, L. R., 4 Ch. D. (C. A.) 750.

(*e*) *Clarke v. Fuller*, 16 C. B., N. S. 24.

(*f*) R. S. C., Order LI. And see *Id.* App. C., Forms of Pleading, No. 24; *Hillman v. Mayhew*, L. R., 1 Ex. D. 132; 45 L. J., Ex. 334; 34 L. T. 256; 24 W. R. 435.

(*g*) County Court Act of 1865 (28 & 29 Vict. c. 99); County Court Act of 1867 (30 & 31 Vict. c. 142), ss. 9, 33. The latter act expressly includes an agreement for a lease, which had been held in *Wilcox v. Marshall*, L. R., 3 Eq. 270, to be impliedly included by the former act amongst the matters in which an equitable jurisdiction

was given to county courts.

(*h*) *Soames v. Edge*, 1 Johns. 669; *Lancaster v. De Trafford*, 31 L. J., Ch. 554; *Norris v. Jackson*, 1 Johns. & H. 319; 7 Jur., N. S. 510; *Saunders v. Lawford*, 4 Giff. 42; 8 Jur., N. S. 739; *Cory v. Thomas Iron Co.*, 11 W. R. 589; *Johnson v. Wgatt*, 2 De Gex. J. & S. 18; 33 L. J., Ch. 394; *Hindley v. Emery*, L. R., 1 Eq. 52; 35 L. J., Ch. 6; *Durrell v. Pritchard*, L. R., 1 Ch. Ap. 214; 35 L. J., Ch. 223.

(*i*) *Chinnock v. Sainsbury*, 30 L. J., Ch. 409; *Ferguson v. Wilson*, L. R., 2 Ch. Ap. 77; 15 W. R. 80.

(*k*) *Lewers v. Earl of Shaftesbury*, L. R., 2 Eq. 270; but see *Hove v. Hunt*, 31 Beav. 420; 32 L. J., Ch. 36.

CH. IV. SEC. 4.
Specific Per-
 formance
 of Agreement
 for Lease.

Combination
 of Damages
 with Specific
 Performance.

Where A. agreed to grant a lease to B. (who was to enter at once and expend money on improvements), with a proviso that if he failed within three months to grant a valid lease he would repay to B. the amount of his outlay, and from and after such failure B. should be at liberty to quit, and the agreement should cease, except as to B.'s right to payment, and A. was unable to grant a lease for want of title: it was held, that B. had a lien on A.'s interest in the premises for his outlay and costs of suit (*l*). Where the defendant could not obtain his lessor's consent to an underlease, except upon payment of a reasonable and extra rent, specific performance was decreed, with damages to be assessed against him in the event of his not obtaining such consent (*m*). And where a tenant for life agreed to grant a lease for three lives, but had only power to grant one for his own life, he was decreed to perform his agreement specifically pro tanto, with compensation for the difference in value between the term as granted and the term as agreed (*n*). In one case, the court have decreed specific performance of an agreement to take a lease, but refused to order a specific performance of certain building stipulations, and instead thereof directed an inquiry as to the damages (*o*). But the rule seems to have been that the court would not, in addition to a decree for specific performance, award damages for the mere non-performance of a contract, unless special damages were proved (*p*). Even before 21 & 22 Vict. c. 27, the court would in some cases award damages for want of a literal performance of one term of a contract of which specific performance was decreed (*q*). Thus it would award compensation for the deterioration of the estate pending the contract; and in so doing it in truth gave damages to the purchaser for the loss which he sustained by the contract not having been literally performed (*r*).

Ground of
 Decree for
 Specific Per-
 formance.

Where a contract in writing respecting real property, in conformity with the Statute of Frauds, was entered into between competent parties, and was moreover in its nature and circumstances unobjectionable, it was as much of course for a court of equity to decree a specific performance as it was for a court of common law to give damages for the breach of such a contract (*s*). The original and sole foundation of the jurisdiction to decree the specific performance of contracts was

(*l*) *Middleton v. Magnay*, 2 H. & M. 233; 12 W. R. 706; *Hindley v. Emery*, L. R., 1 Eq. 52; 35 L. J., Ch. 6; *Turner v. Marriott*, L. R., 3 Eq. 744.

(*m*) *Hilton v. Tipper*, 18 L. T. 626; 16 W. R. 888.

(*n*) *Leslie v. Cromelin*, 2 Ir. Eq. R. 134.

(*o*) *Kay v. Johnson*, 2 H. & M. 118.

(*p*) *Chinnock v. Marchioness of Ely*, 2 H. & M. 221; 34 L. J., Ch. 399.

(*q*) *Aubin v. Holt*, 2 K. & J. 66, 70;

Peacock v. Penson, 11 Beav. 355; *Helling v. Lumley*, 3 De Gex & J. 493; *Phelps v. Prothero*, 7 De Gex, M. & G. 722.

(*r*) *Phelps v. Prothero*, supra. See also *Jaques v. Millar*, L. R., 6 Ch. D. 163, in which the intending tenant recovered damages for loss of profits on trade meant, to the knowledge of the intending landlord, to be carried on upon the premises.

(*s*) *Hall v. Warren*, 9 Ves. 608.

simply this; that an award of damages at law would not give a party the compensation to which he is entitled, that is, would not put him in a situation as beneficial to him as if the agreement were specifically performed (*t*).

CH. IV. SEC. 4.
Specific Performance of Agreement for Lease.

The jurisdiction of the court to grant specific performance is a purely discretionary one. It seems that no decree will be made for the specific performance of an agreement for a tenancy from year to year, the remedy in damages being deemed sufficient (*u*); nor where the agreed term has expired or will expire before a decree can be obtained (*x*); nor where the lease is to be granted upon certain specified buildings being erected within a limited time, which has nearly elapsed, and the buildings have not been begun (*y*).

Of Tenancy from Year to Year, &c. refused.

A writing purporting to be a lease for more than three years, which is void at law as a lease because not by deed (*z*), may be good in equity as an agreement for a lease, and enforced by a decree for a specific performance, with costs (*a*). And although such contract is void at law as a lease, it may nevertheless be valid, even at law, as an agreement for a lease, and also with respect to any express stipulations therein contained so as to support an action for breaches of such stipulations (*b*). And the law would probably be the same with respect to any stipulations to be necessarily implied from the terms of the contract; but no action can be maintained for not giving possession at the time appointed for the commencement of the term, because possession under a lease for a certain number of years (exceeding three years) was agreed for, and not a possession as tenant from year to year upon the terms of the intended lease so far as they are applicable to and not inconsistent with a yearly tenancy (*c*).

Instrument void as Lease, but good as Agreement.
Parker v. Tanswell.

Before commencing an action for the specific performance (*d*) of an agreement to grant, or to take a lease, the complainant should consider:

What Complainant should consider before commencing Action.

1. Whether the contract is so complete and unobjectionable in every respect, that a court of equity will enforce it by a decree for

(*t*) *Id.* 645; *Harnett v. Yeilding*, 1 Sch. & Lef. 553.

(*u*) *Clayton v. Illingworth*, 10 Harc. 451; *Mortal v. Lyons*, 8 Ir. Ch. R. 112; *Fry*, s. 7; *Sug. V. & P.* 209 (14th ed.).

(*x*) *Newbit v. Meyer*, 1 Swans. 226; *Walters v. Northern Coal Mining Co.*, 5 De Gex, M. & G. 629; 25 L. J., Ch. 633; *De Brassac v. Martyn*, 11 W. R. 1020; *Turnor v. Clowes*, W. N. 1869, p. 6; *Fry*, ss. 603, 606; *Dart V. & P.* 702.

(*y*) *Asylum for Female Orphans v. Waterlow*, 16 W. R. 1102, M. R.

(*z*) *Post*, Chap. V., Sect. 2, post.

(*a*) *Parker v. Tanswell*, 2 De Gex & J. 557; 27 L. J., Ch. 812.

(*b*) *Bond v. Rosling*, 1 B. & S. 371; 30 L. J., Q. B. 227; *Rollason v. Leon*, 7 H. & N. 73; 31 L. J., Ex. 96; *Tadey v. Mollett*, 16 C. B., N. S. 298; 33 L. J., C. P. 236;

Hayne v. Cummings, 16 C. B., N. S. 421; *Hunt v. Harris*, 19 C. B., N. S. 13; 31 L. J., C. P. 249.

(*c*) *Drury v. Maenamaru*, 5 E. & B. 612; *Pitman v. Woodbury*, 3 Exch. 4; *Swatman v. Ambler*, 8 Exch. 72; 22 L. J., Ex. 81; *Jinks v. Edwards*, 11 Exch. 775; *Tress v. Savage*, 4 E. & B. 36; *Cole Ejec.* 222, 444.

(*d*) The law and practice in actions for specific performance not only with respect to agreements for leases, but generally, is ably stated in *Fry on Specific Performance* (A.D. 1858); also in *Dart on Vendors and Purchasers*, Chap. XVIII. (5th ed., A.D. 1876), to each of which works frequent reference will be made. There is also an excellent note on the subject in 2 *Tudor L. C. Eq.* 441–461, 2nd ed. (note to *Seton v. Slade*). See also 1 *Seton on Decrees*, 593–626 (3rd ed.).

CH. IV. SEC. 4. *Specific Performance of Agreement for Lease.* specific performance; 2. Whether the proposed evidence is sufficient; 3. Whether any and what notice should be given, or demand made, or draft lease tendered or other act done (*e*) by the complainant before the commencement of the action; 4. Who should be plaintiff or plaintiffs, and who should be made defendant or defendants; 5. On whom the costs of each party will probably fall; 6. Whether any other and what remedy is preferable.

An action for specific performance cannot be maintained after the plaintiff has recovered damages at law for non-performance of the contract (*f*).

Time, whether
Essence of
Contract.

Time is not generally considered as of the essence of the contract (*g*). "A court of equity will indeed relieve against, and enforce, specific performance, notwithstanding a failure to keep the dates assigned by the contract, either for completion, or for steps towards completion, if it can do justice between the parties, and if there is nothing in the express stipulations between the parties, the nature of the property or the surrounding circumstances, which would make it inequitable to interfere with and modify the legal right. This is what is meant, and all that is meant, where it is said, that in equity time is not the essence of the contract" (*h*). An underlease with compensation will not be decreed where the defendant has contracted for a lease (*i*).

(a) *Oral Agreement with part Performance.*

Oral Agree-
ment with
part Perform-
ance.

Although a mere *oral* agreement for a lease cannot be sued upon as such, an action for a specific performance can be maintained if the terms of such contract be distinctly proved or admitted, and there has been a sufficient part performance of the contract to take it out of the operation of the Statute of Frauds (*k*). The principle upon which courts of equity exercise their jurisdiction in decreeing specific performance of a parol agreement accompanied by part performance, is the *fraud* and injustice which would result from allowing one party to refuse to perform his part, after part performance by the other upon the faith of the contract (*l*).

(*e*) *Aubin v. Holt*, 2 Kay & J. 66, 70; 25 L. J., Ch. 36; *Faulkner v. Hewellyn*, 31 L. J., Ch. 549; *Lancaster v. De Trafford*, 31 L. J., Ch. 554; *Farrer v. Nash*, 35 Beav. 167; 14 W. R. 8. Sometimes the concurrence (in a lease) of a third person having an equitable interest in the property may be necessary; *Reeves v. Gill*, 1 Beav. 375.

(*f*) *Sunter v. Ferguson*, 1 Mac. & Gor. 286; Fry, s. 65; Dart V. & P. 703.

(*g*) Sug. V. & P. 212, 213 (14th ed.); Dart V. & P. Chap. X.; Id. 701; Fry, s. 4; 2 Tudor L. C. Eq. 451 (2nd ed.); *Davis v. Howe*, 2 Sch. & Lef. 341, 347; *Cartan v. Bury*, 10 Ir. Ch. R. 387; *Webb v. Hughes*,

L. R., 10 Eq. 281, Malins, V.-C.

(*h*) *Tilley v. Thomas*, L. R., 3 Ch. Ap. 61, 67; *Roberts v. Berry*, 3 De Gex, M. & G. 281.

(*i*) *Madeley v. Booth*, 2 De G. & Sm. 718; *Darlington v. Hamilton*, 1 Kay, 557, 558; *Warren v. Richardson*, You. 1; Fry, ss. 803, 858; 2 Tudor L. C. Eq. 455 (2nd ed.); *Blake v. Phinn*, 3 C. B. 976; *Barnett v. Wheeler*, 7 M. & W. 364.

(*k*) Fry, ss. 383—407; *Price v. Salusbury, Hart*, 32 Beav. 446; 32 L. J., Ch. 441; affirmed, Dom. Proc., 14 L. T., N. S. 110.

(*l*) *Buckmaster v. Harrop*, 7 Ves. 346; *Munday v. Jolliffe*, 5 Myl. & Cr. 177; *Gro-*

In equity the acts of part performance must be such as are referable to the contract as alleged, and consistent with it (*m*); and such as cannot be referred to any other title than the alleged agreement, nor be considered done with any other view or design than to perform it (*n*). Therefore the mere possession by the tenant is not sufficient, because that may be referred to his character as tenant, under the implied tenancy created by entry (*o*). So the expenditure by the tenant of moneys on the farm in the ordinary course of husbandry, is no part performance of an agreement for a lease, but attributable to his implied tenancy (*p*). But possession and special expenditure by the tenant, provided that it be such that would be likely to take place only in the pursuance of such a contract as that alleged, and it be with the privity of the other party, is an act of part performance: as where the tenant enters and builds, or causes expensive alterations to be made (*q*). And an outlay by a sub-lessee, made with the knowledge and approval of the party agreeing to grant the lease, has been held to be as much part performance as if it had been the outlay of the tenant himself (*r*). The laying out of considerable sums of money by a person who enters under an agreement for a long term, is rationally to be referred to such agreement, rather than to the mere tenancy at will to be implied from such entry (*s*). After such expenses have been incurred on the faith of a lease agreed to be granted, it would be fraudulent and inequitable for the landlord to refuse to grant such lease (*t*); but this cannot be said of the ordinary expenditure of a tenant. Where a tenant under a term alleged the rebuilding of a party-wall, which was in a ruinous state during his term, as part performance of an agreement by his landlord to grant a renewed term: it was held, that the act was equivocal, as it might have been done by him as well in respect of his title under the old term, as under the alleged agreement for a renewed term (*u*).

CH. IV. SECT. 4.
Specific Performance of Agreement for Lease.

What Acts of part Performance are or are not sufficient.

Outlay by Sub-lessee

gory v. Wilson, 2 Hare, 690; Fry, s. 338; Dart V. & P. 658, 660; *Wilson v. West Hartlepool R. Co.*, 34 L. J., Ch. 241; 13 W. R. 361, L.J.J.; *Caton v. Caton*, L. R., 1 Ch. Ap. 137, 148; Addison on Contr. 392 (7th ed.).

(*m*) Fry, s. 386; *Tomkinson v. Straight*, 17 C. B. 697; *Faulkner v. Llewellyn*, 31 L. J., Ch. 549; 11 W. R. 1055; 12 W. R. 193; *Powell v. Lovegrove*, 8 De Gex, M. & G. 357; *Price v. Salisbury*, 32 Beav. 446; 32 L. J., Ch. 441; affirmed, Dom. Proc., 11 L. T., N. S. 110; *Nunn v. Fabian*, L. R., 1 Ch. Ap. 35, 40; 35 L. J., Ch. 140.

(*n*) *Gunter v. Halsey*, Ambl. 586; *Ex parte Hooper*, 19 Ves. 479; Fry, s. 387; Dart V. & P. 657.

(*o*) *Wills v. Stradling*, 3 Ves. 378; *Morphett v. Jones*, 1 Swans. 181; *Faulkner v. Llewellyn*, 31 L. J., Ch. 549; 12 W. R. 193; 5 Vin. Abr. 323, pl. 41; but see *Pain*

v. Coombs, 3 Sm. & Giff. 419; 1 De Gex & J. 24; 3 Jur., N. S. 307, 847; *Miller v. Finlay*, 5 L. T., N. S. 510.

(*p*) *Brennan v. Bolton*, 2 Dru. & W. 319; Fry, ss. 387, 402.

(*q*) *Wills v. Stradling*, 3 Ves. 378; *Stockley v. Stockley*, 1 V. & B. 23; *Toole v. Medlicott*, 1 Ball & B. 393; *Sutherland v. Briggs*, 1 Hare, 26; *Mundy v. Jolliffe*, 5 Myl. & Cr. 167; *Surcome v. Pinniger*, 3 De Gex, M. & G. 571; and see *Farrell v. Davenport*, 8 Jur., N. S. 862, 1043.

(*r*) *Williams v. Evans*, L. R., 19 Eq. 517; 44 L. J., Ch. 319.

(*s*) Fry, s. 402; *Farrell v. Davenport*, 3 Giff. 363; 8 Jur., N. S. 862, 1043.

(*t*) *Frame v. Dawson*, 14 Ves. 386; *Lindsay v. Lynch*, 2 Sch. & Lef. 1; see *Williams v. Evans*, 32 L. T. 360.

(*u*) *Frame v. Dawson*, and *Lindsay v. Lynch*, *supra*.

CH. IV. SEC. 4.
*Specific Per-
 formance
 of Agreement
 for Lease.*

Payment of
 increased
 Rent.

*Nunn v.
 Fabian.
 New Lease,
 &c.*

In *Nunn v. Fabian*, a landlord having verbally agreed with his tenant to grant him a lease for twenty-one years at an increased rent, with the option of purchasing the freehold, died before the execution of the lease. Before his death the tenant had paid one quarter's rent at the increased rate. It was held, that this constituted a sufficient part performance of the agreement to take the case out of the Statute of Frauds, and specific performance was decreed (*x*).

Where an agreement in writing for a three years' tenancy reserved to the tenant the option of requiring a twenty-one years' lease at the expiration of the prior term, V.-C. *Wigram* appears to have considered that the tenant's verbal notice of an intention to take the new lease, accompanied by retention of possession, was binding upon him (*y*). The possession of a tenant after the expiration of his lease, under an agreement for a renewed lease, has been held a sufficient part performance (*z*), and so has the possession of a stranger under an express or implied agreement for a lease (*a*). It has also been held, that the giving up a business, coupled with possession, was part performance, although the tenant agreed to pay nothing but ground rent, rates and taxes (*b*).

Terms of Con-
 tract must be
 certain.

But the court will not decree a specific performance, although possession has been taken, unless the terms of the contract are clearly proved (*c*); nor if any of the terms are uncertain (*d*); although vagueness of language in a contract may sometimes be cured by evidence of surrounding circumstances, and of the subsequent conduct of the parties (*e*). The doctrine of part performance of a parol agreement is not to be extended by the court, and it is inapplicable in a case where a trustee has a power to lease at the request in writing of a married woman, which has not been made (*f*).

Execution of
 Repairs.
*Shillibeer v.
 Jarvis.*

In *Shillibeer v. Jarvis*, after an offer had been made by a plaintiff to take a lease of a farm from the defendant a draft was prepared by the defendant's solicitors, and approved of by the plaintiff with some alterations, and was afterwards altered by the defendant himself, and left by him with his solicitors, for the purpose of its being ascertained whether the plaintiff would agree to the alterations. On their submitting it to him he agreed to the alterations, but no agreement was signed. A part of the terms was, that the plaintiff should execute certain repairs before the lease was granted. The plaintiff was put into possession by the

(*x*) *Nunn v. Fabian*, L. R., 1 Ch. Ap. 35; 35 L. J., Ch. 140. Compare this with *Re National Savings Bank Association, Ex parte Brady*, 15 W. R. 753.

(*y*) *Beatson v. Nicholson*, 6 Jur. 620.
 (*z*) *Dowell v. Dew*, 1 You. & Coll. C. C. 345; Durt V. & P. 656.

(*a*) *Fry*, ss. 397—400; *Gregory v. Mighell*, 18 Ves. 328; *Pain v. Coombs*, 3 Sm. & Gif. 449; 1 De Gex & J. 34, 46; 3 Jur.,

N. S. 307, 847.

(*b*) *Coles v. Pilkington*, L. R., 19 Eq. 174; 31 L. T. 422.

(*c*) *Mortal v. Lyons*, 8 Ir. Ch. R. 112.

(*d*) *Reynolds v. Waring*, 1 You. 346; *Price v. Asheton*, 1 Y. & C. 441.

(*e*) *Oxford v. Proband*, L. R., 2 P. C. C. 136; *Coupland v. Arrowsmith*, 18 L. T., N. S. 755.

(*f*) *Phillips v. Edwards*, 33 Beav. 440.

direction of the defendant's solicitors, and executed some repairs. It was held, that although the plaintiff might have been let into possession without authority from the defendant, there was a concluded agreement for a lease on the part of the defendant, and a sufficient part performance to take the case out of the Statute of Frauds, and specific performance was decreed (*g*). Where the plaintiff and the defendant entered into an agreement, that when a certain house belonging to the plaintiff should be completed and finished fit for habitation, the plaintiff would grant to the defendant a lease of such house for twenty-one years, and the defendant took possession before the house was completed, and occupied it for a year; but refused to pay rent or execute the lease until the house should be completed and finished fit for habitation: whereupon the plaintiff filed a bill for specific performance, and moved that the defendant might be ordered to pay the year's rent into court; the motion was refused with costs (*h*).

CH. IV. SEC. 4.
Specific Performance of Agreement for Lease.

Of course the oral agreement, of which the part performance is relied on, must be of such a nature, i.e. so definite and unobjectionable, that if it had been in writing, and duly signed, the court would have decreed specific performance of it (*i*).

Oral Agreement must be definite.

(b) *There must be a complete Contract.*

Whether the contract be proved by one or more writings (*k*), or by parol evidence, coupled with sufficient acts of part performance (*l*), there must, in each case, be a *complete contract* (*m*). An escrow or writing, delivered subject to a condition which has not been performed, is not sufficient (*n*). A mere proposal or offer to take a lease does not, before acceptance thereof, constitute a complete contract. The acceptance, to be operative, must be unequivocal, unconditional and without variance of any sort between it and the proposal, and communicated to the other party within a reasonable time (*o*). The proposal or offer may be revoked at any time before such accept-

There must be a complete Contract.
Escrow.

Unaccepted Proposal of Offer.
What Acceptance is sufficient.

Revocation of Proposal.

(*g*) *Skillicbeer v. Jarvis*, 8 De Gex, M. & G. 79.

(*h*) *Faulkner v. Ilewellyn*, 31 L. J., Ch. 549; 11 W. R. 1055; 12 W. R. 193; and see *Modlen v. Snowball*, 29 Beav. 641; 31 L. J., Ch. 44; 4 De Gex, F. & J. 143.

(*i*) Fry, ss. 392—394; *Thynne v. Ld. Glengall*, 2 H. L. Cas. 158.

(*k*) Ante, 85.

(*l*) Ante, 92.

(*m*) *Dart V. & P.* 657; *Jackson v. Oglander*, 2 H. & M. 465; 13 W. R. 936; *Ramsden v. Dyson*, 14 W. R. 926, Dom. Proc.; overruling *Thornton v. Ramsden*, 4 Giff. 519; 12 W. R. 850; and see *Caton v. Caton*, L. R., 2 H. L. Cas. 127; 36 L. J.,

Ch. 886; *Lewers v. Earl Shaftesbury*, L. R., 2 Eq. 270; 16 L. T., N. S. 135; *Bankart v. Tennant*, 39 L. J., Ch. 809; 23 L. T. 137.

(*n*) *Wheate v. Hall*, 17 Ves. 80; *Pym v. Campbell*, 6 E. & B. 370; *Gudgen v. Bessett*, Id. 986; *Millership v. Brooks*, 5 H. & N. 797; 27 L. J., Ex. 369.

(*o*) Fry, ss. 167—175; *Warner v. Wilington*, 3 Drew. 523; 25 L. J., Ch. 662; *Oriental Inland Steam Navigation Co. v. Briggs*, 2 Johns. & H. 65; 31 L. J., Ch. 241; 10 W. R. 125; *Forster v. Rowland*, 7 H. & N. 103; 30 L. J., Ex. 396; *Baines v. Woodfall*, 6 C. B., N. S. 657; *Ramgate Victoria Hotel Co. Limited v. Montefiore*; *Same v. Goldamid*, L. R., 1 Ex. 109.

CH. IV. SEC. 4.
*Specific Per-
 formance
 of Agreement
 for Lease.*

Effect of Ac-
 ceptance of
 Proposal.

Counter-
 Proposal.

After a
 Counter-Pro-
 posal the
 original Offer
 cannot be
 accepted.

ance (*p*) ; but not afterwards (*q*). Unless the proposal or offer be accepted promptly, a revocation thereof may be implied : for, in the absence of any special stipulation to the contrary, it is always subject to an implied condition that it be accepted within a reasonable time, i. e. forthwith (*r*). An unaccepted offer does not bind the land, nor the trustees of the person making the offer, on his becoming a bankrupt (*s*). So long as a proposal or offer is an existing one, i. e. until it has been accepted or revoked, expressly or by implication, the other party may, by accepting it purely and simply, without any addition or other alteration whatever, make it an agreement (*t*) ; unless, indeed, by the terms of the proposal, an agreement or contract *in writing* is to be made (*u*). An acceptance of a proposal or offer, subject to any new term or other variation, amounts only to a counter-proposal, which must be accepted purely and simply before there will be any complete agreement (*x*). Where the proposal or offer is agreed to, but a different day is named for possession to be given, that is not sufficient as an acceptance (*y*). The acceptance of a proposal for a lease, adding, "We hope to give you possession at half-quarter day," has been held sufficient, the latter words having no legal operation (*z*). But there is no complete contract if terms be offered for a lease and accepted for a sublease (*a*), or if a particular covenant, such as not to assign without licence, be not agreed to (*b*), or if even the questions as to the costs of the counterpart, and by whom it should be engrossed, are left open (*c*).

After a counter-proposal the party making it cannot accept the first proposal, so as thereby to make it binding as an agreement. Therefore, where the owner of a farm offered to sell it to A. for

(*p*) *Routledge v. Grant*, 4 Bing. 653 ; *Head v. Diggon*, 3 Man. & R. 97 ; *Gilkes v. Leonino*, 4 C. B., N. S. 485, 503 ; *Warner v. Willington*, 3 Drew. 523 ; 25 L. J., Ch. 662 ; *Jackson v. Oglander*, 2 H. & M. 465 ; 13 W. R. 936 ; *Rummens v. Robbins*, 11 Jur., N. S. 631 ; 13 W. R. 979, L.JJ.

(*q*) *Baines v. Woodfull*, 6 C. B., N. S. 657 ; *Cowley v. Watts*, 17 Jur. 172, M. R.

(*r*) *Dunlop v. Higgins*, 1 H. L. Cas. 381 ; *Williams v. Williams*, 17 Beav. 213 ; *Fry*, s. 176.

(*s*) *Meynell v. Surtees*, 2 Sm. & Giff. 101 ; 1 Jur., N. S. 737.

(*t*) *Kennedy v. Lee*, 3 Mer. 454 ; *Johnson v. King*, 2 Bing. 270 ; *Atherstone v. Bostock*, 2 M. & G. 511, 521 ; *Adams v. Lindell*, 1 B. & A. 681 ; *Duncan v. Topham*, 8 C. B. 222 ; *Dunlop v. Higgins*, 1 H. L. Cas. 381 ; *Thornsbury v. Bovill*, 1 You. & Coll. C. C. 554 ; *Meynell v. Surtees*, 2 Sm. & Giff. 101 ; 1 Jur., N. S. 737 ; *Baumann v. James*, L. R., 3 Ch. Ap. 508 ; 16 W. R. 877.

(*u*) *Governor, &c. Kingston-upon-Hull v.*

Petch, 10 Exch. 610 ; 24 L. J., Ex. 23 ; *Royd v. Hind*, 25 Id. 246 ; 2 C. B., N. S. 77, n. ; *London Dock Co. v. Sinnott*, 8 E. & B. 317 ; 27 L. J., Q. B. 347.

(*x*) *Moneyman v. Marryatt*, 21 Beav. 14 ; 26 L. J., Ch. 619 ; 6 H. L. Cas. 112 ; *Routledge v. Grant*, 4 Bing. 653 ; *Jordan v. Norton*, 4 M. & W. 155 ; *Hutchinson v. Bowker*, 5 M. & W. 535 ; *Hall v. Hall*, 12 Beav. 414 ; *Holland v. Eyre*, 2 Sim. & Stu. 194 ; *Cheveley v. Fuller*, 13 C. B. 122 ; *Barker v. Allan*, 6 H. & N. 61, 68.

(*y*) *Routledge v. Grant*, 4 Bing. 653.

(*z*) *Clive v. Beaumont*, 1 De Gex & S. 397 ; see also *Johnson v. King*, 2 Bing. 270.

(*a*) *Holland v. Eyre*, 2 Sim. & Stu. 194.

(*b*) *Lucas v. James*, 7 Hare, 410.

(*c*) *Forster v. Rowland*, 7 H. & N. 103 ; 30 L. J., Ex. 396. Compare this with *Shillibeer v. Jarvis*, 8 De Gex, M. & G. 79, ante, 94 ; and see *Jackson v. Oglander*, 2 H. & M. 465 ; 13 W. R. 936, where the lease had been settled on both sides and engrossed pursuant to an oral agreement :—held, no sufficient contract.

1,000l.; upon which A. wrote offering 950l., which was refused, and then A. signified his acceptance of the original offer: it was held that there was no contract between the parties, and a specific performance was refused (*d*). It not unfrequently happens that when a proposal or offer is made a correspondence takes place upon the subject, and it is sometimes difficult to say whether the result of such correspondence shows a complete contract or merely a series of unaccepted proposals and counter-proposals (*e*). Letters will not constitute an agreement which the court will specifically perform, unless the answer is a simple acceptance, without the introduction of a new term (*f*).

CH. IV. SEC. 4.
Specific Performance of Agreement for Lease.

Correspondence after a Proposal.

A written proposal or offer, signed by the defendant and accepted orally by the plaintiff, is sufficient to satisfy the statute (*g*). But a written proposal or offer signed by the plaintiff must be assented to in writing by the defendant to bind him and to satisfy the statute (*h*). The acceptance of a proposal by a corporation must generally be under their common seal, or pursuant to the express provisions of some act of parliament, before there will be any contract (*i*).

Signed Proposal, binding after Oral Acceptance.

A written proposal or offer, which is accepted orally, need not be stamped as an agreement (*k*).

Stamp.

There is, of course, no binding agreement when the writing appears only to be terms agreed on as a basis for an agreement, and not the agreement itself (*l*); or where it provides that any of the terms are to be afterwards settled (*m*); or where it is expressed to be "subject to the preparation and approval of a formal contract" (*n*); or where there appears any design of further negotiation (*o*). The court will refuse to act where it only rests reasonably doubtful whether what passed was only treaty, let the progress towards the confines of agreement be more or less (*p*). But the mere circumstance that a

If Terms agreed on subject to further Negotiations, there is no Contract.

(*d*) *Hyde v. Wrench*, 3 Beav. 334.

(*e*) See *Honeyman v. Marryatt*, 21 Beav. 14; 26 L. J., Ch. 619; 6 H. L. Cas. 112; *Ridgway v. Wharton*, 6 H. L. Cas. 238; 27 L. J., Ch. 46; *Skinner v. M'Dowall*, 2 De Gex & S. 265; *Richards v. Hayward*, 2 M. & G. 574; *Atherstone v. Bostock*, 11 L. J., Ch. 511; *Skelton v. Cole*, 1 De Gex & J. 587; *Barker v. Allan*, 5 H. & N. 61; *Gilkes v. Leonino*, 4 C. B., N. S. 485; *Thomas v. Blackman*, 1 Coll. C. C. 301; *Felthouse v. Bindley*, 11 C. B., N. S. 869; *Beaumann v. James*, L. R., 3 Ch. Ap. 508; 16 W. R. 877.

(*f*) *Wright v. St. George*, 12 Ir. Ch. R. 226.

(*g*) *Boys v. Ayerst*, 6 Madd. 316; *Warner v. Willington*, 3 Drew. 523; 25 L. J., Ch. 662; *Smith v. Neale*, 2 C. B., N. S. 67, 88; *Reuss v. Pickles*, L. R., 1 Ex. 342; 4 H. & C. 588; 14 W. R. 924; *Barker v. Allan*, 5 H. & N. 61; *Fry*, ss. 181, 182.

(*h*) *Id.*; *Felthouse v. Bindley*, 11 C. B.,

N. S. 869.

(*i*) *London Docks Co. v. Sinnott*, 8 E. & B. 347; 27 L. J., Q. B. 347; *Haigh v. North Brierty Union*, 1 E., B. & E. 873, 883; 28 L. J., Q. B. 62; *Copper Miners of England Co. v. Fox*, 16 Q. B. 229.

(*k*) *Drant v. Brown*, 3 B. & C. 665.

(*l*) *Frost v. Moulton*, 21 Beav. 496.

(*m*) *Wood v. Midgley*, 5 De Gex, M. & G. 41; *Honeyman v. Marryatt*, 21 Beav. 14; 26 L. J., Ch. 619; 6 H. L. Cas. 112.

(*n*) *Winn v. Bull*, L. R., 7 Ch. D. 29; 47 L. J., Ch. 139; 26 W. R. 230.

(*o*) *Tawney v. Crouther*, 3 Bro. C. C. 318; *Stratford v. Bonworth*, 2 V. & B. 341. As to agreement "subject to approval of solicitor," see *Husney v. Payne*, L. R., 4 App. Cas. 311, and other cases cited post, Ch. VII., Sect. 2 n, "Contract for Assignment—Title of Vendor."

(*p*) *Huddleston v. Briscoe*, 11 Ves. 592; *Jackson v. Oglander*, 2 H. & M. 465; 13 W. R. 936; *Fry*, s. 343.

CH. IV. SEC. 4. Specific Performance of Agreement for Lease. more formal document is intended to be drawn up, is not sufficient to negative a complete contract (*q*). Therefore correspondence about the taking of a house was held to constitute a sufficient agreement, though the agent of the lessor accepted the offer thus:—"These terms I have submitted to Mrs. S., and I am authorized to say they are accepted, and that her solicitor will draw up a proper agreement for signature, which I will forward to you" (*r*). There are numerous cases in which written instruments have been held to amount to actual demises, notwithstanding a stipulation for a more formal lease to be afterwards prepared (*s*). The question in cases of this sort is, whether the writing was intended to operate as a binding contract until a more formal one should be signed (*t*).

SECT. 5.—*Grounds for Refusal of Specific Performance.*

The Agreement must be definite and unobjectionable in certain respects.

The agreement must not only be complete as a contract (*u*), and proved by a writing or writings sufficient to satisfy the Statute of Frauds (*x*), or by parol evidence, coupled with sufficient part performance to take it out of the statute (*y*); but it must also be of so definite and specific a nature (*z*), and unobjectionable in other respects, that the court will decree a performance of it. Therefore a court of equity will not decree the specific performance of a contract for the purchase of a lease, where, from pending and threatened litigation, it is impossible to ascertain to whom the ground rent is payable, and the purchaser may be involved in immediate litigation (*a*). A tenant will not be compelled to take a lease of an expensive new house, which upon a competent survey has been found defective, and finished in such a manner, that it is likely to subject the tenant, under the covenant to repair, to an unusually large annual outlay to maintain it (*b*). Where an agreement for a lease of mineral property did not clearly define the mineral area to be comprised in the lease, the court refused, at the instance of the proposed lessee, to decree specific performance of the agreement (*c*). The court will not decree specific performance of a contract for a lease of premises, where one of the stipulations of the contract is, that the lessee shall engage the personal services of the lessors in the business to be carried on upon the

(*q*) Fry, s. 344.

(*r*) *Skinner v. M'Dowall*, 2 De Gex & S. 265.

(*s*) *Poole v. Bentley*, 12 East, 168; *Doe v. Philip v. Benjamin*, 9 A. & E. 644.

(*t*) *Ridgway v. Wharton*, 6 H. L. Cas. 238; 27 L. J., Ch. 46.

(*u*) Ante, p. 95.

(*x*) Ante, p. 79.

(*y*) Ante, p. 92.

(*z*) *Bernard v. Meara*, 12 Ir. Ch. R. 389.

(*a*) *Pegler v. White*, 33 Beav. 403; 33 L. J., Ch. 569.

(*b*) *Tildesley v. Clarkson*, 30 Beav. 419; 31 L. J., Ch. 362.

(*c*) *Lancaster v. De Trafford*, 31 L. J., Ch. 554; 8 Jur., N. S. 873; and see *Davis v. Shepherd*, L. R., 1 Ch. 410. But see contra, *Haywood v. Cope*, 25 Beav. 140.

premises (*d*). But an agreement for a lease “for seven, fourteen or ——— years,” was held to entitle the tenant to a lease for fourteen years, determinable at the tenant’s, and not the landlord’s, option, at the end of seven years, and that notwithstanding that the landlord had given his agent, who entered into the agreement, no authority to grant a lease with such option (*e*).

CH. IV. SEC. 5.
Refusal of Specific Performance.

The discretion of the court is exercised according to fixed and settled rules, and mere inadequacy of consideration, unless it be so gross as to amount to evidence of fraud, is not a ground for exercising such discretion by refusing a specific performance (*f*). Thus, where the defendant agreed to purchase leasehold property at a valuation to be made by A. B., who made a very high and apparently exorbitant valuation, viz. at thirty years’ purchase for a mere leasehold, but there did not appear to be any “fraud, mistake, or miscarriage,” the court decreed a specific performance with costs (*g*).

Inadequacy of Consideration.

If the plaintiff induced the defendant to enter into a disadvantageous contract by misrepresentations and deceit, his action for specific performance will be dismissed with costs (*h*). And a tenant under an agreement to take a lease of a new house is not bound to accept it, if the house upon a competent survey is found defective, and finished in such a manner that it is likely to subject the tenant, under the covenant to repair, to an unusually large annual outlay to maintain it (*i*). But the mere existence of circumstances at the date of the contract which might easily have led to fraud, and the want of any professional adviser on the part of the defendant, are insufficient to defeat the right to specific performance, if no fraud be shown (*k*).

Misrepresentation and Deceit.

A misrepresentation of matter of law will not disentitle the plaintiff. Therefore where A., who was under an agreement to take the lease of a house containing “all usual covenants,” agreed to assign all his interest to B. and forwarded him a copy of the original agreement, and afterwards in answer to inquiries by B., stated that the lessee would not have to do substantial repairs: upon a bill filed by A. for a specific performance, it was held, that A.’s statement was a misrepresentation of matter of law, and that he would not be bound or prejudiced by it (*l*).

Misrepresentation of matter of Law does not disentitle.

(*d*) *Ogden v. Fosnick*, 32 L. J., Ch. 73.

(*e*) *Powell v. Smith*, L. R., 14 Eq. 85; 41 L. J., Ch. 734. The tenant had entered and spent money on the farm.

(*f*) *Haywood v. Cope*, 25 Beav. 140, 151; *Callingham v. Callingham*, 8 Cl. & Fin. 374; Fry, Chap. VII.

(*g*) *Collier v. Mason*, 25 Beav. 200.

(*h*) *Dart v. P.* 675; *Willingham v. Joyce*, 3 Ves. 168; *Clermont v. Tasburgh*, 1 Jac. & W. 112; *Cadman v. Horner*, 18 Ves. 10; *O’Herlihy v. Hedges*, 1 Sch. &

Lof. 123; *Tildesley v. Clarkson*, 30 Beav. 419; 31 L. J., Ch. 362; *Moxey v. Bigwood*, 12 W. R. 811; 10 Jur., N. S. 597; *Higgins v. Samels*, 2 J. & H. 460; 7 L. T. 240.

(*i*) *Tildesley v. Clarkson*, 30 Beav. 419; 31 L. J., Ch. 362.

(*k*) *Lightfoot v. Heron*, 3 Y. & C. 586; *Dart v. P.* 666; see also *Johnson v. Smart*, 2 Giff. 151; *Cook v. Waugh*, Id. 201.

(*l*) *Kendall y. Hill*, 6 Jur., N. S. 968, M. R.; *Great Western R. Co. v. Cripps*, 6 Hare, 91.

CH. IV. SEC. 5.

*Refusal of
Specific
Performance.**Concealment
of material
Facts.*

A specific performance will not be decreed at the instance of a person who has obtained an advantageous agreement for a renewed lease for lives, by knowingly concealing an important fact, viz., that the last life named in the lease was then *in extremis*, of which he well knew that the lessor was then ignorant (*m*). So where the plaintiff held part of the premises as lessee only, under onerous covenants, but concealed that fact and represented himself to be owner in fee (*n*). So where the vendor of leaseholds had received a notice of re-entry in default of the premises being repaired as therein mentioned, but concealed such notice from the purchaser, who, however, knew the state of the premises (*o*). So where the vendor conceals from the purchaser that the property is liable to be taken under the powers of a recent railway act (*p*). So where, on an agreement for sale of the lease of a colliery for 8,000*l.* in paid-up shares, there was a private arrangement with the plaintiff, not communicated to the shareholders, that 2,500*l.* of these should be given as a bonus to the directors; specific performance was refused (*q*).

*Public Nui-
sance affect-
ing the Pro-
perty.*

The existence of a public nuisance in the immediate neighbourhood of a house agreed to be taken as a residence, and rendering it unfit for that purpose,—its existence, however, being unknown to either party, although easily ascertainable by the lessor,—seems to afford no defence to his suit for a specific performance, although it will induce the court to try the case strictly (*r*).

*Illegal Con-
tract.*

If the agreement is illegal the court will not decree a specific performance (*s*). But the agreement must be legal or illegal, and it is not within the discretion of the court to refuse specific performance because an agreement savours of illegality: it must be shown to be illegal (*t*). Where a stipulation is omitted from the written agreement, upon the supposition that it is illegal (*u*), or where a party having bargained for the insertion of a particular term, knowingly, and without being fraudulently induced thereto, executes an agreement from which it is omitted (*x*), equity will hold the omission binding.

*Plaintiff no
sufficient
Title.
V. & P. Act,
1874.*

By the Vendor and Purchaser Act, 1874, sect. 2, rule 1, it is enacted that under a contract to grant a term of years, whether derived or to be derived out of a freehold or leasehold estate, the

(*m*) *Ellard v. Ld. Llandaff*, 1 Ball & B. 241; Fry, ss. 242, 461—464.

(*n*) *Bascomb v. Phillips*, 29 L. J., Ch. 380; 6 Jur., N. S. 363.

(*o*) *Stevens v. Adamson*, 2 Stark. R. 422.

(*p*) *Ballard v. Way*, 1 M. & W. 520; Fry, s. 667.

(*q*) *Marwell v. Port Tenant, &c. Co.*, 24 Beav. 495.

(*r*) *Lucas v. James*, 7 Hare, 410, 418; Dart V. & P. 681, 695.

(*s*) Fry, Chap. IX.; Dart V. & P. 671; *Dr. Nettlesworth v. Dean and C. of St. Paul's*, Select Cas. Ch. 66.

(*t*) *Aubin v. Holt*, 2 Kay & J. 70.

(*u*) *Ld. Irnham v. Child*, 1 Bro. C. C. 92; 6 Ves. 332; Sug. V. & P. 173 (14th ed.); Dart V. & P. 668.

(*x*) *Shelburne v. Inchiquin*, 1 Bro. C. C. 350; *Jackson v. Cator*, 5 Ves. 688; *Rich v. Jackson*, 4 Bro. C. C. 514, 518; Dart V. & P. 668.

intended lessee shall not be entitled to call for the title to the freehold. CH. IV. SEC. 5.
 If a party agrees to let an estate, and brings an action for the specific *Refusal of*
 performance of the agreement, it will be dismissed with costs, if, in *Specific*
 the course of the action, it should appear that the intended lessor had *Performance.*
 a defective title, even though the objections on which the refusal to
 take the lease was grounded were frivolous and untenable (*y*). Where
 it appears that the plaintiff is unable from causes which he cannot
 control, to make a good title, a demurrer will be allowed, and the
 plaintiff will not be permitted to bring the cause to a hearing on the
 chance that he may by that time, or before certificate, be enabled to
 sue the defendant (*z*). A purchaser of leasehold premises will not be
 compelled to complete his contract if the title to the reversion ex-
 pectant on the lease is admittedly the subject of contest, so that there
 is a strong probability of his being involved in litigation in conse-
 quence of disputed claims to the ground-rents (*a*). If it appear to
 the court that the plaintiff as sole acting executrix had power to let
 or sell, a specific performance may be decreed, notwithstanding one of
 the conveyancing counsel of the court has given a contrary opinion (*b*).
 An appellate court, notwithstanding its impression in favour of the
 vendor's title, will not decree specific performance in opposition to
 the decision of the court below that a good title cannot be made,
 unless such decision be clearly wrong (*c*). But the purchaser will be
 compelled to take a title which appears to the court of appeal to be
 good, although the judge of the court below was of a different opinion;
 that fact not being sufficient to constitute a doubtful title (*d*). Even
 at law there was no remedy where the plaintiff's title was so bad or
 doubtful that a specific performance would not be decreed in equity (*e*).

Where a decree for specific performance would impose serious and Unreasonable
Hardship.
 unreasonable hardship on the defendant the court will sometimes refuse
 to interfere, and only award the plaintiff damages; but much depends
 on the nature of the hardship, and when and how it arose (*f*). Thus,
 in *Costigan v. Hastler* (*f*), where a mortgagor had contracted to grant
 a lease, but failed to obtain the mortgagee's consent, as he expected to
 do, and was also shown to be unable to redeem, the intending tenant
 failed to obtain a decree for specific performance, and only succeeded
 in getting the contract rescinded. But in *Long v. Bowring* (*f*), where *Costigan v.*
Hastler.

(*y*) *Baskcomb v. Phillips*, 29 L. J., Ch. 380; 6 Jur., N. S. 363.

(*z*) *Reeves v. Greenwich Tanning Co.*, 2 H. & M. 64.

(*a*) *Pegler v. White*, 33 Beav. 403; 33 L. J., Ch. 569.

(*b*) *Hamilton v. Buckmaster*, L. R., 3 Eq. 323, Wood, V.-C.; but see *Stevens v. Austen*, 3 E. & E. 685; 30 L. J., Q. B. 112.

(*c*) *Collier v. M'Bean*, 35 L. J., Ch. 144. But see contra, *Beioley v. Carter*, L. R., 4

Ch. Ap. 230, 236.

(*d*) *Beioley v. Carter*, L. R., 4 Ch. Ap. 230; *Sheppard v. Doolan*, 3 Dru. & W. 8; and see *Hamilton v. Buckmaster*, supra.

(*e*) *Simmons v. Heseltine*, 5 C. B., N. S. 554; 28 L. J., C. P. 129; *Stevens v. Austen*, 3 E. & E. 685; 30 L. J., Q. B. 212; *Jeakes v. White*, 6 Exch. 873.

(*f*) *Costigan v. Hastler*, 1 Sch. & Lef. 166; *Long v. Bowring*, 33 Beav. 685; Fry, Chap. VI.

Long v.
Bowring.

CH. IV. SEC. 5. the defendant contracted to grant a sublease, and to pay to the intending sublessee 1,000*l.* by way of liquidated damages if he should fail to obtain the assent of his landlord to the sublease, it was held that he was not entitled to refuse to apply to his landlord for such assent, and by paying the 1,000*l.* to escape a decree for specific performance. And the general rule is, that a hardship which arises subsequently to, or independently of, the contract will not be taken into consideration (*g*).

Injury to
Property by
Fire, &c.
Counter v.
Macpherson.

The accidental destruction by fire or tempest of any of the property agreed to be demised would seem to afford no defence to an action for specific performance. The rule of *Paine v. Meller* (*h*), and similar cases, that a party who enters into a binding contract for the purchase of an estate, becomes in equity the owner of it, and is entitled to any profit and subject to any loss which may afterwards occur, is applicable to a contract for a lease. This was clearly recognized in a case heard before the Judicial Committee of the Privy Council in 1845 (*i*), although the plaintiff (the intending landlord) failed to obtain specific performance on the ground of non-performance on his part of an agreement to put the premises in repair. Where the plaintiff could not give possession on the appointed day, and time was of the essence of the contract, his bill for a specific performance was dismissed (*k*). Where the intended tenant, knowing that the premises were greatly out of repair, stipulated for certain specific repairs, which were done accordingly, and he took possession after being warned that much more expensive repairs were required, and it turned out on a subsequent examination that it was necessary to take down and rebuild a wall at great expense, specific performance was decreed (*l*).

Breach of
Trust.

Where trustees have inadvertently entered into a contract to grant or to renew a lease, in excess of their power, and which if performed would amount to a breach of trust, specific performance will not be decreed (*m*). In *Sneeshy v. Thorne*, one of two executors, erroneously believing that he was acting with the authority of the other, contract to sell a leasehold house, part of the testator's estate: it was held that the purchaser could not enforce a specific performance, and it seems doubtful whether he could have done so if the

(*g*) *Evans v. Walshe*, 2 Sch. & Lef. 419; *Revell v. Hussey*, 2 Ball & B. 280; *Lawder v. Blackford*, Beat. 522; Fry, s. 255; *Helling v. Lumley*, 3 De Gex & J. 493.

(*h*) 6 Ves. 349.

(*i*) *Counter v. Macpherson*, 5 Moore, P. C. 83; *Taylor v. Caldwell*, 3 B. & S. 826, where the plaintiff agreed to let a music hall for four days, and, the music hall having been burnt down between agreement and time for performance, failed to recover damages, is distinguishable on the ground that the existence of the music hall was an implied essential condition of

the agreement.

(*k*) *Tilley v. Thomas*, L. R., 3 Ch. Ap. 61; 18 W. R. 166.

(*l*) *Cook v. Waugh*, 2 Giff. 201; 6 Jur., N. S. 596; compare this case with *Tildesley v. Clarkson*, 30 Beav. 419; 31 L. J., Ch. 362.

(*m*) *Byron v. Acton*, 1 Bro. P. C. 186; *Hartnell v. Yielding*, 2 Sch. & Lef. 549; *Beltringer v. Blagrove*, 1 De Gex & S. 63; *Haywood v. Cope*, 25 Beav. 153; *Phillips v. Edwards*, 33 Beav. 440; Fry, s. 247; Dart V. & P. 640.

executor had been under no misapprehension (*n*). A feme covert, being one of several devisees for sale, cannot bind herself by a contract (*o*). A contract for a lease by a mortgagor cannot be enforced by him unless he procure a reconveyance of the mortgage, or procure the mortgagee to join in or confirm the lease (*p*), but in such case the court may decree the damages sustained and cause them to be assessed (*q*). Where a mortgagee agreed with the plaintiff to grant him a lease, upon the mutual understanding that the mortgagor should concur, but the mortgagor refused concurrence, the court held that the plaintiff was not entitled to insist on having a lease from the mortgagee alone: and, further, that he was not entitled to damages (*r*).

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The possibility of a forfeiture being incurred if the intended lessor perform his agreement is no defence to an action for specific performance (*s*). But where a lessee sold certain lots of building ground, and agreed to make a road, which it was afterwards found he could not do without incurring the risk of forfeiting a piece of leasehold land through which it was to pass, or of being sued by the lessor, the court granting the purchaser specific performance of the agreement for sale refused to enforce the stipulation, but gave him compensation as to that (*t*). Where a tenant for life contracts to grant a lease for a longer period than he has power to grant, the court will decree him to grant such lease as he is able to make (*u*), with compensation for the residue of the agreed term (*x*). If a copyholder were to agree to grant a lease for a longer term than the custom allowed, he would, it seems, be compelled to effectuate his contract in substance, by from time to time executing leases for such terms as he could, till he had made up the term contracted for (*y*). The court never decrees performance of that which is impossible to be done (*z*).

Forfeiture.

Impossibility.

The contract must not only be legal, but it must not be hard or unreasonable (*a*); it must be free from fraud and surprise (*b*) and from mistake (*c*). In *Jeffereys v. Fairs* (*d*), the plaintiff agreed to grant the defendants a lease of a vein of coal, called the Shenkin vein, "about

Fraud—Surprise—Mistake.
Jeffereys v. Fairs.

✓(*n*) *Sneeshy v. Thorne*, 7 De Gex, M. & G. 399.

(*o*) *Avery v. Griffin*, L. R., 6 Eq. 606.

(*p*) *Costigan v. Hastler*, 1 Sch. & Lef. 160.

✓(*q*) *Howe v. Hunt*, 31 Beav. 420; 32 L. J., Ch. 36.

(*r*) *Franklin v. Ball*, 33 Beav. 560; 34 L. J., Ch. 153.

✓(*s*) *Helling v. Lumley*, 3 De Gex & J. 493.

+(*t*) *Peacock v. Penson*, 11 Beav. 355; *Helling v. Lumley*, *supra*; Fry, s. 261.

(*u*) Now see the Settled Estates Act, 1877, ante, 5.

(*x*) *Cleaton v. Gower*, Finch, 164; *Dale v. Lister*, cited 16 Vos. 7; *Hanbury v. Litchfield*, 2 Myl. & K. 629; Fry, s. 299;

Dart V. & P. 682, 683, 685; *Painter v. Newby*, 11 Harc. 20; 21 & 22 Vict. c. 27, s. 2.

(*y*) *Paxton v. Newton*, 2 Sm. & Giff. 437; Fry, s. 669.

(*z*) *Green v. Smith*, 1 Atk. 572.

(*a*) *Tildesley v. Clarkson*, 30 Beav. 419; 31 L. J., Ch. 362.

(*b*) Fry, s. 475; Dart V. & P. 674; *Walters v. Morgan*, 3 De Gex, F. & J. 718.

(*c*) Fry, Chap. XIV.; Dart V. & P. 665, 674; *Wood v. Scarth*, 2 Kay & J. 33; *Brown v. Marquis of Sligo*, 10 Ir. Ch. R. 1.

(*d*) L. R., 4 Ch. D. 448, per Bacon, V.-C.

CH. IV. SEC. 5. two feet thick, with the overlying and underlying beds of clay," at a certain dead rent and royalties; it was held that this agreement could be enforced against the defendants, whether the Shenkin vein existed or not. But this was said to be "because the defendants had in fact got all they bargained for, which was the chance of finding the vein of coal under the particular property," so that it would have been "against reason, against justice and against the whole chain of authorities, to let the defendants off their bargain." A mistake of law is not sufficient (*e*), nor a mistake as to the legal consequences of an act (*f*). A substantial misdescription in the particulars of sale will entitle the purchaser to avoid the contract even at law (*g*): but he must do so immediately (*h*). In equity such a contract will not be enforced against him (*i*). Where there has been a misrepresentation made by the vendor, the court applies the rule caveat emptor with great caution (*k*). If the written contract omits any material term, or inaccurately expresses the real intentions of the parties, the court will not enforce, with a variation to correct the mistake, at the instance of the party in whose favour such correction would operate (*l*). Thus, where a person has contracted for the assignment of a lease he will not be decreed to take the assignment of an underlease even with compensation (*m*). If he has contracted for an estate in possession, he will not be decreed to take a reversionary lease with compensation (*n*). If he has contracted for a specific term, ex. gr. sixteen years, he will not be decreed to take a considerably less term, ex. gr. six years with compensation (*o*). By an agreement in writing, A. agreed to demise to B. premises which were then in lease to C., and B. undertook to procure a surrender from C. of the existing lease and to accept a new lease. C. having afterwards refused to surrender, A. filed a bill against B. for a specific performance, *with a modification*. It was held, upon demurrer, that the bill could not be sustained (*p*). On the other hand, if the opposite party files a bill, the court will not decree a specific performance unless he submits to such alterations or compensation as

Refusal of Specific Performance.

No Decree of specific Performance with a Variation in favour of Plaintiff.

Otherwise at the instance of Defendant.

(*e*) Fry, s. 508; *Croomb v. Lediard*, 2 Myl. & K. 251.

(*f*) *Great Western R. Co. v. Cripps*, 5 Hare, 91.

(*g*) *Flight v. Booth*, 1 Bing. N. C. 376; *Wood v. Keep*, 1 F. & F. 331.

(*h*) *Selway v. Fogg*, 5 M. & W. 83.

(*i*) *Dimmock v. Hallett*, L. R., 2 Ch. Ap. 21; 36 L. J., Ch. 146.

(*k*) *Colby v. Gadsden*, 15 W. R. 1185; 17 L. T. 97.

(*l*) Fry, ss. 519—535; *Dart V. & P.* 663, 689; *Rich v. Jackson*, 2 Bro. C. C. 514; 6 Ves. 334; *Roberts v. Collins*, 7 Ves. 130, 133; *Woolam v. Hearn*, 7 Ves. 211; *Winch v. Winchester*, 1 V. & B. 375, 378; *Higginson v. Clowes*, 15 Ves. 516, 523; *Chinn v. Cooke*, 1 Sch. & Lef. 22, 38; *Manser v.*

Back, 6 Hare, 447; *Squire v. Campbell*, 1 Myl. & Cr. 480; *Emmet v. Deichurst*, 3 Myl. & Cr. 587; *Davies v. Fitton*, 2 Dru. & W. 225; *Nurse v. Lord Seymour*, 13 Beav. 254.

(*m*) *Madeley v. Booth*, 2 De Gex & S. 718; *Darlington v. Hamilton*, 1 Kay, 550; *Warren v. Richardson*, You. 1; Fry, ss. 803, 858; *Anon.*, Sug. V. & P. 300 (14th ed.); *Dart V. & P.* 90, 689.

(*n*) *Lineham v. Cotter*, 7 Ir. Eq. 176; Sug. V. & P. 304 (14th ed.); *Dart V. & P.* 689.

(*o*) *Long v. Fletcher*, 2 Eq. Cas. Abr. 5; *Dart V. & P.* 690.

(*p*) *Beeston v. Stutely*, 26 L. J., Ch. 156, Wood, V.-C.

the court thinks ought to be made upon a consideration of the parol evidence (g). Where a plaintiff alleges a written agreement with a parol variation *in favour of the defendant*, and offers to perform the agreement with the variation, the court will enforce specific performance, although the defendant insists on the statute (r). In one case, A. agreed to grant a lease of a public-house to B., “the lessor to make certain alterations suggested and to make and form a spirit-vault, and put in plate-glass windows, and to do everything therewith necessary at his own expense, and paint new the outside of all wood-work, as well as put the slates, chimney-pots and roofing in thorough repair.” B., by his bill, offered to waive the performance of the agreement so far as regarded any alterations not specifically mentioned therein. It was held, that he was entitled to a decree for specific performance, minus the waiver (s). Where the defendant relies on a parol variation of a written contract, as a defence, he must prove such part performance of the agreement as altered as would induce the court to enforce it as an original independent agreement (t).

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If the amount of premium or rent to be paid, or any other material point, is by the agreement left to be determined by third persons, ex. gr., arbitrators or surveyors, and that has not been done before suit, the court will not decree specific performance, having no power to compel such third persons to perform their duty: it therefore treats the contract as too imperfect to be specifically enforced (u). But after such matter has been so determined, the contract may be enforced by decree even where the sum fixed appears to be exorbitant, no fraud, mistake or miscarriage being proved (x). B. agreed to grant a lease to W. as soon as W. should have built a house with the necessary outbuildings on the land, of the value of 1,400*l.* at the least, “according to a plan to be submitted to and approved by B.” W. agreed to build such house and take the lease; no plan was submitted to or approved by B., but he was ready and willing to approve of any reasonable plan; under such circumstances, a bill filed by B. for a specific performance, was dismissed, with costs (y).

Where any-
thing remains
to be fixed or
decided by
third Persons
over whom the
Court has no
control.

(g) *Joynes v. Statham*, 3 Atk. 388; *Barnard v. Cave*, 26 Beav. 253; *Clarke v. Moore*, 1 Jon. & Lat. 723; *Browne v. Marquis of Sligo*, 10 Ir. Ch. R. 1; *London and Birmingham R. Co. v. Winter*, Cr. & Ph. 57, 62; *James v. Lichfield*, L. R., 9 Eq. 51; *Fry*, s. 493; *Dart V. & P.* 664, 669, 686.

(r) *Martin v. Pycroft*, 2 De Gex, M. & G. 785; *Dart V. & P.* 663, 666.

(s) *Middleton v. Greenwood*, 2 De Gex, J. & S. 142.

(t) *Legal v. Miller*, 2 Ves. 299; *Price v. Dyer*, 17 Ves. 356, 364; *Robinson v. Page*, 3 Russ. 121; *Sugg. V. & P.* 165 (14th ed.); *Dart V. & P.* 669.

(u) *Milnes v. Grey*, 14 Ves. 450; *Darby v. Whittaker*, 4 Drew. 134; *Tillett v. Charing Cross Bridge Co.*, 26 Beav. 419; 28 L. J., Ch. 863; *Fry*, ss. 215, 216, 218; see also *Collins v. Collins*, 26 Beav. 306; 28 L. J., Ch. 184; *Jackson v. Jackson*, 1 Sm. & Giff. 184; *Vickers v. Vickers*, L. R., 4 Eq. 529; 36 L. J., Ch. 946.

(x) *Collier v. Mason*, 25 Beav. 200; *Ormes v. Headol*, 2 Giff. 166; 30 L. J., Ch. 1; *Blackett v. Bates*, 34 L. J., Ch. 515; 2 H. & M. 270, 610; L. R., 1 Ch. Ap. 117.

(y) *Brace v. Wehnert*, 25 Beav. 348. But see *Mayor, &c. of London v. Southgate*, 38 L. J., Ch. 141.

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When Con-
tract condi-
tional on
Lessor's
ability.

If a contract for a lease be made conditional on the lessor's ability to grant it, an action for specific performance cannot be supported without proof of the lessor's ability; or that he has received part of the agreed premium, and interest on the balance, and so in effect estopped himself from relying on the condition (g). But the plaintiff may be entitled to an equitable lien on the land for the sums expended on the faith of the agreement, with interest thereon, and to consequential relief (a). Where the lessor's consent or licence is necessary to an assignment of a lease, it is the vendor's duty to obtain it, and if he cannot do so before the commencement of an action for specific performance he cannot maintain such action (b). The same rule applies on the sale of a public house as a going concern, when the plaintiff is not in a condition to obtain a transfer of the licences at or before the time fixed for completion of the sale (c).

Agreement
not enforce-
able for Un-
certainty.

An agreement to take a lease of a house, if put into thorough repair, and the drawing-room "handsomely decorated according to the present style," is too uncertain to be enforced by a decree for a specific performance (d); but where a lessor agreed to let a house, and to put it in decorative repair, and afterwards refused to fulfil his contract, the court, at the instance of the lessee, who had entered into possession, decreed specific performance of the agreement, with an inquiry whether the agreement as to decorative repair had been performed; and if not, decreed that the lessor should compensate the lessee in damages (e). In *Faulkner v. Llewellyn*, B. agreed with C. to take a lease of a house which C. was building, when it was "complete, finished, and fit for habitation:" B. took possession, but afterwards found various objections to it, contending that it was not properly finished. The matter being referred to an expert, he reported that, although there might be some objections, yet the house was "complete, finished, and fit for habitation." A decree for a specific performance of the agreement was granted (f). Where terms for letting farms provided that all materials required for buildings proposed to be built, or that might thereafter be built, should be led at the expense of the tenant; that the landlord should drain, the tenant leading tiles; that gates, buildings, "&c." should be left in repair by the tenant, the landlord finding new gates when required; and the landlord reserved to himself all customary rights and reser-

(g) *Abbot v. Blair*, 8 W. R. 672; *Bauman v. Matthews*, 4 L. T., N. S. 783, L. C.

(a) *Middleton v. Magnay*, 2 H. & M. 233; 12 W. R. 706; *Hindley v. Emery*, L. R., 1 Eq. 52; 35 L. J., Ch. 6; *Turner v. Marriott*, L. R., 3 Eq. 744; 15 W. R. 420.

(b) *Forrer v. Nash*, 35 Beav. 167; 14 W. R. 8; and see post, Ch. XVII., Sect. 2.

(c) *Day v. Lühke*, L. R., 5 Eq. 336; 37

L. J., Ch. 330; *Claydon v. Green*, L. R., 3 C. P. 511; 37 L. J., C. P. 511; *Modlen v. Snowball*, 4 De Gex, F. & J. 143.

(d) *Taylor v. Portington*, 7 De Gex, M. & G. 328; and see *Jeffery v. Stephens*, 6 Jur., N. S. 947; 8 W. R. 427, M. R.

(e) *Samuda v. Lawford*, 4 Giff. 42; 8 Jur., N. S. 730.

(f) *Faulkner v. Llewellyn*, 31 L. J., Ch. 549; 11 W. R. 1055; 12 W. R. 193.

vations, such as liberty to cut and plant timber, search for and work mines or minerals, "&c." allowing the tenant for any reasonable damages:—It was held, that these stipulations did not render the agreement uncertain, so as to be incapable of being enforced specifically (*g*).

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The court will not decree specific performance of part of a contract (*h*), unless the residue has been already performed (*i*), or the unperformed part is separable and divisible from the rest, and does of itself form a complete contract. Thus, in *Green v. Low*, the owner of a plot of ground agreed to grant a lease of it to A. as soon as the latter had erected a villa thereon, but it was stipulated that if A. should not perform the agreement on his part, the agreement for a lease was to be void, and that the owner might re-enter. A. was to insure in a particular way, and he was to have the option of purchasing the fee within two years, upon certain terms. A. erected the villa, but insured in a wrong office, and in a wrong name. It was held that the contract for a lease was independent of the option to purchase, and that notwithstanding the forfeiture of the first, the latter still subsisted, and a specific performance of the contract for sale was decreed (*k*). And where a landlord agreed to give a builder leases of successive plots of land as the houses upon each of them should be built up to a successive stage, it was held that the agreement was in its nature separable, and could be enforced as to some of the plots by an assignee of the builder (*l*). A tenant for years, with an option of purchasing the fee, must not only give due notice but also on the proper day pay or tender the purchase-money; that being a condition precedent (*m*). Such a notice may be given to the infant heir of the lessor, and will constitute a valid contract, which may be enforced in equity notwithstanding the infant cannot give a discharge for the purchase-money (*n*).

No degree for Performance of Part of a Contract.
Exceptions.

Where one party to an agreement trifles, or shows backwardness in performing his part of it, equity will not decree a specific performance in his favour, especially if the circumstances and situation of the other party are materially altered in the meantime (*o*), or if the contract be in anywise unilateral, as where there is an option to purchase,

After unnecessary Delay by Plaintiff.

(*g*) *Parker v. Taswell*, 2 De G. & J. 559; 27 L. J., Ch. 812; and see *Norris v. Jackson*, 3 Giff. 396; 8 Jur., N. S. 930.

(*h*) *Fry*, Chap. XV.; *Dart V. & P.* 680; *Ogden v. Fossick*, 32 L. J., Ch. 73; 11 W. R. 128; *Scottish North-Eastern R. Co. v. Stewart*, 3 Macq. H. L. Cas. 382.

(*i*) *Hope v. Hope*, 22 Beav. 351.

(*k*) *Green v. Low*, 22 Beav. 625.

(*l*) *Wilkinson v. Clements*, L. R., 8 Ch. 96; 42 L. J., Ch. 38; 27 L. T. 834.

(*m*) *Weston v. Collins*, 34 L. J., Ch. 353; 13 W. R. 610; *Ld. Ranelagh v. Melton*,

2 Dr. & Sm. 278; 34 L. J., Ch. 227.

(*n*) *Woods v. Hyde*, 31 L. J., Ch. 295; 10 W. R. 339.

(*o*) *Hayes v. Caryll*, 1 Bro. P. C. 126; *Norris v. Jackson*, 1 Johns. & H. 319; 7 Jur., N. S. 540; *Dart V. & P.* 701, 702; *Heaphy v. Hill*, 2 Sim. & Stu. 29; *Southcomb v. Bp. of Exeter*, 6 Hare, 213, 218; *Chesterman v. Mann*, 9 Hare, 206; *Eads v. Williams*, 4 De Gex. M. & G. 691; *Walters v. Northern Coal Mining Co.*, 5 De Gex. M. & G. 629; *Sneeshy v. Thorne*, 1 Jur., N. S. 1058; *Fry*, s. 736.

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or a right of renewal, or any other condition in favour of one party and not of another (*p*). As a general rule, a party cannot call upon a court of equity for a specific performance, unless he has shown himself ready, desirous, prompt and eager (*q*). "It would be dangerous to permit parties to lie by, with a view to see whether the contract will prove a gaining or losing bargain, and according to the event either to abandon it, or, considering time as nothing, to claim a specific performance, which is always the subject of discretion" (*r*). But it is otherwise where the defendant has entered into possession, and paid the rent regularly for fourteen or fifteen years (*s*), although the mere payment of rent is not enough (*t*). In other cases the rule will be relaxed where the strict application of it would work injustice (*u*), as where a landlord has sent a draft lease to a tenant who fails to return it (*r*), or where any objection on the ground of delay has been waived (*y*). If a vendor of leaseholds makes time the essence of the contract, and on the day specified for the completion of the purchase insists upon the money being paid, he may, in the event of the purchaser's neglect, omission or refusal to comply with such request, avail himself of a power in the contract to annul the sale (*z*). So where the purchaser stipulates for possession (which includes a good title) on or before a certain day, of a leasehold house for his own residence, if the vendor fail to make out a good title by the day named, the purchaser may refuse to take possession, and rescind the contract (*a*).

*Urgency in
case of Mines;*

In contracts for the lease of working mines, the time for completion, whether specified or not, is, from the fluctuating nature of the property, considered as of the essence of the contract, and the intended lessor is bound to use his utmost diligence to complete, and in default thereof the proposed lessee may, by notice, fix a reasonable time for completion, and, in case of noncompliance therewith, may rescind the contract (*b*).

*or Leases by
Ecclesiastical
Corporations,
&c.*

Time will be considered of the essence of the contract in contracts with ecclesiastical corporations for leases, because every day changes the value and nature of the thing to be granted, and also the persons

(*p*) Fry, s. 733, citing *Brooke v. Garrod*, 27 L. J., Ch. 226.

(*q*) *Milward v. Earl of Thanet*, 5 Ves. 720, n.; 2 Tudor L. C. Eq. 443 (2nd ed.).

(*r*) *Alley v. Deschamps*, 13 Ves. 225; *South-Eastern R. Co. v. Knott*, 10 Hare, 122; *Firth v. Greenwood*, 1 Jur., N. S. 866.

(*s*) *Sharp v. Milligan*, 22 Beav. 606; 23 Beav. 419; *Clarke v. Moore*, 1 Jon. & L. 723; *Cartan v. Bury*, 10 Ir. Ch. R. 387; *Fry*, s. 738.

(*t*) *Davenport v. Walker*, 34 L. T. 168; *Powis v. Ld. Dymovor*, 35 L. T. 940.

(*u*) *Walker v. Jefferys*, 1 Hare, 353:

Jones v. Jones, 12 Ves. 188; 2 Tudor L. C. Eq. 443 (2nd ed.).

(*x*) *Shepherd v. Walker*, L. R., 20 Eq. 659; 33 L. T. 17.

(*y*) Fry, ss. 745, 750; *Hudson v. Bartram*, 3 Mad. 440; *King v. Wilson*, 6 Beav. 124; *Ex parte Gardner*, 4 Y. & C. Ex. 503.

(*z*) *Hudson v. Temple*, 29 Beav. 536; 30 L. J., Ch. 251; 2 Tudor L. C. Eq. 452 (2nd ed.).

(*a*) *Tilley v. Thomas*, L. R., 3 Ch. Ap. 61; 16 W. R. 166.

(*b*) *Macbryde v. Weekes*, 22 Beav. 533; *Sharp v. Wright*, 28 Beav. 150.

who are to participate in the fine or premium to be paid (*c*): also in other cases where the property is of fluctuating value (*d*), or the property is wanted for commercial purposes (*e*).

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Specific performance will not be decreed at the instance of a tenant who, having entered into possession under an agreement for a lease, has committed waste, or omitted to repair, or done other acts which would *clearly* amount to breaches of the covenants to be contained in the lease, and for which the lessor would have been entitled to re-enter and determine the lease, pursuant to a proviso for re-entry to be therein contained (*f*). But if such breaches are disputed, and the evidence thereof is not clear and cogent, or if it appears doubtful whether such breaches have not been waived by the receipt of subsequent rent or otherwise, the court will decree a specific performance, and direct the lease to be ante-dated, with liberty for the landlord to proceed by ejectment, action of covenant, or otherwise, for such alleged breaches, the tenant undertaking to admit in any such action that the lease was executed on the day it bears date (*g*). In such case the tenant must insure *immediately* after the execution of the lease, if it contain a covenant to insure, &c. (*h*). Acts creating a nuisance to the landlord, for which a remedy may be had in damages, but which do not occasion a forfeiture, are no ground for refusing a specific performance (*i*). A proviso against assignment to be contained in the lease will prevent an assignment of the agreement itself (*k*). But the benefit of such proviso may be waived (*l*).

When the Tenant has committed Acts of Forfeiture.

If not clearly proved Lease ante-dated.

Proviso against Assignment.

SECT. 6.—Specific Performance by or against particular Persons.

The person to maintain an action for specific performance must be either, 1st, the lessor himself or his representatives in interest; or, 2ndly, the lessee himself or his representatives in interest. If, however, the contract be entered into by a tenant for life in due exercise of a power, specific performance will, it is conceived, be decreed at the suit of a remainderman (*m*), except where there is an undue exercise of the power (*n*). Where A. agreed to grant B. a lease, and before

Who may sue for a Specific Performance generally.

(*c*) *Cartor v. Dean of Ely*, 7 Sim. 211.
(*d*) *Doloret v. Rothschild*, 1 Sim. & Stu. 590.

(*e*) 2 Tudor L. C. Eq. 453 (2nd ed.).

(*f*) *Weatherall v. Geering*, 12 Ves. 504;
Hill v. Barclay, 18 Ves. 63; *Nesbitt v. Meyer*, 1 Swans. 223; *Lewis v. Bond*, 18 Beav. 86; *Gregory v. Wilson*, 9 Hare, 683; *Nunn v. Truscott*, 3 De Gex & Sm. 304; *Dart V. & P.* 703; *Fry*, s. 642.

(*g*) *Fry*, s. 646; *Pain v. Coombs*, 3 Sm. & Giff. 449; 1 De Gex & J. 34; 3 Jur., N. S. 307, 847; *Lilley v. Leigh*, 3 De Gex & J. 204; *Rankin v. Lay*, 2 De Gex, F. &

J. 65; 29 L. J., Ch. 734; *Rogers v. Tudor*, 6 Jur., N. S. 692; *Loyntz v. Fortune*, 27 Beav. 393; *Broune v. Marquis of Sligo*, 10 Ir. Ch. R. 1; *Blackett v. Bates*, 2 H. & M. 270; 31 L. J., Ch. 515.

(*h*) *Doe d. Darlington v. Ulph*, 13 Q. B. 204.

(*i*) *Gordon v. Smart*, 1 Sim. & Stu. 66.

(*k*) *Weatherall v. Geering*, 12 Ves. 504.

(*l*) *Dowell v. Dew*, 1 You. & Coll. C. C. 345; *Fry*, s. 129.

(*m*) *Shannon v. Bradshad*, 1 Sch. & Lef. 62, 65; *Loze v. Swift*, 2 Ball & B. 529.

(*n*) *Ricketts v. Bell*, 1 De Gex & S. 335.

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Parties to Agreement for Lease.

Against Executors of Lessee.

Where a person who has agreed to take a lease dies, the executors admitting assets may be compelled to take a lease, the covenants being so qualified as that the executors shall be no further liable therein than they would have been on the covenants which ought to have been entered into by their testator (*p*).

Where Action necessary to obtain Possession.

The court in one case refused to enforce performance of an agreement by a person out of possession to grant a present lease to a person who was at the time apprised that he could not obtain possession except by a suit (*q*). It seems, too, that a lessee will not be compelled to assign his lease (containing a covenant not to assign without licence) where the agreement to assign is made "subject to the landlord's approval," although the landlord unreasonably withholds his licence, contrary to his covenant not to do so, contained in the lease (*r*).

Infants.

An infant cannot sue or be sued for a specific performance (*s*).

Married Women.

A married woman may bind her separate estate, but not herself personally, by a contract for a lease; the action must be against her and her trustees (*t*).

Lunatics.

A contract to grant or take a lease may be enforced against a lunatic, if made during a lucid interval (*u*).

Felons.

The court has refused to execute an agreement to grant a lease to a man who has committed felony (*x*); but the terms of the statute 33 & 34 Vict. c. 23, by which forfeiture for felony is abolished, seem to point to such an agreement being enforceable by and against the trustees of the felon's property.

Insolvents.

The insolvency of the intended tenant is a valid ground for resisting the specific performance of an agreement for a lease (*y*).

Bankrupts.

The bankruptcy of the intended tenant does not determine the contract for a lease (*z*): but it vests in his trustee in bankruptcy,

(*o*) *Long v. Dowering*, 33 Beav. 585.
(*p*) *Phillips v. Everard*, 5 Sim. 102; *Stephens v. Hotham*, 1 K. & J. 571; *Page v. Broom*, 3 Beav. 36; Fry, s. 121; Sug. V. & P. 209 (14th ed.).

(*q*) *Bayly v. Tyrrell*, 2 Ball & B. 358; Fry, s. 132; but now see 8 & 9 Vict. c. 106, s. 6; ante, 3.

(*r*) *Lehmann v. M'Arthur*, L. R., 3 Ch. Ap. 496; 37 L. J., Ch. 626.

(*s*) *Flight v. Bolland*, 4 Russ. 298; *Hoggarth v. Scott*, 1 Russ. & Myl. 293; Dart V. & P. 670; but see *Woods v. Hyde*, 31 L. J., Ch. 296.

(*t*) Fry, s. 157; Dart V. & P. 640, 642; *Gaston v. Frankum*, 2 De Gex & S. 561; *Hulme v. Tenant*, 1 Bro. C. C. 16; *Murray v. Barbe*, 3 Myl. & K. 209; *Johnson v. Gallagher*, 3 De Gex, F. & J. 494, 519;

30 L. J., Ch. 298; *Picard v. Hine*, L. R., 5 Ch. Ap. 274.

(*u*) Fry, s. 161; 1 Ves. jun. 82; but see *Hall v. Warren*, 9 Ves. 605. As to contract for lease with committee of lunatic, see 16 & 17 Vict. c. 70; *Re Wynne*, L. R., 7 Ch. 229.

(*v*) *Willingham v. Joyce*, 3 Ves. 169.

(*y*) *Buckland v. Hall*, 8 Ves. 92; *Neale v. Mackenzie*, 1 Keen, 474; *Price v. Asheton*, 1 Y. & C. 441; *O'Herlihy v. Hedges*, 1 Sch. & Lef. 123; *M'Nally v. Gradwell*, 16 Ir. Ch. R. 612.

(*z*) *Buckland v. Papillon*, L. R., 1 Eq. 477; 35 L. J., Ch. 387; 36 Id. 81; L. R., 2 Ch. Ap. 67; and see *Kell v. Nokes*, 14 W. R. 908; *Mackley v. Pettenden*, 1 B. & S. 178; 30 L. J., Q. B. 226.

who may disclaim it (*a*). If the trustee elect to take a lease, he must enter into such covenants as the bankrupt himself would have had to enter into (*b*): or he may assign the agreement for a lease to a purchaser, who may enforce a specific performance, unless indeed the agreement contains a proviso against alienation (*c*). If the trustee elect not to take a lease, the court will not enforce the agreement at the instance of the bankrupt (*d*). Where a person agreed to grant a lease to A., his executors, administrators and assigns, upon certain conditions, and A. assigned his interest in the contract to B., and afterwards became bankrupt, it was held that B., on performing the conditions, had a right to enforce the agreement specifically (*e*).

CH. IV. SEC. 6.
*Parties to
Agreement for
Lease.*

If there has been a part performance of a contract for a lease by a corporation, the court will decree a specific performance of it, though the contract was not under the common seal of the corporation (*f*).

Corporations.

It has been held, that the commissioners of woods and forests are neither entitled to sue nor liable to be sued for the specific performance of contracts entered into with or by them (*g*).

SECT. 7.—*Form of Lease, and how settled after a Decree.*

Questions as to the validity of the contract, and as to whether it is inequitable to enforce its specific performance, must be determined at the hearing; questions of title are referred to chambers (*h*). The court, on pronouncing a decree for specific performance of an agreement to grant or to take a lease, will not usually enter into the question as to what covenants the lease shall contain. But it will do so where the nature of the decree to be made depends upon that question (*i*). In ordinary cases any such question must, if necessary, be settled in chambers: and for that purpose one party must prepare the draft of a lease, and hand a copy to the other, that such alterations may be made as may be deemed necessary: and when the parties cannot agree upon any point, it may be brought before the judge's chief clerk, who will settle the draft lease in such manner as he thinks fit (*k*). Either party may appeal to the judge, and apply to him to vary the terms of the draft lease as settled by the chief clerk: but at the peril of costs (*l*).

Form of
Lease—how
settled.

(*a*) Post, Chap. VII., Sect. 7.

(*b*) *Powell v. Lloyd*, 2 Y. & J. 372.

(*c*) *Crosbie v. Troke*, 1 Myl. & K. 431; *Morgan v. Rhodes*, Id. 495; *Buckland v. Papillon*, *supra*.

(*d*) *Brook v. Hewett*, 3 Ves. 255; *Weatherall v. Geering*, 12 Ves. 504.

(*e*) *Morgan v. Rhodes*, 1 Myl. & K. 435.

(*f*) *Steven's Hospital v. Dias*, 15 Ir. Ch. R. 405; *Wilson v. West Hartlepool R. Co.*, 34 L. J., Ch. 241.

(*g*) *Nurse v. Id. Seymour*, 13 Beav. 254.

(*h*) *Hood v. Oglander*, 34 Beav. 513.

(*i*) *Blakesley v. Wheildon*, 1 Haro, 176, 183 (where see form of minutes giving such directions); *Reeves v. Greenwich Tanning Co.*, 2 H. & M. 54; *Onions v. Cohen*, 2 H. & M. 354; 34 L. J., Ch. 338; *Beadel v. Pitt*, 11 Jur., N. S. 162; 13 W. R. 287.

(*k*) *Jenkins v. Green*, 27 Beav. 440; 28 L. J., Ch. 817, 820; *Parish v. Sleeman*, 1 De Gex, F. & J. 326; 29 L. J., Ch. 53.

(*l*) *Parish v. Sleeman*, *supra*; *Sharp v. Milligan*, 23 Beav. 419.

CH. IV. SEC. 7.
Decree for a
Lease.

"Usual Covenants."
Church v. Brown.

The question what covenants the parties to an agreement for a lease are entitled to have inserted in the lease itself is of great importance (*m*), but it seems clear, that whether the agreement for the lease stipulates for usual covenants or not, the law implies that usual covenants shall be inserted (*n*). The question what are usual covenants appears to be one of fact, not of law, in a case where the parties stipulate for usual covenants (*o*), but to be a question of law where the contract for the lease is silent as to covenants (*p*).

What are "usual" covenants depends, in some measure, on the practice of conveyancers, which varies from time to time, so that what was a usual covenant in Lord Eldon's time would not necessarily be held to be a usual covenant now; and also depends upon the character of the property agreed to be demised, so that what would be a usual covenant in a contract for a mining, would not necessarily be held to be so in a contract for an agricultural lease.

Rent. The covenant to pay rent has been held to be a usual covenant in the construction of a lease under a power (*q*), and seems indeed to be in all cases a usual covenant.

Repair. The covenant to repair seems clearly usual (*r*), and it has been twice held on the construction of a contract for a lease (*s*), that the exception which has for some time been commonly inserted in leases, in case of destruction of the premises by fire, is not "usual."

To pay Taxes. A covenant by the tenant to pay rates and taxes ought clearly to be inserted, if the contract for the lease stipulate for a *net* rent (*t*); but this is not so much because the covenant is usual, as because the words "net rent" imply it; and the better opinion seems to be—though there is no express decision to that effect—that amongst "usual covenants" must be reckoned a covenant by the tenant "to pay taxes, except such as are usually payable by the landlord" (*u*).

Not to assign or underlet. The covenant not to assign or underlet, without the leave of the lessor, is not a usual covenant (*x*), whether it be restricted by such

(*m*) See the question carefully discussed, Dav. Prec. vol. 5, pt. 1, p. 51 (ed. 3, A.D. 1876), where it is said that the result of the authorities is that the only covenants which the lessor can insist on as "usual covenants" are covenants to pay rent and taxes, and to repair and to allow the lessor to enter and view the state of repair, with a proviso for re-entry on breach of the covenant to pay rent; and that the only covenant which the lessee can insist on is the usual qualified covenant for quiet enjoyment; a passage cited with approval by Jessel, M. R., in *Hampshire v. Wickens*, L. R., 7 Ch. D. 555, and *infra*, p. 113 (*y*).

(*n*) *Church v. Brown*, 15 Ves. at p. 265; *Proper v. Parker*, 3 My. & K. 280.

(*o*) In *Bennett v. Womack*, 7 B. & C. 627, and in *Brookes v. Drysdale*, L. R., 3 O. P. D. 52, post, it was assumed to be a question of fact.

(*p*) *Church v. Brown*, *ubi supra*.

(*q*) *Taylor v. Horde*, 1 Burr. 60.

(*r*) *Kendall v. Hill*, 6 Jur. N. S. 968.

(*s*) *Id.*; *Sharp v. Milligan*, 23 Beav. 419.

(*t*) *Bennett v. Womack*, 3 C. & P. 96; 7 B. & C. 627.

(*u*) *Hampshire v. Wickens*, *infra*.

(*x*) *Church v. Brown*, 15 Ves. 258; *Henderson v. Hay*, 3 Bro. C. C. 632; *Vere v. Loreden*, 12 Ves. 179; *Buckland v. Papillon*, L. R., 2 Ch. 67; 36 L. J., Ch. 83.

words as “such leave not to be withheld to a respectable and responsible tenant,” or not (*y*). CH. IV. SEC. 7.
Decree for a
Lease.

A covenant not to carry on a particular trade, without the leave of the lessor, is not a usual covenant (*z*), and a contract for a lease of a house to contain usual covenants between landlord and tenant, and a covenant not to convert the house into a school, does not imply a restrictive covenant upon trading generally (*a*). Not to trade.

In *Bennett v. Womack* (*b*), the defendant contracted for the purchase of the lease of a public-house described as held “upon usual and common covenants.” In an action for not completing, the judge directed the jury to find for the plaintiff upon evidence that six out of ten public-house leases contained the proviso for re-entry if the lessee should carry on any other business than that of a victualler, which proviso had been objected to by the defendant as uncommon (*b*); and the court refused to enter a non-suit. To use for
particular
purpose.

A contract for a lease (to contain usual covenants) of land on which the lessee was to build and not to use the premises for any other purpose than a glass manufactory, was held not to entitle the lessor to an affirmative covenant by the lessee to use the premises for such purpose (*c*).

Where there was an agreement to take an assignment of a public-house lease subject to covenants “common and usual in leases of public-houses,” and the lease was found to contain a condition that every underlease, &c. should be left with the ground landlord’s solicitor, it was held, the jury having found as a fact that the condition was not usual, that the condition was a covenant within the contemplation of the agreement, and that the purchaser was not bound to complete (*d*). Registration
of Sublease
with Ground
Landlord.

The whole question was considered in 1878 by Jessel, M. R., in *Hampshire v. Wickens* (*y*). In that case the defendant agreed to accept a lease of a dwelling-house in London “on all usual covenants and provisoes,” but declined to accept the lease proposed to be granted on the ground that such lease contained a covenant by the lessee “that he would not, without the previous consent of the lessor, assign, underlet, or part with the possession of the said premises, but such consent not to be withheld to a respectable and responsible tenant,” &c. Jessel, M. R., after ruling that “if no objection can be made to an unrestricted covenant against assignment none can be made to a covenant that is restricted,” held that the agreement could not be specifically enforced, and cited with approval the passage from David- List of “Usual
Covenants.”
Hampshire v.
Wickens.

(*y*) *Hampshire v. Wickens*, L. R., 7 Ch. D. 555; 47 L. J., Ch. 243; 26 W. R. 491, per Jessel, M. R.

(*z*) *Proper v. Parker*, 3 Myl. & K. 280.

(*a*) *Van v. Corps*, 3 Myl. & K. 269.

(*b*) 7 B. & C. 627.

(*c*) *Doe d. Marquis of Dute v. Guest*, 15 M. & W. 160.

(*d*) *Brookes v. Drysdale*, L. R., 3 C. P. D. 52; 37 L. T. 467; 26 W. R. 331.

CH. IV. SEC. 7 son's Precedents in Conveyancing, of which an abstract has already
Decrees for a been given (g).
Lease.

Proviso for
Re-entry.

Hodgkinson v.
Crowe.

In *Hodgkinson v. Crowe* (h), it was laid down that, as a "usual" term, the proviso for re-entry is applicable to the breach of the covenant to pay rent, and to the breach of no other covenant. In that case there was an agreement for a lease of mines to contain numerous terms succinctly stated, and amongst them "all usual and customary mining clauses." Bacon, V.-C., held that the intending landlord was entitled to have inserted in the lease a proviso for re-entry on non-payment of rents and royalties, "or if and whenever there should be any breach of the covenants and agreements in the lease contained." But this ruling was reversed on appeal; and James, L. J., expressed the opinion that the clause of forfeiture for breach of covenant generally was "a most odious stipulation, offensive, and oppressive beyond measure."

Re-entry on
Bankruptcy.

A proviso for re-entry on the bankruptcy of the lessee has been held to be usual in the case of a contract for a lease of a hotel (i), but not of a contract for a mining lease (k), or for a farming lease (l). There is strong authority for saying that it is not "usual" (m).

Proviso for
Exclusion of
Agricultural
Holdings Act.

A proviso for the exclusion of the Agricultural Holdings Act is now commonly inserted in agricultural leases; but such a proviso would not, it is conceived, be held "usual" in the legal sense, inasmuch as every person is presumed to know that the statute applies to every contract for an agricultural tenancy, unless excluded by writing.

Concluding
Remarks on
"Usual Covenants."

It is to be observed that in the majority of the cases (n) the question was decided by an equity judge without a jury. Was it so decided as a question of fact or of law? Is evidence admissible? Would a judge be bound to direct a jury to find in accordance with the equity decisions? These are open questions upon the authorities, but it is submitted that what is usual must in every case be a question of fact to be decided upon evidence if either party so require, that upon an action for specific performance in the Chancery Division there would be some reason for applying for a jury under Order XXXIX., Rule 26, and that such a jury might find independently of the equity decisions.

(g) Ante, 112 (m).

(h) L. R., 10 Ch. 622; 44 L. J., Ch. 680; 33 L. T. 388; 23 W. R. 886. The Settled Estates Act, 1877, ss. 4, 46 (pp. 5, 31, ante), requires only a condition of re-entry on non-payment of rent. See further on this subject, p. 302, post.

(i) *Haines v. Burnett*, 27 Beav. 500; 29 L. J., Ch. 289.

(k) *Hodgkinson v. Crowe*, L. R., 19 Eq. 591; 44 L. J., Ch. 238; 33 L. T. 122.

(l) *Hyde v. Warden*, L. R., 3 Ex. D. 72; 47 L. J., Ch. 121—C. A.

(m) *Hyde v. Warden*, supra; *Hampshire v. Wickens*, supra, where it is said that *Haines v. Burnett*, supra, "must be treated as distinctly overruled" by *Hodgkinson v. Crowe*, supra. But note, that in *Haines v. Burnett* the words were, "such covenants as are usually inserted in leases of property of a similar description."

(n) Only in *Bennett v. Womack*, 7 B. & C. 627, and *Brookes v. Drysdale*, L. R., 3 C. P. D. 52, was the question submitted to a jury.

CHAPTER V.

THE LEASE.

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SECT. 1.—Definition of "Lease."

A LEASE is a conveyance by way of demise of lands or tenements, for life or lives, for years, or at will, but always for a less term than the party conveying himself has in the premises; for if it be for the whole interest, it is an assignment and not a lease (*a*); although it may for some purposes, as between the parties thereto, operate as an underlease, when that is necessary to carry into effect their real intentions (*b*). A lease is usually made in consideration of rent, or some other annual recompense rendered to the party conveying the premises—who is called the lessor or landlord—by the party to whom they are conveyed or let, who is called the lessee or tenant (*c*).

A lease for years is a contract for the *exclusive* possession of lands or tenements for some certain number of years or other determinate period (*d*). An instrument is not a demise or lease, although it con-

Distinction
between Lease
and Licence
to Use.

(*a*) *Cole Ejec.* 223; *Thorne v. Woolcombe*, 3 B. & Ad. 595; 4 M. & Gr. 145, n.; 5 M. & Ry. 157—162; *Palmer v. Edwards*, 1 Doug. 187; *Freece v. Corrie*, 5 Bing. 24; *Parmenter v. Webber*, 8 Taunt. 593; *Pascoe v. Pascoe*, 3 Bing. N. C. 898; *Barret v. Rolph*, 14 M. & W. 348; *Cottee v. Richardson*, 7 Exch. 143, 147, 151; *Beardman v.*

Wilson, L. R., 4 C. P. 57; 17 W. R. 54.

(*b*) *Cottee v. Richardson*, 7 Exch. 151; *Baker v. Gostling*, 1 Bing. N. C. 19, 246; *Pollock v. Stacy*, 9 Q. B. 1033; *Williams v. Hayward*, 1 E. & E. 1040.

(*c*) 2 Blac. Com. 317; *Shep. Touch.* 266.

(*d*) *Reg. v. Morrish*, 32 L. J., M. C. 245.

CH. V. SEC. 1.
*Definition of
 "Lease."*

*Distinction
 between Lease
 and Licence
 to Use—cont.*

tains the usual words of demise, if its contents show that such was not the intention of the parties. Thus where A. agreed with B. to let him have the use of the Surrey Gardens and Music Hall, Newington, for four days, at 100*l.* per day, for the purpose of giving a series of four grand concerts and day and night fêtes; but from the terms of the agreement it was evident that A. was not to part with the possession of the premises during those four days: this was held no demise (*e*). So where A., an owner of lace machines, paid 12*s.* a-week to B. for permission to place the machines in a room in B.'s factory, and for free ingress and egress to the room for himself and workmen for the purpose of working and inspecting the machines; B. supplied the necessary steam power for working the machines, payment for which was included in the above sum: it was held that there was no demise to A. of any part of the room, and no relation of landlord and tenant created between him and B. (*f*). Where an incorporated canal company by deed granted to the plaintiff the sole and exclusive right or liberty of putting or using pleasure boats for hire on their canal, it was held that the grant did not create such an interest or estate in the plaintiff as to enable him to maintain an action in his own name against a person who disturbed his right of putting and using pleasure boats for hire on the canal (*g*). A licence to fasten a coal-barge to moorings fixed in a river, until determined by a month's notice—the licensee to pay 30*l.* annually towards the expense of the moorings—does not amount to a demise nor give the licensee an exclusive right to the use of the moorings, nor render him liable to be rated as the occupier of part of the bed of the river (*h*). The grant by a riparian proprietor of a right to take water from a natural stream on which his land abuts, operates as a licence in gross, and not as a demise, and will not enable the grantee to maintain an action in his own name against a wrongdoer (*i*). The gratuitous loan of a shed for a particular purpose operates as a mere licence revocable at any time (*k*). A licence to get all the copperas stone which may be found in part of a manor, for twenty-one years, at the yearly rental of 25*l.*, is not a demise, and will not support a distress for the rent (*l*). A demise of a fire-brick manufactory, for twenty-one years, with powers during such term to dig fire-clay from under certain adjoining land, does not amount to a lease, but only to a licence as to the fire-clay, and will not prevent the

(*e*) *Taylor v. Caldwell*, 3 B. & S. 826; 32 L. J., Q. B. 164.

(*f*) *Hancock v. Austin*, 14 C. B., N. S. 634; 32 L. J., C. P. 252.

(*g*) *Hill v. Tupper*, 2 H. & C. 121; 32 L. J., Ex. 217.

(*h*) *Watkins v. Overseers of Milton next Gravesend*, L. R., 3 Q. B. 350; 37 L. J., M. C. 73; *Grant v. Oxford Local Board*, L. R., 4 Q. B. 9; 17 W. R. 76; see also

London and North-Western R. Co. v. Buckmaster, L. R., 10 Q. B. 444; 44 L. J., M. C. 180; 33 L. T. 329; *Cory v. Bristol*, L. R., 2 App. Cas. 262.

(*i*) *Stockport Waterworks Co. v. Potter*, 3 H. & C. 390.

(*k*) *Williams v. Jones*, 3 H. & C. 256; 33 L. J., Ex. 297.

(*l*) *Ward v. Day*, 4 B. & S. 337; 5 Id. 359; 33 L. J., Q. B. 3, 254.

licensor from digging parts of such fire-clay, or authorizing others to do so, or otherwise dealing with such adjoining land in a manner not inconsistent with the licence (*m*).

A licence to hunt or shoot over land, although it does not give the licensee any estate in the land (*n*), amounts to the grant of an incorporeal hereditament; and an assignee of the reversion may sue for breaches of any covenant which touches or relates to the land and runs with it (*o*). But the licence to convey an estate must be by deed; for a parol licence to exercise a right of way or other easement over land of the licensor, whether anything was paid for such licence or not, may be revoked at any time, either expressly or by doing some act inconsistent with such licence (*p*). Any such licence is determined by the death of the licensor or of the licensee, or by an assignment of the land over which, or of the subject-matter in respect of which, the easement or privilege is to be enjoyed (*q*). But an action lies for a breach of contract to grant an incorporeal hereditament, although the contract be not under seal (*r*).

These things must concur in the making of every good lease: General Re-

1. There must be a lessor, who is able to make the lease.
2. There must be a lessee, who is capable of taking the thing demised.
3. There must be a thing demised which is demisable.
4. If the thing demised or the term expressed to be granted be not grantable without a deed, or the party demising be not able to grant without a deed, the lease must be made by deed, containing a sufficient description of the lessor, the lessee, the thing demised, the term granted, and the rent and covenants: and all necessary circumstances, as sealing, delivery, &c., must be observed.
5. If it be a lease for years, it must have a certain commencement, at least when it takes effect in interest or possession, and a certain determination, either by an express enumeration of years, or by reference to a certainty that is expressed, or by reducing it to a certainty upon some contingent event, which must happen before the death of the lessor or lessee.
6. There must be an acceptance of the thing demised, and of the estate by the lessee (*s*).

(*m*) *Carr v. Benson*, L. R., 3 Ch. Ap. 524.

(*n*) *Bird v. Great Eastern R. Co.*, 19 C. B., N. S. 268.

(*o*) *Hooper v. Clark*, 8 B. & S. 160; L. R., 2 Q. B. 200; 36 L. J., Q. B. 79.

(*p*) *Wood v. Leadbitter*, 13 M. & W. 838; *Hyde v. Graham*, 1 H. & C. 693; *Wakley v. Froggatt*, 2 H. & C. 669; *Waterflow v.*

Bacon, L. R., 2 Eq. 514; *Gale*, 74, 75.

(*q*) *Coleman v. Foster, Bart.*, 1 H. & C. 37; *Roberts v. Rose*, 3 H. & C. 162; 33 L. J., Ex. 1, 241; 35 Id. 62; *Wallis v. Harrison*, 4 M. & W. 538; 5 Id. 142; *Raffey v. Henderson*, 17 Q. B. 575.

(*r*) *Smart v. Jones*, 33 L. J., C. P. 154.

(*s*) *Shep. Touch.* 267.

CH. V. SEC. 1.
Definition of
"Lease."

Right of
Shooting, &c.
Wood v.
Leadbitter.

General Re-
quisites of a
good Lease.

CH. V. SEC. 2.

*What Leases
must be by
Deed.*

Lease for
3 Years may
be in writing
or by parol:
Lease for
more than
3 Years must
be by Deed.
8 & 9 Vict.
c. 106, s. 3.

SECT. 2.—*What Leases must be by Deed.*

A lease for three years or less may be in writing or parol as the parties please (t), but a lease for more than three years must be by deed. Such is the effect of 8 & 9 Vict. c. 106, s. 3, taken in conjunction with sects. 1, 2 of the Statute of Frauds. By 8 & 9 Vict. c. 106, s. 3, "a lease required by law to be in writing, of any tenements or hereditaments made after the 1st October, 1845, shall be void at law unless made by deed." And by the Statute of Frauds, 29 Car. 2, c. 3, s. 1, "all leases, estates, interests of freehold, or terms of years, or any uncertain interest of, in, to or out of any messuages, manors, lands, tenements or hereditaments, made or created by livery and seisin only, or by parol and not put in writing and signed by the parties so making or creating the same, or their agents thereunto lawfully authorized by writing (u), shall have the force and effect of leases or estates at will only; and shall not, either in law or equity, be deemed or taken to have any other or greater force or effect, any consideration for making any such parol leases or estates to the contrary notwithstanding" (x): excepting, nevertheless, sect. 2, "all leases not exceeding the term of three years from the making thereof, whereupon the rent reserved to the landlord during such term shall amount unto two-third parts at the least of the full improved value of the thing demised." A lease for a term of less than three years, with the right in the lessee, at his option, to prolong it to a period exceeding three years from the date of the lease, is within this exception (y). Sect. 4 enacts "that no action shall be brought whereby to charge any person upon any contract or sale of lands, tenements or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing and signed by the party to be charged therewith or some other person thereunto by him lawfully authorized" (z).

Void Lease
may operate
as Agreement.

*Parker v.
Taswell.*

The effect of 8 & 9 Vict. c. 106, s. 3, is, that an instrument not under seal which purports to demise or let premises for more than three years from the making thereof, or even for a less term, if the

(t) See *Ryley v. Hicks*, 1 Stra. 651; *Lord Bolton v. Tomlin*, 5 A. & E. 856.

(u) *Smith L. & T.* 82 (2nd ed.).

(x) But such estates at will may change into tenancies from year to year, when any of the agreed rent is paid and received. *Clayton v. Blakey*, 8 T. R. 3; *Doe d. Rigge v. Bell*, 5 T. R. 471; 2 *Smith, L. C.* 98, 102 (7th ed.); *Smith L. & T.* 23, 82 (2nd ed.).

(y) *Hand v. Hall*, L. R., 2 Ex. D. 355; 46 L. J., Ex. 603; 36 L. T. 765; 25 W.

R. 734—C. A., reversing decision below, 2 Ex. D. 318; 46 L. J., Ex. 242.

(z) This extends to all mere agreements for leases (even for less than three years); but the agent need not be authorized by writing as under sect. 1; *Smith, L. & T.* 93 (2nd ed.); *Clarke v. Fuller*, 16 C. B., N. S. 24; *Foster v. Rowland*, 7 H. & N. 103; *Heard v. Pilley*, L. R., 4 Ch. Ap. 548. For the effect of sect. 4 upon an agreement for a lease, see ante, p. 78.

rent reserved does not amount unto two-third parts at the least of the full value of the thing demised, is *void at law as a lease*; but it may operate as an agreement for a lease (a), even at law. Since the above act courts of law will construe a writing rather as a valid agreement for a lease than as a void lease (b).

CH. V. SEC. 2.
What Leases must be by Deed.

If the tenant enter into possession under a void lease he thereupon becomes tenant from year to year upon the terms of the writing, so far as they are applicable to and not inconsistent with a yearly tenancy (c). Such tenancy may be determined by the usual notice to quit at the end of the first or any subsequent year thereof (d); and it will determine, without any notice to quit, at the end of the term mentioned in the writing (e). But if the lessee do not enter, he will not be liable to an action for not taking possession (f); nor, on the other hand, will an action lie against the lessor for not giving possession at the time appointed for the commencement of the term but before the lease is executed (g). The effect of the act 8 & 9 Vict. c. 106 is not to put an end to oral leases, but merely to superadd to such leases as are required by the Statute of Frauds to be in writing, the necessity of their being *by deed*.

Tenant entering under void Lease is Tenant from Year to Year.
Doe v. Bell.

First, then, of leases by deed. A deed is a writing sealed and delivered by the parties, and is either an indenture or a deed-poll. If a deed be made by more parties than one, there ought regularly to be as many copies of it as there are parties, and each formerly was cut or indented (*instar dentium*) on the top or side, to tally or correspond with the other, which deed so made is called an indenture (h). Formerly, if a deed began "This indenture" made, &c. and the parchment or paper was not indented, it was not an indenture, because the words could not make it indented; but if the deed was actually indented, though there were no words of indenture in the deed, yet it was an indenture in law; for it might be an indenture without words, but not by words without indenting (i). But now, by 8 & 9 Vict. c. 106, s. 5, "a deed executed after the 1st October, 1845, purporting to be an indenture, shall have the effect of an indenture,

Leases by Indenture.

(a) *Parker v. Taswell*, 2 De G. & J. 559; 27 L. J., Ch. 812; *Coccon v. Phillips*, 33 Beav. 18.

(b) *Bond v. Rosling*, 1 B. & S. 371; 30 L. J., Q. B. 227; *Rollason v. Leon*, 7 H. & N. 73; 31 L. J., Ex. 96; *Tidey v. Mollett*, 16 C. B., N. S. 298; 33 L. J., C. P. 235; *Hayne v. Cummings*, 16 C. B., N. S. 421.

(c) *Doe d. Riggs v. Bell*, 5 T. R. 472; 2 Sm. L. C. 96; *Richardson v. Gifford*, 1 A. & E. 52; *Doe d. Thompson v. Amey*, 12 A. & E. 479; *Berrey v. Lindley*, 3 M. & Gr. 498; *Lee v. Smith*, 9 Exch. 662; *Deale v. Saunders*, 3 B. N. C. 850 (assignee

under void lease); *Doe d. Pennington v. Tanier*, 12 Q. B. 998, 1013; *Tress v. Savage*, 4 E. & B. 36; *Pistor v. Cater*, 9 M. & W. 315; *Doe v. Broome*, 8 East, 165; *Cooch v. Goodman*, 2 Q. B. 580.

(d) *Cole Ejec.* 36, 222.

(e) *Tress v. Savage*, 4 E. & B. 36; *Cole Ejec.* 223, 414.

(f) *Lyman v. Stamp*, 1 Stark. 12; *Edge v. Strafford*, 1 C. & J. 391; 1 Tyr. 295.

(g) *Drury v. Macnamara*, 5 E. & B. 612; *Jinks v. Edwards*, 11 Exch. 775.

(h) *Style*, 459; 1 Inst. 171; 2 Blac. Com. 295.

(i) *Co. Lit.* 229.

CH. V. SEC. 2.

*What Leases
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although not actually indented.” All the parts of an indenture make but one deed, and each part is of as great force and effect as all the parts together; so they are esteemed the mutual acts of the respective parties, each of whom may be bound by either part of the same, for the words of the indenture are the words of each party (*l*). When the several parts of an indenture are interchangeably executed by the several parties, that part or copy which is executed by the grantor is usually called the *original*, and the rest are *duplicates or counterparts* (*m*). A lessee who executes the counterpart of a lease, or any person claiming under him, cannot dispute its admissibility in evidence, or impeach its validity on the ground of the original lease not being properly stamped (*n*). A counterpart is primary evidence against the lessee, and all the persons claiming under him, of the contents of the lease, and of the execution thereof by the lessor (*o*).

Counterpart.

*Discrepancy
between
counterpart
and lease.
Burchell v.
Clark.*

The ordinary rule is, that where the lease and the counterpart conflict, the lease prevails; but this rule does not apply where the mistake is clearly in the lease. So it was held by the Court of Appeal in *Burchell v. Clark* (*p*). There, by lease dated in 1784, the lessor demised the premises to the lessee for $94\frac{1}{4}$ years, “yielding during the said term of” $91\frac{1}{4}$ years a certain rent. The counterpart spoke of the term as $91\frac{1}{4}$ years in both instances. The court (Kelly, C. B., diss.), reversing the decision below, held that as it was clear that there was some clerical error in the lease, the counterpart might be used to correct it, and that the premises were recoverable by action brought at the end of the $91\frac{1}{4}$ years.

General Re-
quisites.

A lease by deed must be written or printed: it may be in any character or language: it cannot be exemplified upon wood, leather, cloth, or the like, but only upon parchment or paper: for the writing or printing upon them can be least vitiated, altered or corrupted. It must also have the regular stamps imposed upon it by statute for the increase of the public revenue (*q*).

Effect of the
Loss of a
Lease.

The estate of the lessee is not determined by the loss or cancellation of the lease, so that the existence of the term can be proved; for the estate is derived from the lessor, and not from the lease otherwise than as it shows the intention of the parties, which is not altered by the loss or cancellation of the instrument of demise (*r*). Where no counterpart can be found the landlord is entitled to inspect and take a copy

(*l*) Plowd. 134, 421; Lit. s. 370.

(*m*) 2 Blac. Com. 296.

(*n*) *Faul v. Meek*, 2 Y. & J. 116.

(*o*) *Burleigh v. Stibbs*, 5 T. R. 465; *Roe d. West v. Davis*, 7 East, 363; *Hughes v. Clark*, 10 C. B. 906; *Houghton v. Kewig*, 18 C. B. 235; *Homes v. Pearce*, 1 F. & F. 283; *Cole Ejec.* 170, 253.

(*p*) *Burchell v. Clark*, L. R., 2 C. P. D.

88; 46 L. J., C. P. 116; 35 L. T. 690; 25 W. R. 334.

(*q*) See the Stamp Act, 1870, a consolidating Act, post, Appendix A., sect. 7; and see also Sect. 13 of this chapter.

(*r*) *Read v. Brookman*, 3 T. R. 161; *Lord Ward v. Lumley*, 5 H. & N. 87, 666; 29 L. J., Ex. 322.

of the lease (s). So, on the other hand, in a proper case, the tenant may obtain an inspection of the duplicate or counterpart lease (t). Under an agreement that the lessor would, at the request and costs of the lessee, grant a lease, the lessor is not entitled to charge the tenant with the expense of a counterpart (u).

CH. V. SEC. 2.
*What Leases
must be by
Deed.*

SECT. 3.—*Form of Lease.*

An attempt has been made by the legislature to shorten leases, and accordingly the 8 & 9 Vict. c. 124, gives a concise form, which may be adopted if parties desire it (x). But this form is somewhat inaccurate, and is, it is believed, seldom used (y).

Statutory
Form under
8 & 9 Vict.
c. 124.

The usual words by which a lease is made are, "demise and lease," or, "demise, grant, and to farm let;" but any words which amount to a grant are sufficient to make a lease (z); and it may be laid down for a rule, that whatever words are sufficient to explain the intent of the parties, that the one shall divest himself of the possession and the other come into it, for any determinate time, whether they run in the form of a licence, covenant, or agreement, are of themselves sufficient, and will in construction of law amount to a lease for years as effectually as if the most proper and pertinent words had been made use of for that purpose; for a lease of years being no other than a contract for the *exclusive* possession and profits of the land on the one side, and a recompense of rent or other income on the other,—if the words made use of are sufficient to prove such a contract, in whatsoever form they are introduced, or howsoever variously applicable,—the law calls in the intent of the parties, and moulds and governs the words accordingly (a). Where the owner in fee of premises demised them for a term of 999 years, and afterwards released to the lessee the reversion in fee; and the latter, by indenture reciting the demise, did "grant, bargain, sell, assign and set over" the premises for the residue of the term of 999 years:—held, that there was a resuscitation of the term by virtue of these words (b). In *Cottee v. Richardson*, the plaintiff in consideration of 530*l.* to be paid by A. demised to him premises for 55 years at the yearly rent of 84*l.*, and subject to covenants to repair, &c. The consideration not having been paid, A.

Usual Words
of Demise.

(s) *Doe v. Slight*, 1 Dowl. 163; *Doe d. Morris v. Roe*, 1 M. & W. 207.

(t) *Doe d. Child v. Roe*, 1 E. & B. 279; *Cole Ejec.* 120, 200.

(u) *Jennings v. Major*, 8 C. & P. 61; see post, Sect. 13.

(x) See post, Appendix A., Sect. 1.

(y) Numerous precedents of leases, &c. are given in Appendix B., post.

(z) Co. Lit. 45; 2 Blac. Com. 318.

(a) Bac. Abr. tit. *Leases*, (K.); Smith L. & T. 84, 85 (2nd ed.). For distinction between lease and licence, see ante, 115.

(b) *Denn d. Wilkins v. Kemys*, 9 East, 366.

CH. V. SEC. 3. assigned to the plaintiff the residue of the term then unexpired, subject to the rents and covenants, and with a power of sale. In pursuance of that power the plaintiff, in consideration of 500*l.* “bargained, sold, assigned, and transferred and set over” to the defendant the said premises, to hold “for the residue of the term of 55 years,” subject to the yearly rent of 84*l.*, and the covenants contained in the lease to A.; and the defendant covenanted to pay the rent and perform the covenants. The defendant having entered, it was held, that although the mortgage by A. to the plaintiff operated as a merger of the term originally granted, yet the assignment by the plaintiff to the defendant created a new lease for the residue of the unexpired term, and consequently the defendant was liable on the covenants (c).

Lease must show an intention to Demise.

Although no specific words are necessary to create a lease, yet there must be words used which show an intention to demise: therefore, where a lessee of tithes agreed with the owner of lands, for certain collateral considerations, not to take tithes in kind from the tenants of the lands for twelve years, but to accept a reasonable composition not exceeding 3*s.* 6*d.* per acre, it was adjudged to be no lease (d). Where, on the letting of land to a tenant, a memorandum was drawn up, the terms of which were, that he should on a future day bring a surety and sign the agreement, neither of which he ever did; it was held, that the memorandum was a mere unaccepted proposal, and did not operate as a lease (e). An agreement bearing even date with a lease, by which it was agreed that the lessor should manage the farm leased for the lessee; the lessee giving 12*s.* a week to the lessor, and “allowing him and his family to reside and have the use of the dwelling-house and furniture free of rent:” has been held not to be a lease (f). Where a contract was made between A. and B., that B. should receive certain sums of money from A., and should build certain houses on A.’s land, and procure responsible tenants for the same at a given rate, and himself pay the rent from a certain day till he procured such tenants: it was held that no tenancy was created between A. and B. (g).

Particular Words which have been decided upon.

The word “*dedi*” is said to be a sufficient word to make a lease for years (h), and even a “licence” to inhabit or enjoy (i), if it give an exclusive right to occupy (k), may have the same effect. The words “covenant, grant and agree” that A. shall have the lands for so many years, enure as a lease for years (l); so the word “covenant” will make a lease, though the words “grant and agree” be omitted (m).

(c) *Cottee v. Richardson*, 7 Exch. 148.
 (d) *Brewer v. Hill*, 2 Anstr. 413.
 (e) *Doe d. Bingham v. Cartwright*, 3 B. & A. 326.
 (f) *Doe d. Hughes v. Derry*, 9 C. & P. 494; *Mayhew v. Swittle*, 4 E. & B. 347.
 (g) *Taylor v. Jackson*, 2 C. & K. 22.

(h) Co. Lit. 301 b; *Right d. Green v. Proctor*, 4 Burr. 2209.
 (i) *Hall v. Seabright*, 1 Mod. 14.
 (k) *Reg. v. Morrish*, 32 L. J., M. C. 246.
 (l) *Whitlock v. Horton*, Cro. Jac. 91.
 (m) *Richards v. Sely*, 2 Mod. 80.

So a covenant "to stand seised," if made by the owner, or a covenant for quiet enjoyment (n) is a lease (o) : for a covenant together with an entry amounts to a lease ; but a covenant merely does not vest the estate in the lessee, but only gives him a right to enter and possess it ; and therefore the estate is not vested in him till actual entry (p).

A lease, however formal (not being a bargain and sale under the Statute of Uses), creates only an *interesse termini* before entry (q). CH. V. SEC. 3.
Form of Lease.

Interesse termini.

SECT. 4.—*Construction of Lease.*

Before the Act of 1845 (8 & 9 Vict. c. 106), s. 3 required all leases for more than three years to be by deed, questions very frequently arose whether a particular instrument was intended to operate as an actual lease or merely as an agreement to grant one. The decisions were numerous and conflicting (r), but as the Act of 1845 has very considerably diminished their importance, it is sufficient to state here that their general effect may be taken to be that the intention of the parties was considered, and that the courts would construe the document very liberally in order to effectuate that intention (s).

A written contract not under seal made since the Act of 1845 for a longer term than three years, or for three years to begin from a subsequent day, or even for a less term if the rent reserved is less than two-thirds of the full improved value of the thing demised, cannot operate as a lease, or create any term, it being "void at law." But it may operate as an agreement for a lease (t) and be enforced in equity by a decree for a specific performance (u). An action at law may be maintained upon it for not granting, or not accepting, as the case may be, a lease pursuant to such contract (x) : but not an action for not giving possession at the time appointed for the commencement of such lease, because the possession bargained for is not a possession as tenant at will or from year to year, but a possession for a term of years to be created by the lease (y). Such last-mentioned action may, however, be supported when the contract is for a less term than three years (z).

(n) *Doe d. Pritchard v. Dodd*, 5 B. & Adol. 689.

(o) *Right d. Bassett v. Thomas*, 3 Burr. 1441, 1446 ; 1 W. Blac. 446.

(p) *Copley v. Hepworth*, 12 Mod. 1 ; Co. Lit. 37.

(q) *Cole Ejec.* 459 ; *Barnett v. Earl of Guildford*, 11 Exch. 19 ; *Anderson v. Radcliff*, E. B. & E. 806.

(r) See *Chapman v. Bluck*, 4 B. N. C. 187 ; *Chapman v. Turner*, 6 M. & W. 100 ; *Rawson v. Eicke*, 7 A. & E. 451 ; *Smith L. & T.* 85.

(s) See *Poole v. Bentley*, 12 East, 168.

(t) *Bond v. Rosling*, 1 B. & S. 371 ; 30 L. J., Q. B. 227 ; *Kollason v. Leon*, 7 H. & N. 73 ; 31 L. J., Ex. 96 ; *Tidey v. Mollett*, 16 C. B., N. S. 298 ; 33 L. J., C. P. 235 ; *Hayne v. Cummings*, 16 C. B., N. S. 421 ; overruling *Stratton v. Pettitt*, 16 C. B. 420.

(u) *Parker v. Taswell*, 2 De G. & J. 559 ; 27 L. J., Ch. 812 ; *Cowen v. Phillips*, 33 Beav. 18.

(x) *Bond v. Rosling*, 1 B. & S. 371 ; 30 L. J., Q. B. 227.

(y) *Drury v. Macnamara*, 5 E. & B. 612.

(z) *Jinks v. Edwards*, 11 Exch. 775.

Whether
Lease or
Agreement.

Effect of void
Lease.

CH. V. SEC. 4.
Construction of
Lease.

Effect of
Entry under
void Lease.

*Clayton v.
Blakey.*

Even when the contract is for more than three years, if the tenant be allowed to enter and take possession under such contract, and pays any of the rent therein expressed to be reserved, a tenancy from year to year will be thereby created upon the terms of such contract, so far as they are applicable to and not inconsistent with a yearly tenancy (*a*). Actual payment of rent is not always essential; if the payment be allowed to stand over by mutual consent, that is sufficient (*b*); payment of the rent does not of itself create a tenancy from year to year, but is *only evidence* from which a jury may find the fact (*c*). Where payment of rent unexplained would ordinarily imply a yearly tenancy, it is open to the payer or receiver of such rent to prove the circumstances under which such payment was made for the purpose of repelling such implication (*d*). Until there has been a payment of rent or something equivalent to such payment, a distress cannot be made for the rent expressed to be reserved, no *actual tenancy at an agreed rent* having been created (*e*). But it is otherwise with respect to an agreement for a lease which contains an express stipulation for an intermediate tenancy at the rent and subject to the covenants and conditions therein mentioned until the lease shall be prepared (*f*). A yearly tenancy created by entry under the contract, and payment of any of the rent therein mentioned (or anything equivalent to such payment), may be determined at the end of the first or any subsequent year of the term mentioned in the contract, by the usual notice to quit (*g*): and at the end of the term mentioned in the contract the tenancy will expire without any notice to quit (*h*). When the contract is for a lease for twenty-one years, determinable at the end of the first seven or fourteen years, the tenant cannot quit at the end of the first seven or fourteen years, *without any previous notice* (*i*).

Lease or
Agreement.
*Poole v.
Bentley.*

It is very seldom, if ever, that any question now arises whether a contract for less than three years amounts to a lease or only to an agreement. It depends upon the *intention* of the parties, to be collected from the writing, and from collateral circumstances. If it contains words of present demise ("doth agree to let," &c.), although to hold from a subsequent day, it will amount to a lease, notwithstanding a more formal lease is stipulated for, that being considered only as a

(*a*) *Clayton v. Blakey*, 8 T. R. 3; 2 Smith L. C. 102 (7th ed.); *Tress v. Savage*, 4 E. & B. 36; *Doe d. Pennington v. Taniere*, 12 Q. B. 998, 1013; *Lee v. Smith*, 9 Exch. 662; *Beale v. Sanders*, 3 Bing. N. C. 850; *Richardson v. Gifford*, 1 A. & E. 52; *Smith L. & T.* 80, 81 (2nd ed.).

(*b*) *Cox v. Bent*, 5 Bing. 185; *Vincent v. Godson*, 24 L. J., Ch. 122.

(*c*) *Jones v. Shears*, 4 A. & E. 832; *Finlay v. Bristol and Exeter R. Co.*, 7 Exch. 415, 420.

(*d*) *Doe d. Lord v. Crago*, 6 C. B. 90.

(*e*) *Hegan v. Johnson*, 2 Taunt. 148; *Dunk v. Hunter*, 5 B. & A. 322.

(*f*) *Pinero v. Judson*, 6 Bing. 206; *Rollason v. Leon*, 7 H. & N. 73; 31 L. J., Ex. 96; *Anderson v. Midland R. Co.*, 3 E. & E. 614; 30 L. J., Q. B. 94.

(*g*) *Doe d. Thomson v. Amey*, 12 A. & E. 476; *Cole Ejec.* 36, 222, 444.

(*h*) *Tress v. Savage*, 4 E. & B. 36.

(*i*) *Chapman v. Townner*, 6 M. & W. 100.

further assurance (*k*). The question in such cases is, whether the parties intended to create a tenancy before the execution of any further instrument (*l*). An instrument containing an express proviso that it shall not operate as a lease but only as an agreement, will be construed to be a mere agreement, notwithstanding it contains words of present demise (*m*). But if it contains a clause to the following effect, viz.: "And it is hereby mutually agreed that these presents shall operate as an agreement only, and that until a lease shall be executed, the rents, covenants and agreements agreed to be therein reserved and contained shall be paid and observed, and the several rights and remedies shall be enforced, in the same manner as if the same had been actually executed;" and the tenant enters into possession under such agreement, the concluding stipulation will create an actual tenancy at a fixed rent, for which a distress may be made (*n*). So where an agreement for a lease, to contain certain specified covenants concluded thus: "And in the meantime and until such lease shall be executed, to pay the said yearly rent, and to hold the same premises, subject to the covenants above mentioned:" it was held that the latter words amounted to an actual demise (*o*).

CH. V. SEC. 4.
Construction of
Lease.

Lease or
Agreement—
could.

Anderson v.
Midland R. Co.

Deeds—including of course leases by deed—being the highest description of private written documents are themselves the best evidence of the facts which they contain, the circumstances which they relate, and their makers' intentions. In their construction, regard must be had to all their parts; and general words may be restrained by particular recitals (*p*). Where the recitals in a lease stated that a sum of money which was in part to be given for fixtures was part of the consideration for the lease, it was held, that, whether the lessee would or would not be estopped by it, he was not bound to execute such a lease (*q*). If a deed may operate in two ways, the one consistent with the intent of the parties, and the other repugnant to it, the courts will put such a construction on it as to give effect to the intent (*r*); for deeds must be construed so as to operate according to the intention of the parties, if by law they may; and if they cannot operate in one form they will in another (*s*). Where a material word appears to have been omitted in a lease by mistake, and other words cannot

General Rules
for the Con-
struction of
Leases by
Deed.

(*k*) *Poole v. Bentley*, 12 East, 168; *Pinero v. Judson*, 6 Bing. 206; *Anderson v. Midland R. Co.*, 3 E. & E. 614; 30 L. J., Q. B. 94.

(*l*) *Smith L. & T.* 85.

(*m*) *Ferring v. Brook*, 1 Moo. & R. 510; 7 C. & P. 360.

(*n*) *Anderson v. Midland R. Co.*, 3 E. & E. 614; 30 L. J., Q. B. 94.

(*o*) *Pinero v. Judson*, 6 Bing. 206; *Rollason v. Leon*, 7 H. & N. 73; 31 L. J., Ex. 96. Compare these cases with *Holland v. Kensington Vestry*, L. R., 2 C. P. 565; 36

L. J., M. C. 105..

(*p*) *Payler v. Homersham*, 4 M. & S. 423; *Simons v. Johnson*, 3 B. & Adol. 175; *Bain v. Cooper*, 9 M. & W. 701; *Major v. Salisbury*, 2 D. & L. 763, 768; *Doe d. White v. Osborne*, 4 Jur., O. S. 911, C. P.

(*q*) *Vonhollen v. Knowles*, 12 M. & W. 602.

(*r*) *Solly v. Forbes*, 4 Moo. 448; *Hotham v. East India Co.*, 1 T. R. 638.

(*s*) *Goodtitle d. Edwards v. Bailey*, Cowp. 600; *Shep. Touch.* 81 (sec. 13).

CH. V. SEC. 4. have their proper effect unless it be introduced, such lease must be construed as if that word were inserted, although the particular passage where it ought to stand conveys a sufficiently distinct meaning without it (*t*). An instrument of demise was produced in evidence, by which the plaintiff agreed to let for the term of one year fully to be complete and ended; most of the subsequent stipulations in the lease were wholly inapplicable to a tenancy determinable by a notice to quit; the document appeared on the face of it to have originally contained words creating a tenancy from year to year, which were struck out, and the above words as to the term only remained; it was held, that the words struck out might be looked at to show what the intention of the parties was; that the tenancy was for a single year only; and that the terms inapplicable to such a tenancy must be considered as expunged, or as only applicable in case the tenancy should continue (*u*). General words at the end of a particular specification will not pass any property of a different nature from that particularly mentioned (*x*).

Parol Evidence inadmissible to vary Deeds.

The general rule with regard to the admission of parol evidence to explain the meaning, or to add to, vary or alter, the express terms of a deed, is, that it shall not be admitted (*y*). Thus where property has been conveyed by deed, parol evidence of an agreement to apportion the rent of the current quarter, contrary to the terms of the deed, is inadmissible (*z*). So parol evidence is inadmissible to show that a particular close was intended to be included in or to be excluded from the deed (*a*). The exceptions to such rule are—1, where, although the deed is clearly enough expressed, some ambiguity arises from extrinsic circumstances; 2, where the language of a charter or deed has become obscure, and the construction doubtful from antiquity; 3, where the grant appears uncertain, owing to a want of acquaintance with the grantor's estate; 4, where it is important to show a different consideration consistent with but not repugnant to that stated in the deed itself; 5, where it becomes necessary to show a different time of delivery from that at which the deed purports to have been made; 6, where it is sought to prove a customary right not expressed in the deed, but which is not inconsistent with any of its stipulations; 7, where fraud or illegality in the formation of the deed is relied on to avoid it. If a clause in a deed be so ambiguously or defectively expressed, that a court of justice cannot, even by refer-

Exceptions.
Ambiguity.

Custom of Country.

(*t*) *Wright v. Dickson*, 1 Dow, 114, 147.
(*u*) *Strickland v. Maxwell*, 2 C. & M. 539.

(*z*) *Anon.*, Loftt, 398; *Sandiman v. Breach*, 7 B. & C. 96; *Hare v. Horton*, 5 B. & Adol. 715; *Reg. v. Nevill*, 8 Q. B. 452, 463; *East London W. Co. v. Trustees of Mile End Old Town*, 17 Q. B.

512; *Lyndon v. Stanbridge*, 2 H. & N. 51.

(*y*) *Ros. Ev.* 17 (13th ed.).

(*z*) *Flinn v. Calow*, 1 M. & G. 589.

(*a*) *Mereu v. Ansell*, 3 Wils. 276; *Hope v. Atkins*, 1 Price, 143; *Doe d. Norton v. Webster*, 12 A. & E. 442; *Barton v. Dawes*, 10 C. B. 261. And see *Minton v. Geiger*, 28 L. T. 449.

ence to the context, collect the meaning of the parties, it will be void on account of uncertainty (*b*). But this is the last rule of construction ever resorted to.

CH. V. SEC. 4.
Construction of
Lease.

Where a party granted a manor by a particular name, and he had two manors of that name, parol evidence was admitted to show which of them he meant; and where there was a demise of premises in Westminster, late in the occupation of A., particularly describing them, part of which was a yard, parol evidence was received to show that a cellar situated under that yard, but which was then in the occupation of B., another tenant of the lessor, was not intended to pass (*c*). Evidence of usage was received to show that a room which had not been occupied with a certain messuage did not pass under a demise of that messuage, together with all the rooms, chambers and appurtenances thereunto belonging (*d*). Where a lease grants a right of way, evidence may be received of the state of the premises at the time of granting the lease, and then the judge will put a construction on the lease as to the line along which the way granted runs; but if it is uncertain on the words which of two ways is intended, parol evidence may be given to show which the grantor meant (*e*).

Cases illustra-
tive of Excep-
tion on ground
of Ambiguity.

Where an expression used in a written instrument has technical meaning, parol evidence is admissible to show that it has been used in that sense, and not in its ordinary meaning in common parlance, although that may be perfectly clear and unambiguous in itself; therefore, where a lessee of a coal mine covenanted to get the whole of the coals "not deeper than or below the *level* of the bottom of the mine" at a particular point, it was held, that parol evidence of the understanding amongst miners was admissible to show that the word "level" had a particular technical meaning different from its ordinary signification of "horizontal line." It might be questionable whether a previous agreement between the parties for a lease of the same mine, and for which the lease in question was substituted, was also admissible in evidence for the same purpose (*f*). Again, where in a lease of a rabbit warren, &c., the lessee covenanted that on the expiration of the term he would leave on the warren 10,000 rabbits, the lessor paying for them 60*l.* per thousand, it was held, that parol evidence was admissible to show that, by the custom of the country where the lease was made, the word "thousand," as it applied to rabbits, denoted twelve hundred (*g*). Where the lessee of a coal mine covenanted to pay a certain share of all such sums of money as the coals should sell for at the pit's mouth, evidence of the lessee's having accounted with the lessor, and paid him

Expression of
technical
meaning.

(*b*) *Anon.*, 1 Mod. 180; *Doe d. Wyndham v. Carew*, 2 Q. B. 317.

(*c*) *Doe d. Freeland v. Burt*, 1 T. R. 701; *Paddock v. Pradley*, 1 O. & J. 90.

(*d*) *Kerelake v. White*, 2 Stark. 508.

(*e*) *Osborne v. Wise*, 7 C. & P. 761.

(*f*) *Clayton v. Gregson*, 5 A. & E. 302; 4 N. & M. 602; 6 Id. 694; *Shore v. Wilson*, 9 Cl. & F. 365.

(*g*) *Smith v. Wilson*, 3 B. & Adol. 728.

CH. V. SEC. 4. the share of the money produced by the sale of coals elsewhere, was not considered admissible to explain the intention of the parties (*h*). Where a lessee made an agreement for a lease, and the under-lessee contracted to erect a shop-front to the house; in ejectment for a forfeiture for not erecting the shop-front, it was held, that the original lease by which a penalty was imposed, if the lessee allowed a trade to be carried on upon the premises, was not admissible in evidence for the defendant to explain the meaning of the words "shop-front" in the agreement (*i*). Since the passing of the 24 Geo. 2, c. 23, for altering the style, a lease of lands by *deed*, to hold from the feast of *St. Michael*, must, unless there be a custom to the contrary, as in Kent (*k*), be taken to mean *New Michaelmas*, and cannot be shown by extrinsic evidence to refer to a holding from *Old Michaelmas*, unless there be such custom, or a reference in the lease to a prior holding from *Old Michaelmas* (*l*). But this rule has been held to relate only to leases by deed; for in a lease by parol made to commence at Lady-Day, evidence is admissible to prove that by the custom of the country *Old Lady-Day* was intended (*m*). If there be any ambiguity or contradiction in expressing the time of the commencement of a lease, the lease is construed beneficially for the lessee, on the principle that every man's grant shall be taken most strongly against himself (*n*).

Cases illustrative of the other Exceptions.

Evidence of Custom.

Wigglesworth v. Dallison.

Where a man granted an estate for life, without saying whether it was for his own life or for that of the grantee, parol evidence was received to show what interest he had in the estate: for if he was tenant in fee, it was considered that the grantee should take an estate for his own life; but that if the grantor himself was a tenant for life only, the grantee would take an estate for the grantor's life only (*o*). The express terms of a lease cannot be controlled by the custom of the country; but if the lease be entirely silent as to the time of quitting, evidence of the custom of the country may be given to fix the time (*p*). Although no right to an away-going crop is reserved in a lease, if there are no covenants which either in express terms or by implication of law *exclude* such right, the lessee may produce parol evidence to show that he is entitled to such away-going crop by

(*h*) *Clifton v. Walmsley*, 5 T. R. 564; *Gerrard v. Clifton*, 7 T. R. 676; 1 B. & P. 524.

(*i*) *Doe d. Nash v. Birch*, 1 M. & W. 402.

(*k*) *Furley d. Mayor, &c. of Canterbury v. Wood*, 1 Esp. 198.

(*l*) *Doe d. Spicer v. Lee*, 11 East, 312; *Doe d. Hall v. Benson*, 4 B. & A. 588; *Denn d. Peters v. Hopkinson*, 3 D. & R. 507; *Smith v. Walton*, 8 Bing. 235.

(*m*) *Doe d. Hall v. Benson*, 4 B. & A. 588; *Furley d. Mayor, &c. of Canterbury v. Wood*, *supra*; *Denn d. Peters v. Hopkinson*, *supra*.

(*n*) *Anon.*, Dyer, 261 b. pl. 28; *Lilley v. Whitney*, Dyer, 272 a; *Seamen's case*, Godb. 166; *Doe d. Davies v. Williams*, 1 H. Blac. 25; *Shep. Touch.* 88, s. 6.

(*o*) *Smith v. Doe d. Earl of Jersey*, 2 Brod. & B. 551; 3 Moo. 339; 7 Price, 281; 3 Bligh, 290.

(*p*) *Webb v. Plummer*, 2 B. & A. 746.

the custom of the country (*q*). So evidence of custom for an away-going tenant to provide work and labour, tillage and sowing, and all materials for the same in his away-going year, the landlord making him a reasonable compensation, has been received, although there was an express written agreement between the parties, when that agreement was not *inconsistent* with such custom (*r*).

CH. V. SEC. 4.
Construction of Lease.

SECT. 5.—*Description of the Demised Premises.*

A lease by deed usually consists of the following parts; viz. 1. What is usually called the *Premises*, which contain a statement of the date; the names, addresses and additions of the parties; the recitals (if any); the operative words; the description of the parcels demised and the appurtenances; also any exceptions or reservations thereout; 2. The *Habendum*, or that part which fixes the duration of the term; 3. The *Reddendum*, or reservation of rent: 4. The covenants: 5. A proviso or condition for re-entry for nonpayment of rent or non-observance of covenants; or, for the determination of the term by notice before the expiration thereof; *e.g.* at the end of the first seven or fourteen years.

Parts of a Lease by Deed.

The PREMISES in a lease are all the parts which precede the *habendum*. The office of this part of the lease is rightly to name and describe the lessor and lessee; to state the consideration (*s*), to set forth with certainty the thing demised, either by express words, or by that which by reference may be reduced to a certainty; and to state the exceptions or things reserved, if any.

The Premises.

With respect to the proper mode of describing the property to be demised, it may be remarked, “that corporeal hereditaments consist wholly of substantial and permanent objects; all which may be comprehended under the general denomination of land only; for *land* comprehends, in its legal signification, any ground, soil or earth whatsoever; so the word ‘land’ includes, not only the face of the earth, but everything under it or over it; and therefore if a man grant all his lands, he grants thereby all his mines of metal and other fossils, his woods, his waters and his houses, as well as his fields and meadows: not but that the particular names of the things are equally sufficient to pass them, except in the instance of water, by a grant of which nothing passes but a right of fishing; and to recover the land

Description of the Property.

(*q*) *Caldecott v. Smythies*, 7 C. & P. 808; *Wigglesworth v. Dallison*, 1 Doug. 201; 1 Smith's L. C. 598 (7th ed.); *Wilkins v. Wood*, 17 L. J., Q. B. 319; *Hutton v. Warren*, 1 M. & W. 466; *Faviell v. Gascoin*, 7 Exch. 273; 21 L. J., Ex. 85;

Muncey v. Dennis, 1 H. & N. 216; *Holding v. Pygott*, 7 Bing. 465.

(*r*) *Senior v. Armytage*, Holt, 197; *Hutton v. Warren*, 1 M. & W. 466, 476.

(*s*) The premium or fine, if any, is generally expressed in words at length.

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*Description of
 Demised
 Premises.*

Where the
 Description is
 untrue in
 Part.

at the bottom of which, it must be called so many 'acres of land covered with water.' But the capital distinction is this, that by the name of a castle, messuage, toft, croft or the like, nothing else will pass, except what falls with the utmost propriety under the term made use of (though, indeed, by the name of a castle one or more manors may be conveyed; and è converso, by the name of the manor a castle may pass); but by the name of land, which is nomen generalissimum, everything terrestrial will pass" (*u*). The expressions "arable land, meadow or pasture land," are specific descriptions of land and are confined to land of that particular species; and in general, where meadow or pasture land is named, it must be understood of ancient meadow or pasture (*x*). The words "more or less" must be confined to a reasonable quantity (*y*).

If the thing described be sufficiently ascertained, it is sufficient, though all the particulars are not true; as if a man demise his meadows in B. and D., containing ten acres, whereas they contain twenty acres, all the meadows pass (*z*). Whatever constitutes the essence of the thing granted, or is parcel of it, will pass with it, although it be accidentally severed at the time of the lease; therefore, by the lease of a mill, the millstone passes, though severed at the time; so by the lease of a house, the doors, window sashes, locks, keys, &c. pass as parcel of it, although by accident they may not be in their proper places when the lease is made. A man may demise his farm, which may comprehend a messuage and much land, meadow, pasture, wood, &c. thereunto belonging, or therewith used; for the word "farm" properly signifies a capital or principal messuage, and a quantity of land thereunto appertaining (*u*). So by the name of a messuage, he may pass a house, a curtilage, a garden, an orchard, a dove-house, a shop or a mill, as parcel of the same (*b*); so the word "house" includes everything that would ordinarily pass by that name (*c*), the like of a cottage, a toft, a chamber, a cellar, &c. (*d*). Under a lease of all that part of the park called B. situate and being in the county of O., and now in the occupation of S., lying within certain specified abutments, with all houses, &c. belonging thereto, and which are now in the occupation of S., a house on a part which is within the abutments, but not in the occupation of S., will pass (*e*).

(*u*) 2 Blac. Com. 18.

(*x*) *Tresham v. Lamb*, 2 Brownl. 46; *Gunning v. Gunning*, 2 Show. 8.

(*y*) *Day v. Fynn*, Owen, 133; 1 Esp. 229; *Cross v. Elgin*, 2 B. & Adol. 106.

(*z*) Com. Dig. tit. *Feil* (E. 4).

(*a*) *Shep. Touch.* 93; *Lord Portman v. Mill*, 3 Jur. 366, L. C.; *Goodtitle v. Paul*, 2 Burr. 1089; *Goodtitle v. Southern*, 1 M. & S. 298.

(*b*) *Shep. Touch.* 94; *Doe d. Norton v. Webster*, 12 A. & E. 442; *Cole v. West*

London and Crystal Palace R. Co., 27 Beav. 242; 28 L. J., Ch. 767.

(*c*) *Grosvenor v. Hampstead Junction R. Co.*, 1 De Gex & J. 446; 26 L. J., Ch. 731; *Hewson v. South Western R. Co.*, 8 W. R. 467; *Steele v. Midland R. Co.*, L. R., 1 Ch. Ap. 275.

(*d*) *Shep. Touch.* 94.

(*e*) *Doe d. Smith v. Gallonay*, 5 B. & Ad. 43; compare this with *Martyr v. Lawrence*, 2 De Gex, J. & S. 261.

By a lease of all that part of the townland of B., containing 509 acres, arable, meadow and pasture, bounded by certain boundaries, it was held that 400 acres of bog and land reclaimed from bog within the boundaries, also passed (*f*). If garden ground be let for years, and the lessee demise part of the term to an under-tenant, who builds on it, by a grant of the garden ground, the buildings thereon will pass (*g*). It would appear that a lease of "the issues and profits" of land would pass the land itself; for to have the issues and profits is the same thing as to have the land itself (*h*); and it has been held, that if a grant be made of a boilery of salt, the land passes, for that is the whole profit (*i*). If in a lease the demised land be mentioned and described as meadow land, no other evidence is necessary to prove that it was meadow land at the commencement of the term (*k*). By the grant of a forest, park, chase or warren in the soil of the grantor, the soil as well as the privilege passes; but it is otherwise if the soil be another's (*l*): and a sheep walk or a foldcourse may include the soil by the custom of the country (*m*).

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*Description of
Demised
Premises.*

In a parish settlement case, it was held that the lease of a fishery of a pond, with the spear sedge and the flags and rushes growing in and about the same, passed the soil (*n*). If a lease of a ferry describes it as a ferry both ways across a river, whereas it is but one way only, yet it will pass (*o*). In the recent Irish case of *Dwyer v. Rich* (*p*), the lease described the lands demised as "bounded on the west by the river Shannon," and as containing 31½ acres or thereabouts: it was held that half the soil of the bed of the river passed under these words, although a map annexed to the lease showed no boundary either on the bank or the middle of the river. Where an annual sum was payable as tenants' damages, besides a way-leave rent for a coal railway passing through a farm, it was left to the jury to say whether the land covered by the railway passed by the agreement of letting to the tenant, because if it did the tenant, and not the landlord, was entitled to the sum payable as tenants' damages (*q*). A demise of a house and garden described the premises by boundaries which strictly would include a portion of a piece of ground at the back and adjoining the garden, which was laid out as a common walk for a row of houses; it was held, that this portion of the common walk was included in the premises demised, though by the lease a right was granted to the lessee of the use of the whole of the common walk (*r*).

Fishery.

Ferry.

Way.

(*f*) *Jack v. McIntyre*, 12 Cl. & Fin. 151.

(*g*) *Burton v. Brown*, Cro. Jac. 648.

(*h*) *Parker v. Plumber*, Cro. Eliz. 190.

(*i*) Co. Lit. 4 b.

(*k*) *Birch v. Stephenson*, 3 Taunt. 469;
Shipwith v. Green, 1 Stra. 610.

(*l*) *Cromwell's case*, Dyer, 169 b.

(*m*) *Huddleston v. Woodroffe*, 2 Roll. R. 61.

(*n*) *Rex v. Old Abresford*, 1 T. R. 358.

(*o*) *Fun v. Curell*, 6 M. & W. 234.

(*p*) Ir. R., 6 C. L. 144, Exch.

(*q*) *Wilson v. Anderson*, 1 C. & K. 544.

(*r*) *Curling v. Mills*, 6 M. & G. 173.

CH. V. SEC. 5. The demise of a house "with the appurtenances" will pass the house, with the orchards, yards and curtilage and gardens, but not the land; especially if it be at a distance, though occupied with the house; so the demise of a house "and the appurtenances" will not pass an adjoining building not accounted parcel of the house, although held with it for thirty years (*s*). So a demise of premises in Westminster, late in the occupation of A. (particularly describing them), part of which was a yard, was held not to pass a cellar situate under that yard, which was then occupied by B., another tenant of the lessor; for though *primâ facie* the property in the cellar would pass by the demise, yet that might be regulated and explained by circumstances (*t*). Under a demise of a messuage, with all rooms and chambers, and the appurtenances thereto belonging, is to be understood all that is occupied together as an entire messuage at one and the same time; therefore, such a demise will not comprehend a room which had once formed part of the messuage, but which had been separated from it by means of a wooden partition, and had not been occupied with it for many years previously to the demise (*u*). So a stable will not pass under the renewed lease of a messuage with the appurtenances, which was not originally demised therewith and actually forms no part thereof (*x*). Generally speaking, land will not pass as appurtenant to a house, but it may sometimes do so, to effectuate the obvious intention of the parties (*y*). Land cannot be appurtenant to a messuage in the proper sense of the word; nor can one species of land be appurtenant to another, because the term is only properly applied to the annexation of incorporeal to corporeal hereditaments, in those cases in which the law permits such an union; but land may be appurtenant to a messuage in common parlance, as being usually occupied with it (*z*). Whether the thing claimed as appurtenant be parcel or not must be gathered from evidence: thus where there is a conveyance in general terms of all that acre called Blackacre, everything which belongs to Blackacre passes with it; but whether parcel or not of the thing demised is always matter of evidence (*a*). Under a lease of premises, "together with all ways appertaining, or with any parts thereof used or enjoyed," a right of way was held to pass, although not expressly mentioned, upon proof that it was used with the premises at the time the lease was

(*s*) *Bryan v. Wetherhead*, Cro. Car. 17.

(*t*) *Doe d. Freeland v. Burt*, 1 T. R. 701; *Press v. Parker*, 2 Bing. 456.

(*u*) *Kerslake v. White*, 2 Stark. 508.

(*x*) *Maitland v. Mackinnin*, 1 H. & C. 607; 32 L. J., Ex. 49.

(*y*) *Hill v. Grange*, Dyer, 130 b; Plow. 170, S. C.; *Baudeley v. Brook*, Cro. Jac. 189; *Hearn v. Allen*, Cro. Car. 57; *Roe d.*

Walker v. Walker, 3 Bos. & P. 375; *Buck d. Whalley v. Nurlon*, 1 Bos. & P. 53; cited 5 C. B., N. S. 463. There are cases both ways, per V. Williams, J., 7 C. B. 714.

(*z*) *Wilmore v. Cain*, Cro. Eliz. 918; *Anon.*, Moor. 221; Cro. Eliz. 16.

(*a*) *Cole Ejec.* 240.

granted (*b*); but where an under-lease described the road demised and the ways granted by the words "all ways thereunto appertaining," it was held that a right of way over the original lessor's soil would not pass by these words (*c*). A grant of a close, "together with all ways, easements, and appurtenances thereto appertaining, and with the same now or heretofore used, occupied or enjoyed," will not pass a right of way over an adjoining close used by the grantor as owner of both closes, no such way having existed before the unity of possession became vested in him (*d*). Generally speaking, a right of way cannot pass under the word "appurtenances" (*e*). But a way of necessity may so pass (*f*). There is a distinction between easements which are in their nature continuous and apparent, such as drains, &c., and other easements, such as ordinary rights of way, or the right to use a pump in adjoining land—the former pass by a devise or conveyance of the messuage without any general words; but the others must be created by an express grant (*g*). According to the current of the most recent decisions it would seem that nothing will pass under the word "appurtenances" which would not equally pass by a conveyance of the principal subject-matter, without the word "appurtenances" (*h*).

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*Description of
Demised
Premises*

SECT. 6.—Term granted.

(a) *The Habendum.*

The habendum is that part of the lease which begins with "to have and to hold," and properly succeeds the premises: its office is to limit with certainty the estate: it may also abridge or alter the generality of the premises (*i*); in short, it fixes the quality and quantity of the estate, and ascertains the meaning of the premises, but cannot contradict or destroy them (*k*). Its operation as a grant is merely pro-

Office and use
of the Ha-
bendum.

(*b*) *Koostra v. Lucas*, 5 B. & A. 830; *James v. Plant* (in Error), 4 A. & E. 749; ante, Ch. III., Sect. 5.

(*c*) *Harding v. Wilson*, 2 B. & C. 96.

(*d*) *Thomson v. Waterlow*, L. R., 6 Eq. 36; 37 L. J., Ch. 495; *Langley v. Hammond*, L. R., 3 Ex. 161, 169; ante, Ch. III., Sect. 5.

(*e*) *Worthington v. Gimson*, 2 E. & E. 618; 29 L. J., Q. B. 116; *Clements v. Lambert*, 1 Taunt. 205; *Plant v. James*, 5 B. & Adol. 791; 4 A. & E. 749, 761; *Ackroyd v. Smith*, 9 C. B. 689; 10 C. B. 164; *Dodd v. Burchell*, 1 H. & C. 113, 121; 31 L. J., Ex. 364; *Thomson v. Waterlow*, L. R., 6 Eq. 36; 37 L. J., Ch. 495; *Langley v. Hammond*, L. R., 3 Exch. 161, 169.

(*f*) *Pinnington v. Galland*, 9 Exch. 1; 22 L. J., Ex. 348; *Pheysey v. Vicary*, 16

M. & W. 484; *Hinchcliffe v. Earl of Kin-noul*, 5 Bing. N. C. 1; *Darvis v. Scar*, L. R., 7 Eq. 427.

(*g*) *Iyer v. Carter*, 1 H. & N. 916; *Worthington v. Gimson*, 2 E. & E. 618; 29 L. J., Q. B. 116, 120; *Pearson v. Spencer*, 1 B. & S. 571, 583; 3 B. & S. 761; S. C., *Folden v. Bastard*, 4 B. & S. 258, 263; 32 L. J., Q. B. 372; S. C. (in error), L. R., 1 Q. B. 156; 7 B. & S. 130; 35 L. J., Q. B. 92.

(*h*) Cases *supra*; and see *Shep. Touch.* 89; 6 M. & W. 189.

(*i*) *Shep. Touch.* 75; Com. Dig. tit. *Fait* (E. 9); 2 Prest. Conv. 439, 442.

(*k*) *Plowden*, 153; *Cocking v. Heath-cote*, Loftt, 190; *Doe d. Timmis v. Steele*, 4 Q. B. 663; *Bird v. Baker*, 1 E. & E. 12; 28 L. J., Q. B. 7; *Smith L. & T.* 104 (2nd ed.).

CH. V. SEC. 6.
Term granted
(Habendum).

spective from the time of the execution of the lease: the term is then first created (*l*); but the duration of it is to be computed from the day in that behalf mentioned in the habendum (*m*). By indenture dated and made on 19th July, 1851, A. demised to B., to hold from 25th December, 1849, for the term of fourteen years thence next ensuing, determinable as therein mentioned; provided, that either party might determine the demise at the expiration of the first seven years thereof by six months' notice: held that the seven years were to be reckoned from the 25th December, 1849, and that the lease might be determined on 25th December, 1856 (*m*). The word "term" in a covenant in a lease may signify either the time or the estate granted (*n*). Where a lease was made on the 10th of October, habendum from the 20th day of November (not saying in what year) for five years, the court held that the lease was void for uncertainty (*o*). But where a lease was made for years, to begin at the feast of our Lady Mary (without expressing what feast, whether of the Annunciation, Purification, &c.), the court held the lease to be good, and that the lessee by his entry might determine at which of the said feasts the term should begin (*p*). A lease to one for life, habendum to his three sons successively, but omitting to mention the sons in the premises of the deed, was held to be for the life of the father only, and that the sons should not take in possession, or by way of remainder: for it being limited to the father for his life, that was a greater estate than for the lives of others; and the three sons were named as persons to have an estate, and not to make a limitation of an estate (*q*).

Discrepancy
between Ha-
bendum and
Reddendum.
Burchell v.
Clark.

The ordinary rule is, that where there is a discrepancy between the habendum and the reddendum, the habendum must prevail (*r*); but this rule does not apply where on the face of the lease the habendum is wrong (*s*).

(b) Terms for Life.

Leases for
Lives.

An estate for life may be created by deed, either by express limitation or by a grant in general terms. Thus a grant by A. to B. of the manor of Dale gives to B. an estate for his life (*t*). This, however, would be otherwise if a contrary intention could be collected from the terms of the deed (*u*). Where A. demises to B. for the term of *his*

(*l*) *Jervis v. Tomkinson*, 1 H. & N. 195, 206; *Shaw v. Kay*, 1 Exch. 412; *Lewis v. Hilliard*, 1 Sid. 374; *Wyburd v. Tuck*, 1 B. & P. 464; *Dinsdale v. Isles*, 3 Keb. 207; 2 Lov. 88.

(*m*) *Bird v. Baker*, 1 E. & E. 12; 28 L. J., Q. B. 7.

(*n*) *Evans v. Vaughan*, 4 B. & C. 261; *Wright d. Plowden v. Cartwright*, 1 Burr. 282; 1 Ld. Ken. 529; *Green v. Edwards*, Cro. Eliz. 216; *Cottee v. Richardson*, 7 Exch.

151; 2 Blac. Com. 143; *Shep. Touch.* 267.

(*o*) *Anon.*, 1 Mod. 180.

(*p*) *Anon.*, 1 Leon. 227.

(*q*) *Windsore v. Hubbard*, Cro. Eliz. 57.

(*r*) *Shep. Touch.* 52.

(*s*) *Burchell v. Clark*, L. R., 2 C. P. D. 88; and see ante, 120.

(*t*) Co. Lit. 42 a, 183 a.

(*u*) *Doe d. Pritchard v. Dodd*, 5 B. & Ad. 689; Co. Lit. 42 a.

natural life, the demise is *primâ facie* for the life of B.; but where A. demised to B., his executors and administrators, for the term of *his* natural life, and the lease contained a covenant by A. for the quiet enjoyment of the premises by B., his executors, &c. during the natural life of A., it was held that the word "his" in the demising clause must be referred to A., the grantor, and not to B., though his name was the last antecedent (*x*). Where a person demised land for the lives of two persons named, and the life of a grand-daughter of a third person, who then was not born; it was held that the lease was good for the lives of the two persons named only (*y*).

CH. V. SEC. 6.
Term granted
(Habendum).

Estates for life granted absolutely will, generally speaking, endure as long as the life for which they are granted (*z*): but there are some estates for life which may determine upon future contingencies, before the life for which they are granted expires: as where a lease is to a man *quamdiu* so bene gesserit; to a woman *durante viduitate* or *dum sola*; to husband and wife during coverture; to A., as long as he inhabits or pays such rent, or till he be preferred to such a benefice, or till out of the profits he has paid 100*l.* or other sum:—in these and the like cases, the duration of the estate depends merely upon the condition (*a*). But the estate is as perfect an estate for life until the event take place, as if it had been granted absolutely. A lease for years, if the lessee so long live, with a remainder to another for the residue of the term, must be construed to give the remainder-man a power to enjoy during all the residue of the years to come (*b*).

Absolute or
Conditional.

At common law a lease for life cannot be made to begin at a day to come, for an estate of freehold cannot commence in futuro (*c*); therefore, if a lease be made to hold to the lessee for life from Michaelmas next, or after the death of the lessor, or after the death of J. S., such lease would not be good at common law. "From" may, however, mean either inclusive or exclusive, according to the subject-matter (*d*). A lease for lives, to begin from the day of the date thereof, is good and will not be said to convey a freehold to commence in futuro (*e*): so a lease to hold to the lessee for his life, which term shall begin after the determination of a previous term for three lives, is good (*f*). But, although the above rule prevails at common law as to leases in futuro, a very different rule of law prevails in cases of limitations taking effect under the Statute of Uses, or as devises or trusts (*g*). And now, by

Commence-
ment of
Leases of
Lives.

(*x*) *Doe d. Pritchard v. Dodd*, *supra*.

(*y*) *Doe d. Pemberton v. Edwards*, 1 M. & W. 553.

(*z*) 2 Blac. Com. 121.

(*a*) Co. LIT. 42 a.

(*b*) *Wright d. Plowden v. Cartwright*, 1 Burr. 282; 1 Ld. Ken. 529; Shep. Touch. 272.

(*c*) Shep. Touch. 272; 2 Blac. Com. 144, 314.

(*d*) *Pugh v. Duke of Leeds*, Cowp. 714, 725; *Ackland v. Lutley*, 9 A. & E. 879.

(*e*) *Freeman d. Vernon v. West*, 2 Wils. 165.

(*f*) *Underhay v. Underhay*, Cro. Eliz. 296.

(*g*) *Rivis v. Watson*, 5 M. & W. 255; *Gilbertson v. Richards*, 4 H. & N. 277; 5 Id. 463.

CH. V. SEC. 6. 8 & 9 Vict. c. 106, s. 2, "all corporeal tenements and hereditaments shall, as regards the conveyance of the immediate freehold thereof, be deemed to lie in grant as well as in livery."

Term granted (Habendum).

How far Subsistence of Lease for Lives warranted.
Coates v. Collins.

It was held by a Court of Appeal, in *Coates v. Collins (h)*, that a covenant in a lease for lives, that the lease is good for the lives for which it is granted, does not warrant the subsistence of the lives. Therefore, where the defendant assigned a lease for the lives of W., J. and H., and the survivors and survivor of them, and covenanted that the lease was "a good and valid lease" for such lives, and was "not forfeited, surrendered or become void or voidable," and J. had died before the making of the assignment, the plaintiff failed to recover as for a breach of covenant.

(c) Commencement of Terms for Years.

Certainty in Commencement.

As a lease *for years* is a mere chattel, it may be made to commence either presently or at a future period, at a date to come, as at *Michaelmas* next, or at three or ten years after, or after the death of the lessor, or of J. S. (*i*). A lease to commence upon the expiration of a previous lease conveys only an *interesse termini* until the expiration of the previous lease, and does not amount to an assignment of the reversion expectant on such lease (*k*). After the day appointed for the commencement of the term, an *interesse termini* is sufficient to support an entry or objectment (*l*). All leases for years, whether they begin in *præsenti* or in *futuro*, must be certain: that is, they must have a certain beginning and a certain ending, and so the continuance of the term must be certain: otherwise they are not good (*m*). Unless the time of the commencement of the lease be stated it cannot be known when the rent is to become due or when the landlord is entitled to distrain for it. But, though the commencement of a term must be fixed with certainty, it will be sufficient if it be so fixed when the lease is to take effect in interest or possession; for until that time it may depend upon an uncertainty, viz., either a possible contingency, which is to precede the interest or possession, or upon a limitation or condition subsequent; but where it is to be reduced to a certainty upon a precedent contingency, such contingency must happen in the lives of the parties (*n*).

(h) L. R., 7 Q. B. 144; 41 L. J., Q. B. 90; 26 L. T. 134. Lush, J., dissented in the court below. The Exchequer Chamber was unanimous, both on principle and on the authority of *Basket v. Scot*, Roll. Abr. vol. ii. p. 249.

(i) Shep. Touch. 273.

(k) *Smith v. Day*, 2 M. & W. 684; *Blatchford, app., Cole, resp.*, 5 C. B., N. S.

514; *Lock v. Furze*, 19 C. B., N. S. 96, 103, 105; L. R., 1 C. P. 441; 34 L. J., C. P. 201; 35 Id. 141.

(l) *Cole Ejec.* 72, 287, 459.

(m) 2 Blac. Com. 144; Shep. Touch. 267, 272.

(n) Shep. Touch. 272, 273; *Doe d. Hull v. Richardson*, 3 T. R. 462.

A lease to commence after the determination of a prior lease begins at once, if the previous lease be void at law: so a lease intended to commence in futuro, which misrecites the prior lease on which it depends in a material point, begins immediately (*o*). But if the new lease had misrecited a lease to A., and had then been made for twenty-one years, to commence after the expiration of the term of A., the misrecital would be unimportant, and the new lease would begin from the determination of A.'s term (*p*).

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Term granted
(Commence-
ment).

Commence-
ment on the
Determina-
tion of prior
Lease.

If no date is fixed for the commencement of the tenancy, it is usually taken to commence at the date of the lease. This, however, may be negatived by internal evidence, as where a lease dated on the 20th of December was held, from the fact that the first payment of a quarterly rent was to be on the 25th of March, to commence on 25th of December (*q*). The words "from the day of the date" mean either *inclusive* or *exclusive*, according to the context and subject-matter; and the court will construe them so as to effectuate the intention of the parties (*r*). Generally speaking, a lease from 25th March commences the next day and ends on 25th March, otherwise the day on which the last quarter's rent is usually reserved would be subsequent to the expiration of the lease (*s*). A lease "from the day of the date," and "from henceforth," is the same thing (*t*). Sometimes a lease "from the day of the date" will be construed to mean "from the day of the execution of the deed" (*u*), but the more literal construction is usually adopted (*r*).

Commence-
ment from the
Date of the
Lease.

Unless there
is Evidence to
the contrary.

As to an impossible or uncertain date, there appears to have been this distinction taken in the books, viz. that if a lease be made to begin from an impossible date, as from the 30th of February, or the like, it takes effect from the delivery (*y*). So if the lease be dated and is to commence from the "making hereof," or "from henceforth" (*y*), or from the executing of a former lease, and no such lease in fact exist, or if the prior lease be void in law (*z*); but where the limitation is uncertain, as a lease made the 10th day of October, to hold from the 20th day of November, without saying what November is meant, the lease is thereby vitiated, because the limitation is part of the agreement and the court cannot determine it, not knowing the terms of

Impossible or
uncertain
Date.

(*o*) Co. Lit. 46 b.

(*p*) *Foote v. Berkeley*, 1 Lev. 235; *Woodhouse's case*, Dyer, 93 b.

(*q*) *Sandill v. Franklin*, L. R., 10 C. P. 377; 44 L. J., C. P. 216; 32 L. T. 309; 23 W. R. 473.

(*r*) *Fugh v. Duke of Leeds*, Cowp. 711; *Ackland v. Lutley*, 9 A. & E. 879; Buc. Abr. tit. *Leases* (L. 1); *Smith L. & T.* 104, 105 (2nd ed.).

(*s*) *Ackland v. Lutley*, supra; *Wilkinson v. Gaston*, 9 Q. B. 137.

(*t*) *Llewellyn v. Williams*, Cro. Jac. 258;

Clayton's case, 5 Rep. 1.

(*u*) *Underwood v. Horwood*, 10 Ves. 209.

(*x*) *Shep. Touch.* 108; *Joe d. Cox v. Day*, 10 East, 427; *Steele v. Mart*, 4 B. & C. 272; *Stykes v. Wardle*, Id. 908; *Cooper v. Robinson*, 10 M. & W. 694; *Joe d. Darlington v. U'ph.* 13 Q. B. 201; *Bird v. Baker*, 1 E. & F. 12.

(*y*) Co. Lit. 46 b; *Stykes v. Wardle*, 4 B. & C. 908.

(*z*) *Miller v. Maynwaring*, Cro. Car. 397; *Bassett v. Lewis*, 1 Lev. 77.

CH. V. SEC. 6. *Term granted (Commencement).* the contract (a). Where a deed has no date, or an impossible date, as the 30th of February, and in the deed reference is made to the date, that word must be construed "delivery;" but if it have a sensible date, the word *date* occurring in other parts of the deed means the day of the date and not of the delivery; and, therefore, in covenant on an indenture of lease dated the 24th day of December, 1822, whereby the defendant agreed, within twenty-four calendar months then next after the date of the indenture, to procure a certain thing to be done: it was held, that the deed took effect from the day of the date, and that the twenty-four calendar months reckoned from the date (b). Where a lease was dated 25th March, 1783, habendum "from the 13th March *now last past*," and it was proved that the deed was not executed until some time after the date, it was held, that the term commenced on the 25th March, 1783, and not in 1782 (c). A deed having been made in the month of August in a leap year, the words "the 29th February then next ensuing" were construed to mean the 29th February in the next leap year (d). A lease operates as a grant only from the time of its execution, and the tenant is not liable for previous breaches of covenant, although committed after the date of the deed (e). But the duration of the term is to be computed from the day in that behalf mentioned in the lease (f).

Commencement with reference to Entry.

In general a letting by parol will be considered to commence from the day of the tenant's entering, and not with reference to any particular quarter day (g). But where a tenant entered in the middle of a quarter, and afterwards paid for that time to the beginning of a succeeding regular quarter, from which time he paid half-yearly, his tenancy was held to commence from the quarter succeeding his entering (h). Where, however, the tenant entered in the middle of a quarter, upon an agreement to pay rent "quarterly and for the half-quarter," the jury, under the judge's direction, found that the tenancy commenced from the quarter day preceding the entry (i). A party having taken possession on the 1st of August, and at the Michaelmas following paid the half-quarter's rent, and continued afterwards to pay quarterly on the usual feast days, it was held, that a notice to quit at Michaelmas was sufficient; and that although the landlord had at first given notice expiring with the half-quarter, it was not necessarily to be inferred from that circumstance that the tenancy from year to year commenced on that day (k). Where a tenant under a

(a) Bac. Abr. tit. *Leases* (L. 1); *Anon.*, 1 Mod. 180; *Foote v. Berkeley*, 1 Sid. 461.

(b) *Styles v. Wardle*, 4 B. & C. 908.

(c) *Steele v. Mart*, 4 B. & C. 272.

(d) *Chapman v. Becham*, 3 Q. B. 723.

(e) *Shaw v. Kay*, 1 Exch. 412; *Jervis v. Tomkinson*, 1 H. & N. 195, 206.

(f) *Bird v. Baker*, 1 E. & E. 12; 28

L. J., Q. B. 7.

(g) *Kemp v. Derrett*, 3 Camp. 610.

(h) *Doe d. Holcomb v. Johnson*, 6 Esp. 10.

(i) *Doe d. Wadmore v. Schoyn*, Hil. T. 1807; *Adams Ejec.* 107 (4th ed.).

(k) *Doe d. Savage v. Stapleton*, 3 C. & P. 275.

lease continued to hold after the expiration of it as a tenant at will, and assigned it to another, the tenancy of the assignee was held to commence at the day on which the original tenancy commenced under the lease, notwithstanding the assignee came in on a different day (*l*).

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*Term granted
(Commence-
ment).*

A lease may commence at one day in point of computation, and at another in point of interest (*m*), and it may commence from a day that is past; therefore, a lease "to hold from a day past for fifty years then next ensuing, the said term to commence and begin immediately after the determination of an existing lease in the same premises," was not esteemed uncertain as to its commencement (*n*).

Different
Computation
of Time and
Interest.

If when the lease is to take effect in interest or possession the years be certain, it is sufficient, for until that time it may depend upon an uncertainty; either upon a possible contingency precedent to its beginning in possession or interest, or upon a limitation or condition subsequent; but if it is to be reduced to a certainty upon a contingency precedent, the contingency must have happened in the lives of the parties (*o*).

Leases to
commence on
the happening
of Contin-
gencies.

Though there appear no certainty of years in the lease, yet if by reference to a certainty it may be made certain, it is sufficient (*p*). Thus if a lease be granted for years after lives in being, though it is uncertain at first when that term will commence, because those lives are in being, yet when they die it is reduced to a certainty, and that is certain which can be rendered so (*q*). So a lease may be granted for a term of years to commence at the determination of a previous term for years which is still subsisting (*r*). If the lease be made to commence from the end and expiration of the previous term, then, if the previous term be surrendered or forfeited, &c., the second term commences immediately; but if made to commence after the end and expiration of the twenty-one years aforesaid, then the second term would not commence until after the expiration of the twenty-one years (*s*). Where a lessor let Whiteacre to A. for twenty years, and Blackacre to B. for forty years, and then demised both to C. for a term of years, habendum from the end or determination of the said several demises to A. and B., it was held, that as to Whiteacre the term granted to C. commenced immediately upon the expiration of that granted to A., and was not to be deferred until the expiration of the

Reference to
a Certainty
may cure an
Uncertainty.

(*l*) *Doe d. Castleton v. Samuel*, 5 Esp. 173.

(*m*) *Smith L. & T.* 106 (2nd ed.).

(*n*) *Enys v. Donnithorne*, 2 Burr. 1190; *Moore v. Muagrove*, Hob. 18; 2 Roll. Abr. 850.

(*o*) *Shep. Touch.* 272.

(*p*) *Id.*

(*q*) *Goodright v. Richardson*, 3 T. R. 463; *Bac. Abr. tit. Leases (K.)*; *Bro. Abr. tit.*

Leases, 71; *Clarke v. Sydenham*, Yelv. 85; S. C., 1 Brownl. & G. 136.

(*r*) 1 Roll. Abr. 849; *Dyer*, 261 b, pl. 28; *Lord Puget's case*, 1 Leon. 199; *Smith v. Day*, 2 M. & W. 684; *Blatchford, app., Cole, resp.*, 5 C. B., N. S. 514; *Doe d. Agar v. Brown*, 2 E. & B. 331.

(*s*) *Co. Lit.* 45 b; *Wrotesley v. Adams*, *Dyer*, 177, pl. 35; *Plowd.* 198.

CH. V. SEC. 6. *Term granted (Commencement).* demise to B. (t). Where a lease is thus made to A., reciting a former one to B., and demising for a term of years to commence at the determination of B.'s lease, if in fact no such lease had been made to B., then A.'s term will commence at once (u); and the same if the lease be void (x). But if there be such a former lease, and it be misrecited in a material part in the second, then the new lease can commence presently only in the enumeration of years, but not in interest until the expiration of the first lease (y). If A. seised of lands in fee grant to B. that, when B. shall pay to A. twenty shillings, from thenceforth he shall hold the lands for twenty-one years, and afterwards B. pay the twenty shillings: in this case B. has a good lease for twenty-one years from the date of the payment (z). If one make a lease to another for so many years as J. S. shall name, this at the beginning is uncertain; but when J. S. has named the years (in the lifetime of the lessor) this ascertains the commencement and continuance of the lease accordingly: but if the lease had been made for so many years as the executors of the lessor should name, this could not be made good by any nomination (a). A lease made to another, until a child en ventre sa mère shall come to the age of twenty-one years, is not good as a lease for years but at will only (b).

(d) Duration of Terms for Years.

What Certainty is requisite generally.

The duration of leases for years ought to be ascertained either by the express limitation of the parties at the time of making, or by a reference to some collateral act, which may with equal certainty measure the continuance thereof, otherwise they will be void (c). So an agreement for a lease, or for an underlease, must mention the term, and from what day it is to commence, otherwise it will not be sufficient to satisfy the Statute of Frauds (d). A demise may be made for "one year certain, and so on from year to year," and such demise will create a tenancy for two years at the least (e). So a demise may be made "for six months, and so on from six months to six months until determined by either party," and such demise will create a tenancy for one year at the least (f). So a demise may be

(t) *Windham's case*, 5 Co. R. 7; Moor. 191; Cro. Eliz. 199; 2 Leon. 105.

(u) Bac. Abr. tit. *Leases* (L. 1).

(x) *Id.*; Co. Lit. 46 b.

(y) Bac. Abr. tit. *Leases* (L. 1); Co. Lit. 46 b. As to misrecital of date, see *Touce v. Huntingdon*, Vaugh. 73; Bac. Abr. tit. *Leases* (L. 1); *Palmer's case*, 4 Co. R. 74.

(z) Shep. Touch. 273; Co. Lit. 45 b; 6 Co. R. 35 a; 1 Roll. Abr. 849.

(a) Bac. Abr. tit. *Leases* (L. 2); Co. Lit. 45 b; 2 Leon. 86; Plowd. 6, 373, 524.

(b) *Say v. Smith*, Plowd. 271; *Bishop of Bath's case*, 6 Co. R. 35 b; Bac. Abr. tit. *Leases* (L. 3).

(c) Bac. Abr. tit. *Leases* (L. 3).

(d) *Bayley v. Fitzmaurice* (in error), 8 E. & B. 664; 9 H. L. Cas. 78; *Clinan v. Cooke*, 1 Sch. & Lef. 22; *Clarke v. Fuller*, 16 C. B., N. S. 24.

(e) *Doc d. Chadborn v. Green*, 9 A. & E. 658; *Doc d. Monek v. Geeckie*, 5 Q. B. 841; 1 C. & K. 307.

(f) *Reg. v. Chawton*, 1 Q. B. 247.

made from two years to two years, or from three years to three years, or the like (*g*). So a lease may be made for seven years, and afterwards from year to year (*h*), but an agreement to let from year to year, and for so long as the tenant pays rent, and the landlord has power to let, confers no particular estate beyond a tenancy from year to year (*i*). An instrument, by which A. agreed to let and B. to take certain premises, on the terms that B. should pay certain specified sums varying in amount at the end of every three years up to a specified date, and which provided that from and after that date "*he should pay the clear annual rent of 9l. till the end of the lease,*" without mentioning any period at which the lease was to terminate, was held good only for the time previous to the date at which the 9l. was to commence (*j*).

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*Term granted
(Duration).*

If a man grant another a lease of land for ten years, and that if at the end of every ten years he shall pay the lessor a certain quantity of tiles, then he shall have a perpetual demise of the land from ten years to ten years continually following: this is a good lease for ten years only, and bad as to the rest for uncertainty (*k*). If a man make a lease for years, without saying how many, it is a good lease for two years certain; because for more there is no certainty, and for less there can be no sense in the words (*l*); but if a man lease lands for such a term as both parties shall please, it is but a lease at will (*m*). A tenancy from year to year is determinable at the end of the first as well as of any subsequent year, unless in creating such tenancy the parties use words showing that they contemplate a tenancy for two years at least (*n*). If premises are taken "for twelve months certain, and six months' notice to quit afterwards," the tenancy may be determined at the end of the first year by a six months' previous notice to quit (*o*). A lease for one year and so on from year to year until the tenancy thereby created should be determined as after mentioned, with a provision that either party might determine the tenancy by three months' notice, creates a tenancy for two years certain (*p*). A demise for a year, and so from year to year, is a lease for two years certain at least (*p*); so, if a parson make a lease for a year, and so

Certainty
with reference
to collateral
Matters.

(*g*) *Hennings v. Brabason*, 2 Lev. 45; *Roe d. Bree v. Lees*, 2 W. Blac. 1171; 3 Prest. Conv. 76. And see *Richards v. Sely*, 2 Mod. 80; 3 Keb. 638.

(*h*) *Brown v. Trumper*, 26 Beav. 11.

(*i*) *Wood v. Beard*, L. R., 2 Ex. D. 30; 46 L. J., Q. B. 100; 35 L. T. 866.

(*j*) *Gwynne v. Maynestone*, 8 C. & P. 302.

(*k*) *Say v. Smith*, Plowd. 271.

(*l*) *Bishop of Bath's case*, 6 Co. R. 35; Bac. Abr. *Leases* (L. 3).

(*m*) Bac. Abr. tit. *Leases* (L. 3); *Bishop of Bath's case*, *supra*; Com. Dig. *Estates*

(II. 1); *Richardson v. Langridge*, 4 Taunt. 128; Cole Ejec. 448.

(*n*) *Doe d. Clarke v. Smaridge*, 7 Q. B. 957; *Doe d. Plumer v. Nainby*, 10 Q. B. 473; Bac. Abr. tit. *Leases* (L. 3); *Agard v. King*, Cro. Eliz. 775; *Legg v. Strudwick*, 2 Salk. 414; *Jenn d. Jacklin v. Cartwright*, 4 East, 29, 32; *Harris v. Evans*, 1 Wils. 262; *Birch v. Wright*, 1 T. R. 380.

(*o*) *Thompson v. Maberley*, 2 Camp. 573.

(*p*) *Doe d. Chadborn v. Green*, 9 A. & E. 658; *Doe d. Monck v. Geckie*, 5 Q. B. 841; 1 C. & K. 307.

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Where there is an optional Number of Years fixed.

Dann v. Spurrier.

A lease “for seven, fourteen or twenty-one years, as the lessee shall think proper,” is a good lease for at least seven years, and not void for uncertainty (s). A lease made in 1875, for “three, six or nine years, determinable in 1788, 1791 or 1794,” is a good lease for nine years, determinable at the end of three or six years (t). But the lessee alone has the option to determine such a lease at the earlier periods, on the ground that every doubtful grant must be construed in favour of the grantee (u). The usual form of making such leases at present is to insert the full term in the habendum, and add a proviso at the end for one or either of the parties to put an end to the term at the shorter periods. If the option be given expressly to each party, the lease may be determined by either, or by his representative entitled to the reversion or term (r); and where the option was given to the respective parties, their executors and administrators, it was held that the devisee of the lessor might determine the lease (y). But where the lease contained a proviso that if either of the parties, their respective heirs or executors, should wish to put an end to the term at the end of seven or fourteen years, six months’ notice in writing should be given under “his or their respective hands,” and the lessor died, leaving three executors; it was held, that a notice signed by two of them only, although given on behalf of themselves and the other executor, was not a good notice within the terms of the proviso (z). A lease for twenty-one years expressed to “be determinable nevertheless in seven or fourteen years if the said parties hereto shall so think fit,” is determinable only by consent of both the parties, although it may have been their intention to give the option to either of them (a). The notice must end with the first seven or fourteen years (or other stipulated period), according to the terms of the proviso, and not at any other time (b). It must not end *at noon*

- (g) Bao. Abr. tit. *Leases* (L. 3).
 (r) *Reg. v. Chawton*, 1 Q. B. 247; 464.
 Simpson v. *Margitson*, 11 Q. B. 23.
 (s) *Ferguson v. Cornish*, 2 Burr. 1032.
 (t) *Goodright d. Hall v. Richardson*, 3 T. R. 462.
 (u) *Dann v. Spurrier*, 3 B. & P. 399; 34 L. J., Ex. 6.
 Doe d. *Webb v. Dixon*, 9 East, 15; *Price v. Dyer*, 17 Ves. 356; Cole Ejec. 398.
 (y) *Goodright v. Mark*, 4 M. & S. 30; *Bird v. Baker*, 1 E. & E. 12.
 (y) *Roe d. Bamford v. Hayley*, 12 East, 464.
 (z) *Right d. Fisher v. Cuthell*, 5 East, 491; *Doe d. Aslin v. Summersett*, 1 B. & Ad. 136, 141.
 (a) *Fowell v. Frank*, 3 H. & C. 458; 34 L. J., Ex. 6.
 (b) *Caddy v. Martinez*, 11 A. & E. 720; *Bird v. Baker*, 1 E. & E. 12; 28 L. J., Q. B. 7; Cole Ejec. 398.

on the right day (*c*). Sometimes it is made a condition precedent that the tenant shall not only give the above notice, but also duly pay all the rent, and perform all the covenants on his part, to the termination of the notice (*d*). Such a condition is unreasonable, and ought to be objected to in the first instance (*e*). A lease for three, seven or ten years, determinable on notice, stipulated that a quarter's rent should be paid by the tenant on taking possession, the same to be allowed him for the last quarter's rent "on the determination of the said tenancy;" after a notice to determine the lease at the expiration of the third year had been given, and before its expiration, the parties verbally agreed that the party should continue tenant for another year, no express mention being made of the terms of the tenancy; it was held, that the tenant continued to hold subject to the terms of the original lease, and consequently that the payment on taking possession was applicable to the last quarter of the fourth year (*f*).

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Term granted
(Duration).

If a lease be made for twenty-one years, with a further covenant by the lessor, "that the lessee shall have the same for twenty-one years more after the expiration of the said term, and so from twenty-one years to twenty-one years, until ninety-nine years thence next ensuing shall be complete and ended," the first twenty-one years are not to be reckoned part of the ninety-nine years (*g*). Where one made a lease for three years, and so from three years to three years until ten years should be expired, it was held to be a lease but for nine years, and that the odd year should be rejected, because that could not come to fall within any three entire years, according to the limitation (*h*). Where there was a demise of freehold and copyhold lands at an entire rent, to hold so much as was freehold for twenty-one years and so much as was copyhold for three years, and there was a covenant for renewal of the lease of the copyhold every three years toties quoties during the twenty-one years under the like covenants; and that in the meantime, and until such new leases should be executed, the lessee should hold the said lands, as well copyhold as freehold, &c.; it was held, that this was only a lease of the copyhold for three years, and that the lessor, after the three years, might recover the premises in ejectment against the lessee, there not having been any fresh lease granted (*i*).

Where there
is a recurring
Number of
Years.

Sometimes a term is limited conditionally, ex. gr. for ninety-nine years if the lessee or some other person or persons therein named shall so long live (*k*). Where one made a lease for forty years, "if his wife

Where the
Term depends
on a Contin-
gency.

(*c*) *Page v. More*, 15 Q. B. 684.

(*d*) See for instance *Parker v. Shepherd*, 6 T. R. 665.

(*e*) *Cole Ejec.* 397.

(*f*) *Finch v. Miller*, 5 C. B. 428.

(*g*) *Manchester College v. Trafford*, 2 Show. 31.

(*h*) *Bac. Abr. tit. Leases* (L. 3); *Plowd.* 273, 522 a.

(*i*) *Fenny d. Eastham v. Child*, 2 M. & S. 255.

(*k*) *Hughes and Crowther's case*, 13 Co. R. 66; *Brudnell's case*, 5 Co. R. 9 a; *Cole Ejec.* 402.

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 (Duration).*

or any of their issue should so long live;" it was adjudged that the lease was not determined by the death of one of them, but should continue till all were dead, by reason of the disjunctive *or*, which goes to and governs the whole limitation; but if the words had been "if his wife *and* issue should so long live," there clearly, by the death of any of them within the forty years, the term had been at an end, by reason of the copulative *and*, which conjoins all together, and makes all their lives jointly the measure of the estate (*l*). If a lease be made to two for years, if they should so long live, it would determine by the death of one of them, because their life is but a collateral condition and limitation of the estate, which therefore is broken when one dies: this differs therefore from a lease to two persons for their lives, for that gives an estate to both for their lives, and both have an estate of freehold therein in their own right; which consequently cannot determine by the death of one of them, for then the other could not be said to have an estate for his life, as the lessor at first gave it (*m*). A lease made for twenty-one years, if the lessee should live so long and continue in the lessor's service, has been held not to determine on the lessor's death (*n*). If a lease be made for a certain number of years, provided the lessee shall so long continue to occupy the premises personally, it will cease and determine whenever he parts with the possession, even by compulsion of law (*o*). If a lease be made to J. S. for twenty years, if the coverture between A. and B. shall so long continue; this is a good lease for twenty years although the dissolution of the coverture may determine it sooner (*p*). But a lease to one generally during the coverture of A. and B. would create but a tenancy at will, by reason of the uncertainty of the duration of the coverture (*q*). Where a lease for years is made to A. and B., if they should so long live; or to A., if he and B. should so long live; or if the lessor and lessee, or the lessor and J. S. should so long live: in any of these cases, if one die the lease is determined (*r*). If a lease be made during the minority of J. S., or until J. S. shall come to the age of twenty-one years, these are good leases (*s*); and if J. S. die before he come to his full age, the lease is ended: so, if a man make a lease for twenty-one years, if J. S. live so long (*t*), or if J. S. shall continue to be parson of Dale so long; these and such like leases are good (*u*). If A. make a lease to B. for so many years as A. and B. or either of

(*l*) Co. Lit. 225 a; *Ed. Fauz's case*, Cro. Eliz. 269.

(*m*) Bac. Abr. tit. *Leases* (L. 4); Roll. Rep. 309.

(*n*) *Wrenford v. Gyles*, Cro. Eliz. 643; Noy, 70; Cole Ejec. 402.

(*o*) *Hoe d. Lockwood v. Clarke*, 8 East, 185.

(*p*) *Say v. Smith*, Plowd. 273.

(*q*) Bac. Abr. tit. *Leases* (L. 3).

(*r*) *Brudnell's case*, 5 Co. R. 9 b; *Daniel v. Hill*, Cro. Jac. 377; 1 Roll. R. 197; *Bailes v. Wenman*, 2 Vent. 74.

(*s*) *Bishop of Bath's case*, 6 Co. R. 35; *Boraston's case*, 3 Co. R. 19; *Whittaye v. Lamb*, 12 M. & W. 813.

(*t*) *Wright v. Cartwright*, 1 Burr. 282.

(*u*) Bac. Abr. tit. *Leases* (L. 2, 3).

them shall live, not naming any certain number of years: or, if the parson of Dale make a lease of his glebe for so many years as he shall be parson there; this is not certain, neither can it be made so by any means; and yet if a parson shall make a lease from three years to three years, so long as he shall be parson, this is a good lease for six years, if he continue parson so long, and for the residue is void for uncertainty (*x*).

CH. V. SEC. 6.
Term granted
(Duration).

A covenant in a lease for lives that the lease is good for the lives mentioned therein has been held not to warrant the subsistence of such lives (*y*).

SECT. 7.—*Reddendum.*

The reddendum or reservation of rent is a clause in the lease, whereby the lessor reserves some new thing to himself out of that which he granted before; and this commonly and properly succeeds the habendum, and is usually made by the words "yielding and paying," or similar expressions. In every good reservation these things must always concur:—1. It must be by certain and apt words (*z*). 2. It must be of some other thing issuing or coming out of the thing granted, and not a part of the thing itself, nor of something issuing out of another thing (*a*). 3. It must be of such a thing whereunto the grantor may have resort to distrain. 4. It must be made to one of the grantors, and not to a stranger to the deed (*b*). But the usual formal reddendum in a lease is not essential. This subject is more fully treated of hereafter (*c*).

What Things
are requisite
in a Reserva-
tion.

SECT. 8.—*Express Covenants and Agreements.*

(a) *Generally.*

A covenant is either expressed or implied—it subsists either in fact or in law. An express covenant is a stipulation in a deed that something has or has not been done, or that something shall or shall not be done, or that some right or power then exists, or the like. An implied covenant, or a covenant in law, is that which the law implies, though not expressed by words (*d*). He who makes the covenant is called the covenantor, and he to whom it is made the covenantee (*e*). By 8 & 9 Vict. c. 106, s. 5, "the benefit of a condition or covenant

What a Cove-
nant is gene-
rally.

(*x*) Bac. Abr. tit. *Leases* (L. 3).

(*b*) *Doe d. Barber v. Lawrence*, 4 Taunt.

(*y*) *Coates v. Collins*, L. R., 7 Q. B. 144;

23.

40 L. J., Q. B. 157. See 136, ante.

(*c*) Chap. X., Sect. 2, and see Smith

(*e*) *Parker v. Harris*, 4 Mod. 76; 1 Salk.

L. & T. 111—121 (2nd ed.).

262.

(*d*) Post, Sect. 9.

(*a*) *Doe d. Douglas v. Lock*, 2 A. & E.

(*e*) Shep. Touch. 160; 2 Blac. Com.

705.

304.

CH. V. SEC. 8.
Express Covenants and Agreements.

respecting any tenements or hereditaments may be taken, although the taker thereof be not named as a party to the same indenture" (f). Before this enactment, when a deed was made inter partes, no one who was not expressed to be a party could sue on a covenant contained in it; and this was not a mere rule of construction but a rule of positive law (g). A covenant is valid and binding although indorsed on the deed after the signing, but before the sealing and delivery (h).

By what Words Covenants may be made.

No particular technical words are requisite towards making a covenant (i); for any words or form of expression which import an agreement, or show the party's concurrence in the performance of a future act, or the intention of the parties mutually to contract, will suffice for that purpose (k). Thus, "yielding and paying," &c. amount to a covenant, on which an action lies for nonpayment (l); so, yielding and paying such a rent "free and clear of all manner of taxes, charges and impositions whatsoever," is a covenant to pay the whole rent discharged of all taxes before or afterwards imposed (m). The words "provided always, and it is hereby agreed and declared that," &c. create a covenant (n), and so do the words "provided always, and these presents are upon the express condition that," &c. (o).

Construction of Covenants.

All contracts are to be construed according to the intent of the parties, as expressed by their own words (p); and if there be any doubt upon the sense of the words, such construction shall be made as is most strong against the covenantor, lest by the obscure wording of his contract he should find means to evade and elude it (q). There is, however, a distinction between implied covenants and express covenants, namely, that the latter are to be taken more strictly (r).

Joint or several.

In preparing covenants entered into with several persons, it should be made clear whether it is intended to be a separate covenant with each person, as well as a joint covenant with the whole: and whether a covenant be joint or several (when the words used admit of either construction) depends upon the words used, the subject-matter of the covenant, and the interest which passes thereby (s). If the words of

(f) *Ex parte Cockburn, re Smith*, 12 W. R. 184.

(g) *Chesterfield and Midland Silkestone Colliery Co. v. Hawkins*, 3 H. & C. 677; 11 Jur., N. S. 468.

(h) *Lyburn v. Warrington*, 1 Stark. 162; *Reg. v. Aldborough*, 13 Q. B. 196; *Broke v. Smith*, Moor. 679.

(i) *Stephenson's case*, 1 Leon. 324; 12 East, 182, n.; *Smith L. & T.* 121 (2nd ed.).

(k) *Bush v. Coles*, Carth. 232; *Duke of St. Albans v. Ellis*, 16 East, 352; *Sampson v. Easterby*, 9 B. & C. 605; *Cannock v. Jones*, 3 Exch. 233; *Wood v. Copper Miners' Co.*, 7 C. B. 906.

(l) *Hellier v. Casbard*, 1 Sid. 266; *Porter*

v. Sweetnam, Styles, 406; *Smith L. & T.* 96 (2nd ed.).

(m) *Giles v. Hooper*, Carth. 135.

(n) *Bac. Abr. tit. Covenant (A.)*.

(o) *Brooks v. Drysdale*, L. R., 3 C. P. D. 52; ante, p. 113 (e).

(p) *Com. Dig. tit. Covenant (E. 2)*; *Plowden*, 329; *Iggulden v. May*, 7 East, 241; *Smith L. & T.* 122 (2nd ed.).

(q) *Bac. Abr. tit. Covenant (F.)*.

(r) *Shubrick v. Salmon*, 3 Burr. 1639.

(s) *Slingsby's case*, 5 Co. R. 18 b; 3 Ch. R. 126; *Duke of Northumberland v. Errington*, 5 T. R. 522; *Southcote v. Hoare*, 3 Taunt. 89; *Evys v. Donnithorne*, 2 Burr. 1190.

the covenant are expressly and clearly joint, the covenant will be so construed, although the interest is several; and vice versa (*t*). If the words used admit of two constructions, and the interest of the covenantees is joint, the covenant will be construed as joint (*u*): but if the interest of the covenantees is several, the covenant will be construed as several (*v*). Where A. by lease demised a house and land to B. and C. for a term of years at 16*l*. per annum, with a covenant by them jointly and severally to pay taxes and rates, &c., but none to pay rent; and B. occupied the whole premises, and paid the rent for five years; it was held that the demise being joint, the rent was payable by the two jointly (*x*).

CH. V. SECT. 8.
Express Covenants and Agreements.

The lessee has both a privity of contract and a privity of estate; and though he assigns, and thereby destroys the privity of estate, yet the privity of contract continues, and he is liable in covenant notwithstanding the assignment (*y*): but the assignee comes in only in privity of estate, and is therefore liable to the lessor and his assigns only on those covenants which run with the land and for those breaches which occur during the continuance of such privity of estate, and before he assigns over (*z*). But he continues liable to his immediate assignor, his executors or administrators, upon any express covenant by him in the deed of assignment, for payment of the rent and performance of the covenants contained in the original lease (*a*). If a covenant by two lessees be joint and several, it binds the executors of the deceased lessee, although the whole term, interest and benefit survived to the other lessee (*b*).

Lessee liable, notwithstanding Assignment.

A covenant to do a thing which upon the face of it appears to be prejudicial to the public interest, or otherwise contrary to law, is absolutely void (*c*). On this principle it was held that neither the covenant to pay rent, nor any other covenant in a lease expressed to be made for the purpose of the premises being used to boil oil and

What Covenants void.
For Illegality.

(*t*) *Sorbie v. Park*, 12 M. & W. 146; *Keightley v. Watson*, 3 Exch. 716; *Lee v. Nixon*, 1 A. & E. 201.

(*u*) *Anderson v. Martindale*, 1 East, 497; *Foley v. Addenbrooke*, 4 Q. B. 197; *Pugh v. Stringfield*, 3 C. B., N. S. 2; *Hopkinson v. Lee*, 6 Q. B. 964; *Bradburne v. Botfield*, 14 M. & W. 559.

(*v*) *Withers v. Birchman*, 3 B. & C. 54; *James v. Emery*, 2 Moo. 195; 5 Price, 529, 533; *Servante v. James*, 10 B. & C. 410; *Mills v. Ladbroke*, 7 M. & G. 218; *Poole v. Hill*, 6 M. & W. 835; *Harcourt v. Wyman*, 3 Exch. 817; but see *Thompson v. Hakevill*, 19 C. B., N. S. 713; 35 L. J., C. P. 18; *Wilkinson v. Hall*, 1 Bing. N. C. 713.

(*x*) *Rex v. Great Wakering*, 5 B. & Ad. 971; See also *Levy v. Sale*, 37 L. T. 709.

(*y*) *Eaton v. Jacques*, 2 Doug. 455; *Chancellor v. Poole*, 2 Doug. 764; *Orgill v. Kemnshead*, 4 Taunt. 642; 1 Smith L. C. 77 (7th ed.).

(*z*) *Harley v. King*, 5 Tyr. 692; *Taylor v. Shum*, 1 B. & P. 21; *Le Kreuz v. Nash*, 2 Stra. 1222; *Odell v. Wake*, 3 Camp. 394; *Onslow v. Corrie*, 2 Madd. 330.

(*a*) *Harris v. Goodwyn*, 2 M. & Gr. 405; 9 Dowl. 409; *Burnett v. Lynch*, 5 B. & C. 589; *Wolveridge v. Steward*, 1 Cr. & Mee. 644.

(*b*) *Enys v. Donnithorne*, 2 Burr. 1190, 1197.

(*c*) *Collins v. Blantern*, 1 Smith L. C. 369 (7th ed.).

CH. V. SEC. 8. tar, contrary to the provisions of a Building Act, could be enforced against the lessee (*d*).

Express Covenants and Agreements.

Covenant for Impossibility, &c.

A covenant to do a thing which is impossible is void, if the impossibility exist at the time of making the covenant, but not otherwise (*e*). A covenant in a lease to repair *during the term* does not take effect where the lessor does not execute the lease (*f*). A lessee is not liable for the breach of a covenant committed before the execution of the lease, but subsequently to the day from which by the habendum the term was to commence (*g*). Where a covenant is founded on a conveyance of an estate which proves to be void, and no estate passes, the covenant is void also: thus, where the conveyance was “a grant of so much of a term as should be unexpired at the death of A.,” and there was a covenant for quiet enjoyment, and a bond for performance; the conveyance being void on account of the uncertainty of the time when the term was to commence and end, the covenants were adjudged to be void, as they depended on the estate (*h*): but although this is the case with respect to all dependent covenants, it is otherwise of covenants which are independent (*i*).

(b) *Covenants, whether Real or Personal.*

Meaning of “Running with Land,” Spencer’s case.

Covenants are either real or personal; the former are such as are annexed to an estate, or are to be performed on it, and are said to “run with the land,” so that he who has the one is subject to the other. A covenant is said to run with the land when either the liability to perform it, or the right to take advantage of it passes to the assignee of that land. A covenant is said to run with the reversion when either the liability to perform it, or the right to take advantage of it, passes to the assignee of that reversion (*k*). Covenants which run with the land bind those who come in by act of law, such as the personal representatives of the assignee of a lessee, as well as those who come in by act of the parties (*l*); for the personal representatives of a lessee for years are his assigns (*m*). Covenants which

(*d*) *Gas Light Co. v. Turner*, 5 Bing. N. C. 666; 6 Id. 324.

(*e*) *Shep. Touch.* 163. See *Hall v. Wright*, E. B. & E. 746; 27 L. J., Q. B. 315; *Appleby v. Myers*, L. R., 2 C. P. 651; 36 L. J., C. P. 331; 16 L. T. 669.

(*f*) *Pitman v. Woodbury*, 3 Exch. 4; *Linwood v. Squire*, 5 Exch. 234; *Wheatley v. Boyd*, 7 Exch. 20; *Swatman v. Ambler*, 8 Exch. 72; 22 L. J., Exch. 81.

(*g*) *Shaw v. Kay*, 1 Exch. 412; *Jervis v. Tompkinson*, 1 H. & N. 195, 206; *Bird v. Baker*, 1 E. & E. 12; 28 L. J., Q. B. 7; *Browne v. Burton*, 5 D. & L. 289; *Steele v.*

Mart, 4 B. & C. 272.

(*h*) *Capenhurst v. Capenhurst*, Sir T. Raym. 27; *Hayne v. Malkby*, 3 T. R. 438; Co. Lit. 456.

(*i*) *Northcote v. Underhill*, 1 Salk. 199; 1 Ld. Raym. 380.

(*k*) *Spencer’s case*, 1 Smith L. C. 60 (7th ed.).

(*l*) *Esp. N. P.* 290.

(*m*) *Hornidge v. Wilson*, 11 A. & E. 645; *Wollaston v. Hakewill*, 3 M. & G. 297; *Hopwood v. Whaley*, 6 C. B. 744; 6 D. & L. 342; *Collins v. Crouch*, 13 Q. B. 542.

run with the land therefore bind the assigns although not mentioned. But in preparing covenants which are intended to run with the land, the "assigns" should always be mentioned, for though some covenants will bind them although not mentioned, and others will not bind them although mentioned, yet there is a middle class, in which assignees are bound if mentioned, but not otherwise, and it is prudent to provide for the possibility of a covenant being held to belong to this class.

CH. V. SEC. 8.
Express Covenants ("Running with the Land").

All implied covenants run with the land (*n*), but with regard to express covenants some little uncertainty has prevailed. The general rules (*o*) appear to be that (1) an assignee, whether of the reversion or the term, can, although not named in the covenant, avail himself of those covenants which touch and concern the thing demised; (2) that of such covenants those which concern something not in being at the time of the demise, bind the assignees if named, but otherwise not; and (3) that covenants which do not concern the thing demised, but are personal between the covenanting parties, do not bind assignees in any case.

The following covenants seem to run with the land, so as to bind the assignee, whether of the reversion or the term, although not named:—A covenant to pay rent (*p*) or taxes, or to repair (*q*), or to leave in repair (*r*): to maintain a sea wall in esse (*s*): to repair, renew and replace tenants' fixtures and machinery fixed to the premises (*t*): not to plough (*u*): to use the land in a husbandlike manner (*x*): to lay dung on the demised land annually (*y*): to reside on the demised premises during the term (*z*): to permit the lessor to have access to two rooms excepted from the demise (*a*): to carry all the corn produced on the demised land to the lessor's mill to be ground (*b*): to leave the land as well stocked with game at the end of the term as it was found to be at the beginning of it (*c*): to supply demised houses with good water (*d*): to repair, and pay ground rent (*e*): for quiet

What Covenants run with the Land.

(*n*) As to implied covenants, see Sect. 9, post.

(*o*) See *Spencer's case*, 1 Sm. L. C. 60 (7th ed.); Smith L. & T. 383; Fawcett L. & T. 247. It seems that in equity the question whether assignees are bound turns upon the doctrine of notice, so that, by the effect of the Judicature Act, it will, if the facts admit of it, be immaterial whether a particular covenant run with the land or not. See *Tulk v. Moxhay*, 2 Ph. 774; *Wilson v. Hart*, L. R., 1 Ch. 463, and like cases discussed, 1 Sm. L. C., 7th ed. 94 (A.D. 1876).

(*p*) *Parker v. Webb*, 3 Salk. 5.

(*q*) *Doan and C. of Windsor's case*, 5 Co. R. 24; *Conan v. Kemise*, W. Jon. 245; *Smith v. Arnold*, 3 Salk. 4; *Martyn v. Clue*, 18 Q. B. 661; 22 L. J., Q. B. 147.

(*r*) Vin. Abr. *Covenant* (K. 19); *Doe d. Strade v. Seaton*, 2 C., M. & R. 730; *Martyn v. Clue*, supra (last point).

(*s*) *Morland v. Cook*, L. R., 6 Eq. 212, 267; 37 L. J., Ch. 825.

(*t*) *Williams v. Earle*, L. R., 3 Q. B. 739.

(*u*) *Corkson v. Cock*, Cro. Jac. 125.

(*x*) *Walsh v. Watson*, Esp. N. P. 295.

(*y*) — *v. Davis*, MS. M. T., 42 Geo. 3.

(*z*) *Tatem v. Chaplin*, 2 H. Blac. 133.

(*a*) *Cole's case*, 1 Salk. 196, 8 C. sub nom. *Bush v. Coles*, 1 Snow. 389, Carth. 232.

(*b*) *Fyppan v. Arthur*, 1 B. & C. 410. See *Hemingway v. Fernandes*, 13 Sim. 228.

(*c*) *Hooper v. Clark*, L. R., 2 Q. B. 200; 36 L. J., Q. B. 79.

(*d*) *Jourdain v. Wilson*, 4 B. & A. 266.

(*e*) *Martyn v. Clue*, supra.

CH. V. SEC. 8. enjoyment (*f*): to produce title deeds (*g*): to make further assurance (*h*): to renew the lease (*i*): to endeavour to procure a renewal of the lease for another life (in an underlease by lessee for lives) (*k*): and to build a new smelting mill in lieu of an old one in a lease of mines (*l*).
Express Covenants ("Running with the Land").

There is also authority that the covenant to insure (*m*), the covenant not to assign or sublet without licence (*n*), and the covenant not to carry on a particular trade (*o*), run with the land.

To insure.
Vernon v. Smith.

With regard to the covenant to insure against fire, it was held in *Vernon v. Smith* (*m*) to run with the land, on the ground that the Building Act, 14 Geo. 3, c. 78, s. 83, in that case assumed to have a local application only, enables the landlord to have the insurance money laid out in rebuilding, so that the covenant was in effect a covenant to repair. The statute has since been held to have a general application (*p*), so that if the reasoning in *Vernon v. Smith* be correct, the covenant to insure runs with the land.

Not to assign
 without
 Licence.

The covenant not to assign or sublet without licence was expressly held to run with the land in *Williams v. Earle* (*q*); but in the later case of *West v. Dobb* (*r*) (where the point arose, but did not require to be decided), Blackburn, J., who was one of the two judges who decided *Williams v. Earle*, pointed out that in that case assigns were named in the covenant, and seems to have wished to confine his judgment accordingly (*s*). However this may be, the covenant not to assign or sublet appears to concern the thing demised in relation to its state at the time of the demise, and consequently to bind assignees whether named or not (*t*).

Minshull v. Oakes.

In *Minshull v. Oakes*, a covenant to repair and leave in repair (inter alia) all buildings which should or might be thereafter erected during the term on the demised premises was considered to be, not a covenant absolutely to do a new thing, but to do something condi-

(*f*) *Lewis v. Campbell*, 8 Taunt. 716; 3 Moo. 35, 51; *Campbell v. Lewis* (in error), 3 B. & A. 392; *Noke v. Awdler*, Cro. Eliz. 375, 436.

(*g*) *Barclay v. Raine*, 1 Sim. & Stu. 449.

(*h*) *Middlemore v. Goodhall*, Cro. Car. 503; *Kingdon v. Nottle*, 4 M. & S. 53; *King v. Jones*, 5 Taunt. 418; 4 M. & S. 188.

(*i*) *Isteed v. Stoncley*, 1 Andorson, 82; *Brooke v. Bulkeley*, 2 Ves. jun. 498; *Roe v. Hayley*, 12 East, 464.

(*k*) *Simpson v. Clayton*, 4 Bing. N. C. 758; 6 Scott, 469.

(*l*) *Sampson v. Easterby* 9 B. & C. 505; *Easterby v. Sampson* (in error), 6 Bing. 644; 1 C. & J. 105.

(*m*) *Vernon v. Smith*, 5 B. & A. 1. And see post, Chap. XVII., Sect. 1.

(*n*) *Williams v. Earle*, L. R., 3 Q. B. 739; 37 L. J., Q. B. 231.

(*o*) *Mayor of Congleton v. Pattison*, 10 East, 130. The obiter dicta of Lord

Ellenborough and Bayley, J., seem to be in accordance with principle. In *Wilson v. Hart*, L. R., 1 Ch. 463, it was held that a tenant from year to year was bound by his landlord's covenant that no building to be erected should be used as a beer shop, although such covenant did not run with the land. See, too, *Wilkinson v. Rogers*, 2 De G., J. & S. 62.

(*p*) *Ex parte Coreley*, 34 L. J., Bank. 1. In *Vernon v. Smith*, the judgment of Best, J., proceeded independently of the statute.

(*q*) L. R., 3 Q. B. 739; 37 L. J., Q. B. 231.

(*r*) L. R., 4 Q. B. 634; 38 L. J., Q. B. 289.

(*s*) And see per Bayley, B., in *Paul v. Nurse*, 8 B. & C. 489; *Doe d. Cheere v. Smith*, 5 Taunt. 795; *Bally v. Wells*, 3 Wils. 33.

(*t*) And see 2 Sm. L. C. at p. 77.

tionally, viz. if new buildings were erected on the demised premises during the term to repair them; and, as when built they would be part of the thing demised, it was held that the assignee was bound although not named in the covenant (*u*). In this case the court expressed an opinion that the rule that the naming the assigns in the covenant will bind them in relation to a thing not in esse at the time of the demise, was neither laid down in *Spencer's case* nor consistent with reason. The rule, however, appears to have been recognized as good law in many other cases, both prior (*v*) and subsequent to (*x*) *Minshull v. Oakes*. And it seems to be consistent with reason that the naming of the assigns should vary the liability (*y*).

CR. V. SEC. 8.
Express Covenants ("Running with the Land").

A covenant which is merely personal or collateral to the thing demised does not run with the land, and therefore assignees are not bound even though they be expressly named. The following covenants seem to be personal covenants, so as not to bind the assignee. A covenant by a lessor to pay on a valuation for all trees planted (*z*) or all improvements made (*a*) by the lessee during the term: to give the lessee the option of pre-emption of a piece of ground adjoining the demised premises (*b*): a covenant by lessee to pay, in addition to rent reserved, ten per cent. on the outlay which the lessor should make in improving the buildings (*c*): not to keep a beershop within a certain distance of the demised premises (*d*): a covenant to pay rent and repair, made *with a mortgagor* and his assigns, in a lease granted by himself together with the mortgagee (*e*): a covenant in an underlease, whereby the lessor covenanted to observe and indemnify the lessee against the covenants in the superior lease, one of which was to build several houses on the land (*f*): and a covenant by lessee for himself, his executors and assigns not to have persons to work in a mill to be erected on the demised premises who were settled in other parishes without a parish certificate (*g*).

Personal Covenants do not run with the Land.

Where the lessee of a theatre agreed to repay money lent to him by the plaintiff on a day certain, and that until payment the plaintiff and such persons as he might appoint should have the free use of two

Boxes in Theatre.

(*u*) 27 L. J., Ex. 194; 2 H. & N. 793.

(*v*) *Sampson v. Easterby*, 6 Bing. 644, Exch.; *Doughty v. Bowman*, 4 Q. B. 444; *Greenaway v. Hart*, 14 C. B. 340.

(*x*) *Williams v. Earle*, ubi supra; *West v. Dobb*, ubi supra.

(*y*) But see contra, 1 Sm. L. C. 76 (ed. 7).

(*z*) *Grey v. Cuthbertson*, 4 Doug. 351; 2 Chit. R. 482; 1 Solw. N. P. 448 (13th ed.).

(*a*) *Gorton v. Gregory*, 3 B. & S. 90; 31 L. J., Q. B. 302; but see *Coffin v. Talman*, 4 Selden's New York Rep. 465. Such a covenant would bind executors in their representative capacity.

(*b*) *Collison v. Lettison*, 6 Taunt. 224.

(*c*) *Lambert v. Norris*, 2 M. & W. 333; *Hoby v. Roebuck*, 7 Taunt. 157; *Donellan v. Read*, 3 B. & Ad. 899; *Martyn v. Clue*, 18 Q. B. 661; 22 L. J., Q. B. 147.

(*d*) *Thomas v. Hayward*, L. R., 4 Ex. 311; 38 L. J., Ex. 175.

(*e*) *Webb v. Russell*, 3 T. R. 393; *Stokes v. Russell*, Id. 678; *Russell v. Stokes* (in error), 1 H. Blac. 562.

(*f*) *Doughty v. Bowman*, 11 Q. B. 441. But see *Martyn v. Clue*, 18 Q. B. 661; 22 L. J., Q. B. 147.

(*g*) *Mayor, &c. of Congleton v. Pattison*, 10 East, 130; and see *Walsh v. Russell*, 6 Bing. 163.

CH. V. SEC. 8. boxes (not specified) and afterwards assigned his interest, it was held that this was a mere personal contract, and that no action could be maintained against the assignee for refusing to permit the plaintiff to use the boxes (*h*).

Personal
Chattels.

If sheep or other things personal be demised, a covenant by the lessee for himself and his assigns to deliver them up at the end of the term will not bind the assigns (*i*), and the same rule applies to a covenant to deliver up mere utensils and other things not fixed to the demised premises (*j*).

Condition
for Re-entry.

It may be added here that a condition for re-entry in case the lessee or his assigns becomes bankrupt runs with the land (*k*), but a condition for re-entry in case the lessee or his assigns be convicted of any offence against the game laws does not (*l*).

(c) *Covenants, whether Dependent or Independent.*

General Rule
with respect
to such Cove-
nants.

As to what covenants shall be construed to be conditions precedent or not, it has been laid down that the dependence or independence of covenants must be collected from the sense and meaning of the parties to be deduced from the whole instrument, and not merely from any technical words (*m*); and that in whatever order covenants may stand in a deed, their precedency must depend on the order of time in which the intent of the transaction requires their performance (*n*). No precise technical words therefore are required in a deed to make a stipulation a condition precedent or subsequent; neither does it depend on the circumstance whether the clause is placed prior or posterior in the deed: the merits therefore of a question of this kind must depend on the nature of the contract, and the acts to be performed by the contracting parties, and any subsequent facts disclosed which have happened in consequence of the contract (*o*). Where a covenant is part only of the consideration on one side it is an independent covenant, and not a condition precedent (*p*). If one party covenant to do one thing, the other party doing another, it is not a condition precedent, but a mutual covenant (*q*). If the contract be to grant a lease upon payment of 1,440*l.* by certain instalments at stated times, the granting of such lease is not a condition precedent to a right to recover the 1,440*l.* (*r*). So where A. agrees to sell and B. to purchase an estate,

(*h*) *Flight v. Glossop*, 2 B. N. C. 125.

(*i*) *Spencer's case*, ubi supra.

(*j*) *Williams v. Earle*, L. R., 3 Q. B. 739.

(*k*) *Roe v. Galliers*, 2 T. R. 133.

(*l*) *Stevens v. Copp*, L. R., 4 Ex. 20; 38 L. J., Ex. 175.

(*m*) *Roberts v. Brett*, 11 H. L. Cas. 337; 34 L. J., Ch. 241.

(*n*) *Jones v. Barkley*, 2 Doug. 684.

(*o*) *Hotham v. East India Co.*, 1 T. R. 645; *Newson v. Smythies*, 3 H. & N. 840;

28 L. J., Ex. 97; 1 F. & F. 477.

(*p*) *Carpenter v. Cresswell*, 4 Bing. 409.

(*q*) *Boone v. Eyre*, 2 W. Blac. 1312;

Forde v. Cole, 1 Wms. Saund. 319 b,

320 c; *Newson v. Smythies*, 3 H. & N. 840;

28 L. J., Ex. 97; 1 F. & F. 477; *Mackin*

tosh v. Midland Counties R. Co., 14 M. & W.

548; *London Gas Light Co. v. Chelsea*

Vestry, 8 C. B., N. S. 215.

(*r*) *Baggallay v. Pettit*, 5 C. B., N. S.

637; 28 L. J., C. P. 169.

and B. covenants to pay A. on or before a specified day a certain sum as the consideration of such sale, with interest to the time of completion of the purchase, but no time is fixed for executing the conveyance; A. may maintain an action for the purchase-money and interest, without first tendering a conveyance (s). It is a general rule that covenants are to be treated as independent rather than as conditions precedent, especially where some benefit has been derived by the covenantor (t).

CH. V. SEC. 8.
Express Covenants
(*Dependent or Independent*).

A covenant to keep a house in repair, from and after the lessor has repaired it, is conditional; and it cannot be assigned as a breach that it was in good repair at the time of the demise, and that the lessee suffered it to decay; for the lessor must repair before the lessee is liable (u). Where the plaintiff let to the defendant a messuage, barn, stable and buildings, and the defendant agreed to repair the said messuage, buildings and premises, *the same being first put into repair by the plaintiff*: it was held, that the repair by the plaintiff was a condition precedent to the obligation on the defendant to keep in repair; that that condition precedent could not be divided: and that the plaintiff was not entitled to recover for the non-repair of any part of the premises without having first repaired the whole (v). So if a lessee covenant to repair, "provided always, and it is agreed that the lessor shall find great timber," &c., this makes a covenant on the part of the lessor to find great timber by the word "agreed," and is not to be a qualification of the covenant of the lessee (x): but where the words were, "he the said lessor finding, allowing and assigning timber sufficient for such reparations during the said term, to be cut and carried by the lessee;" it was held not to be a covenant to provide timber, but a mere qualification of the covenant to repair (y). Where a lease for lives contained a covenant by the lessee at his own expense to keep the demised premises in proper repair, "having or taking in and upon the said demised premises competent and sufficient house-bote, hedge-bote, fire-bote, plough-bote and gate-bote for the doing thereof, without committing any waste or spoil:" it was held in an action for not repairing, that the covenant to repair was absolute, with a licence to the lessee to take competent and sufficient house-bote, &c.: and that the finding such house-bote, &c. was not a condition precedent to the liability of the lessee to repair (z).

Particular
Cases decided
respecting
Repairs.

(s) *Mattock v. Kinglake*, 10 A. & E. 50; *Wilks v. Smith*, 10 M. & W. 355; 2 Dowl. N. S. 215; *Dunlop v. Grote*, 2 C. & K. 153; *Dicker v. Jackson*, 6 C. B. 103; *Sibthorp v. Brunel*, 3 Exch. 826; *Thames Haven Dock Co. v. Brymer*, 5 Exch. 696, 710.

(t) *Newson v. Smythies*, 3 H. & N. 843.

(u) *Stater v. Stone*, Cro. Jac. 645.

(v) *Neale v. Ratcliff*, 15 Q. B. 916; 20

L. J., Q. B. 130; *Hunt v. Bishop*, 8 Exch. 675; 22 L. J., Ex. 337; *Hutchinson v. Read*, 4 Exch. 761; *Coward v. Gregory*, L. R., 2 C. P. 153, 172; post, Chap. XVI., Sect. 1 (a).

(x) Bao. Abr. tit. *Covenant* (A).

(y) *Thomas v. Cadwallader*, Willes, 496.

(z) *Dean and C. of Bristol v. Jones*, 1 E. & E. 484; 28 L. J., Q. B. 201.

CH. V. SEC. 8.
*Express Cove-
 nants*
*(Dependent or
 Independent).*

Particular
 Cases con-
 cerning
 Repairs.

Where the lessee covenants to put and keep the demised premises in repair, "being allowed rough timber but not on the stem upon the demised premises, the timber to be fetched and carried at the expense of the lessee:" in an action of covenant for not repairing, it is sufficient to allege that the lessor was *ready and willing* to allow and provide sufficient rough timber not on the stem, without stating that he did actually furnish it (*a*). Where a lessee covenanted to repair a house before the 1st of June, 5,000 slates being found by the lessor towards the repair, and afterwards to keep in repair during the term; it was held, that finding the slates was not a condition precedent to the covenant to keep in repair, but only to the covenant for putting the premises in repair before the 1st of June (*b*). In a farming lease the lessee covenanted with the lessor that the lessee should at all times during the term repair and glaze the windows and also the hedges, &c., when necessary, "the said farmhouse and buildings being previously put in repair and kept in repair by the lessor;" the latter clause was held to amount to an absolute and independent covenant on the part of the lessor to put the premises in repair (*c*). The words "and the whole of which is agreed to be left to the superintendence of the lessee and the lessor's son," annexed to a covenant by the lessor to do certain work, are neither a condition precedent to, nor concurrent with, the covenant (*d*). The covenant to repair generally, and to repair within three months after notice in writing, are independent covenants (*e*); and where a lessee covenanted to leave premises in repair at the expiration of the term, and also that the lessors might direct the lessee to complete the repairs by giving six months' notice in writing, it was held, that these were two distinct and separate covenants, the former of which was not qualified by the latter (*f*); but where a lease contained a covenant by the lessee to repair the premises at all times (as often as need or occasion should require) and "at farthest within three months after notice," it was held to be one entire covenant, the former part of which was qualified by the latter (*g*). Where there was an agreement that the lessee should spend 200*l.* in repairs to be inspected and approved of by the lessor, and to be done in a substantial manner, and the lessee was to be allowed to retain the money out of the first year's rent of the premises, it was held, that the lessor's approval was not a condition

(*a*) *Martyn v. Chu*, 18 Q. B. 661; 22 L. J., Q. B. 147.

(*b*) *Murclstone v. Thomas*, Willes, 146.

(*c*) *Cannock v. Jones*, 3 Exch. 233.

(*d*) *Jones v. Cannock*, 3 H. L. Cas. 700; 5 Exch. 713; *Smith v. Durrant*, 9 H. L. Cas. 192.

(*e*) *Doe d. Morecraft v. Meux*, 4 B. & C. 606; 1 C. & P. 346; *Wood v. Day*, 7

Taunt. 646; *Baylis v. Le Gros*, 4 C. B., N. S. 537, 552; *Cornish v. Cleife*, 3 H. & C. 446; 13 W. R. 389; *Roe d. Gattley v. Paine*, 2 Camp. 520; *Few v. Perkins*, 36 L. J., Ex. 62; 15 W. R. 713.

(*f*) *Wood v. Day*, *supra*.

(*g*) *Horsefall v. Testar*, 7 Taunt. 385; cited 4 C. B., N. S. 551.

precedent to the lessee retaining the rent (*h*). Where a lessee covenanted to expend a certain sum in substantial and beneficial improvements, under the direction or with the approbation of some competent surveyors to be named by the lessor, the appointment of the surveyors was held to be a condition precedent to the lessee's liability to expend the money (*i*). Where the lessor covenanted to pay the lessee for the manure, &c. at the end of the term, upon the lessee delivering up the farm, *if* in the meantime he cultivated it on the four-course system, and performed and kept all and singular other his covenants in the lease: it was held, that the delivery up of a certain agreement pursuant to a covenant in the lease was not a condition precedent to the tenant's right to recover for the manure, &c. (*k*). Where by deed reciting an agreement to let copyhold premises, A. covenanted that as soon as he had procured a licence from the lord of the manor he would lease them to B. for the then residuo of a term of years from a certain day, and B. covenanted that he would repair during the term so to be granted, it was held that B. was liable on this covenant after having occupied the premises for the whole term, though no licence had been procured from the lord nor any lease ever made (*l*).

CH. V. SEC. 8.
Express Covenants
(*Dependent or Independent*).

Where in a lease for seven years, containing the usual covenants that the lessee should pay the rent, keep the premises in repair, &c., there was a proviso that the lessee might determine the term at the end of the first three or five years, giving six months' previous notice, and that then, from and after the expiration of such notice, and payment of all rents and duties to be paid by the lessee, and performance of all his covenants until the end of the three or five years, the indenture should cease and be utterly void, it was held, that the payment of rent and performance of the other covenants were conditions precedent to the lessee's determination of the term at the end of the first three years, and that his merely giving six months' notice, expiring within the three first years, was not sufficient for that purpose (*m*). A mining lease contained numerous covenants by the lessees, and also a proviso that if they should desire to quit the premises at the end of the first eight years, and should give eighteen months' notice thereof to the lessor, then, all arrears of rent being paid, and all and singular the covenants and agreements on the part of the lessees having been observed and performed, the lease should at the expiration of the eighth year be utterly void; but, nevertheless, without prejudice to any claim or remedy which any of the parties might

Option to
determine
Term, &c.

(*h*) *Dallman v. King*, 4 Bing. N. C. 105, recognized in *Stadhart v. Lee*, 3 B. & S. 364, 371.

(*i*) *Coombe v. Greene*, 11 M. & W. 480; 2 Dowl., N. S. 1023; *Cannock v. Jones*, 3 Exch. 233; 5 Id. 713; 3 H. L. Cas. 700;

Hunt v. Bishop, 8 Exch. 675.

(*k*) *Newson v. Smythies*, 3 H. & N. 840; 28 L. J., Ex. 97; 1 F. & F. 477.

(*l*) *Pistor v. Cater*, 9 M. & W. 315.

(*m*) *Porter v. Shephard*, 6 T. R. 655.

CH. V. SEC. 8. then be entitled to for breach of any of the covenants; it was held, in error, that the performance of *all* the covenants by the lessees was a condition precedent to their right to determine the lease (*n*). Another Court of Error, however, appears to have entertained a different opinion (*o*). A lease contained a proviso, that if the lessor should give notice for the delivery up of the land to him, the lessee covenanted to surrender it up, and that the lessor might take possession of it, paying the lessee compensation for money expended thereon: it was held, that the proviso did not operate as a mere covenant by the lessee to give up on notice, but expressly gave the lessor power to take possession; and that he might do so without having first paid compensation (*p*). So where it was agreed that the lessor should within eighteen months from the date of the lease build a cattle-shed, the whole to be left to the superintendence of the lessee and her son; it was held, that this latter provision was not a condition precedent to or concurrent with the lessor's covenant to build (*q*).

Covenant for
Employment
of particular
Person, &c.

On a lease of some coal mines, the lessees covenanted that the lessor should, when he thought fit, employ a fit and proper person to weigh the coals and keep the accounts, the person so weighing and keeping the accounts to be paid by the lessees; but in case such person did not duly attend to his duties, the lessees were authorized to discharge him. It was held, that the appointment of a fit and proper person was a condition precedent to the liability of the lessees to pay the wages, and that therefore they were not bound to pay the wages though they had not dismissed him (*r*). An assignee of a term in coal mines covenanted with the lessee that he would, so long as he should be in receipt of the rents of the premises, pay to the lessors the rent payable by the original lease—and would keep the lessee harmless and indemnified against the rents and covenants of the lease: it was held, that the words “so long as he should be in the receipt of the rents” did not extend to the covenant to indemnify (*s*). A covenant in a farming lease provided that the tenant should consume and convert into manure, and spread on the premises, all the turnips, &c. grown thereon; but that in case he should sell off any part thereof, which he was at liberty to do, then that he should for every ton of turnips, &c. so sold off, bring back and spread thereon one ton of manure within three months after. In an action on this covenant the plaintiff set out the first part only, and assigned for breach that the defendant carried away fourteen acres of turnips, without converting the same into manure and spreading the same: it was held, that the

(*n*) *Friar v. Grey*, 5 Exch. 584, 597; 4 H. L. Cas. 565.

(*o*) *Grey v. Friar*, 15 Q. B. 901.

(*p*) *Doe d. Gardner v. Kennard*, 12 Q. B. 244.

(*q*) *Cannock v. Jones*, 3 Exch. 233; 5 Id. 713; 3 H. L. Cas. 700.

(*r*) *Lawton v. Sutton*, 9 M. & W. 795.

(*s*) *Croasfield v. Morrison*, 7 C. B. 286.

covenant was an alternative one, and that the plaintiff should have negatived the bringing back, within the time limited, an equivalent in manure (*t*).

CH. V. SEC. 8.
*Express Cove-
nants*
(*Dependent or*
Independent).
— — — — —

(d) *How discharged.*

Covenants cannot be discharged *before breach* otherwise than by deed; therefore a parol licence or agreement, dispensing with or changing the terms of such an obligation, could not, before the Judicature Act, be pleaded in bar to an action of covenant (*u*); and it does not seem that that act has made any difference.

Before breach
by Deed.

With respect to the operation of acts of parliament in discharging the obligation of a covenant there is this difference; viz. that where a man covenants not to do an act or thing which it was lawful to do, and an act of parliament is made afterwards and compels him to do it, the statute discharges the covenant. So, if a man covenant to do a thing which is lawful, and an act of parliament comes in and hinders him from doing it, the covenant is discharged (*x*). But if a man covenant not to do a thing which at the time was unlawful, and a subsequent statute makes the action lawful, such statute does not discharge the covenant (*y*): and if the covenant be to do that which is afterwards made unlawful in part only, it must be performed so far as it continues lawful (*z*). If there be a covenant to do a thing which is unlawful by statute, the covenant will not be made lawful by the repeal of the statute, because the covenant was bad ab initio; although it would be otherwise, if the covenant had been originally lawful, but had been made unlawful by a statute which was itself afterwards repealed (*a*).

By the Opera-
tion of Acts of
Parliament.

In accordance with these principles, it has been held that a covenant to build a workhouse on the land demised was discharged by the operation of the Poor Law Amendment Act, 1834 (*b*); and a covenant not to assign without licence (*c*), and a covenant not to permit assigns to build (*d*) by a compulsory assignment to a company under the Lands Clauses Consolidation Act, 1845.

Discharge of
Covenant not
to Build, &c.

But a lessee of tithes is liable on his covenant to pay rent, notwithstanding the tithes have been commuted for a rent-charge, his remedy

Lessee of
Tithes.

(*t*) *Richards v. Bluck*, 6 C. B. 437; 7 D. & L. 325.

(*u*) *Littler v. Holland*, 3 T. R. 590; *Thompson v. Brown*, 7 Taunt. 656; *Sellers v. Bickford*, 1 Moo. 460; *Harris v. Goodwin*, 2 M. & G. 405; *West v. Blakeway*, 2 M. & G. 729, 752; 9 Dowl. 846.

(*x*) *Brewster v. Kitchell*, 1 Salk. 198; *Doe d. Marguis of Anglesea v. Rugeley*, 6 Q. B. 107, 114; *Brown v. Mayor, &c. of London*, 9 C. B., N. S. 728; 13 Id. 828; Bac. Abr. tit. *Conditions* (Q. 2); Com. Dig.

tit. *Condition* (L. 1).

(*y*) *Brewster v. Kitchell*, 1 Salk. 198.

(*z*) 2 Eq. Ca. Abr. 26.

(*a*) *Jacques v. Wither*, 1 H. Blac. 65.

(*b*) *Doe d. Anglesea (Lord) v. Rugeley* (Churchwardens), 6 Q. B. 107.

(*c*) *Slipper v. Tottenham & Hampstead Junction R. Co.*, L. R., 4 Eq. 112; 36 L. J., Ch. 841.

(*d*) *Baily v. De Crespigny*, L. R., 4 Q. B. 180; 38 L. J., Q. B. 98.

CH. V. SEC. 8. being by surrender of his lease, under the 88th section of the Tithe Commutation Act (6 & 7 Will. 4, c. 71) (*f*).
Express Covenants (How discharged).

SECT. 9.—*Implied Covenants and Agreements.*

Covenants in Law, when implied.

An implied covenant or covenant in law is one which the law intends and implies from the nature of the transaction, although not expressed by words in the deed. "A covenant in law, properly speaking, is an agreement which the law infers or implies from the use of certain words having a known legal operation in the creation of an estate; so that, after they have had their primary operation in creating the estate, the law gives them a secondary force, by implying an agreement on the part of the grantor to protect and preserve the estate so by these words already created: as if a man by deed demise lands for years, covenant lies upon the word 'demise,' which imports or makes a covenant in law for quiet enjoyment" (*g*). That the word "demise" in a lease for years imports and makes a covenant in law for quiet enjoyment, at least during the continuance of the estate out of which the lease is granted, is clear from all the authorities (*h*). By 8 & 9 Vict. c. 106, s. 4, the word "give" or the word "grant" in a deed executed after the 1st of October, 1845, "shall not imply any covenant in law in respect of any tenements or hereditaments, except so far as the word 'give' or the word 'grant' may, by force of any act of parliament, imply a covenant" (*i*). Where a renewed lease of a mill was granted to a bleacher for the purpose of carrying on therein his business, parol evidence was held admissible to explain the special circumstances under which the lease was granted, and from which an implied grant to use the stream for the purpose of the business might be inferred (*j*).

Upon a Demise.

When an implied Covenant ceases.

A covenant in law in a demise ceases with the estate of the lessor, and does not necessarily continue during the whole term expressed to be granted. Therefore, if a tenant for life demise by indenture for fifteen years, without any express covenant for quiet enjoyment, upon his death during the term the covenant in law implied from the word "demise" will cense (*k*). But an express covenant, or one to be implied by construction of words used in the deed by way of warranty or contract, would continue in force to the end of the term expressed to be granted, and not merely during the actual continuance of such

(*f*) *Tasker v. Bullman*, 3 Exch. 351.

(*g*) *Williams v. Burrell*, 1 O. B. 429.

(*h*) *Adams v. Gibney*, 6 Bing. 666, 666; *Nokes' case*, 4 Co. R. 80 b; *Holder v. Taylor*, Hob. 12; *Fraser v. Skey*, 2 Chit. R. 646; *Iggulden v. May*, 9 Ves. 325; *Burnett v. Lynch*, 5 B. & C. 589. And see the cases as to "Quiet Enjoyment" further discussed, post, Chap. XVII., Sect. 8.

(*i*) As in conveyances to railway companies, &c.

(*j*) *Hall v. Lund*, 1 H. & C. 676; 32 L. J., Ex. 113.

(*k*) *Swan v. Stransham*, Dyer, 267 a; 1 Leon. 179; *Owen*, 105; *S. C.*, cited 6 Bing. 666; *Adams v. Gibney*, 6 Bing. 666; *Penfold v. Abbott*, 32 L. J., Q. B. 67.

term (*l*). A covenant in law goes to the assignee of the term, and he has advantage of it during the actual continuance of the term (*m*). But the executors or administrators of the lessor are not liable where the term ceases on his death, and the lessee is subsequently evicted (*n*).

Cir. V. Sec. 9.
Implied Covenants and Agreements.

In general, there is no implied covenant by the lessor of a house or of land that it is reasonably fit for habitation, occupation or cultivation (*o*); nor that the house will endure during the term; nor that the lessor will do any repairs whatever (*p*). And if the landlord is bound to do repairs, there is no implied condition that if not done the tenant may quit (*q*); that should be the subject of an express stipulation (*r*).

No implied Covenant by Lessor that Premises fit for Occupation.

There is, however, an important exception to the general rule. In letting a furnished house, the lessor impliedly promises that it is fit for occupation. So it was held in *Smith v. Marrable* (*s*), where a tenant for five or six weeks was held justified in quitting without notice on the ground of the house being infested with bugs; and this case, although shortly afterwards doubted by more than one member of the same court which decided it (*t*), was, in 1877, affirmed in *Wilson v. Finch-Hatton* (*u*), where its principle was held applicable to defective drainage, in the case of a house let for three months.

Furnished House.

Smith v. Marrable.

Wilson v. Finch-Hatton.

In the absence of any express covenant on the subject, a covenant or promise is implied on the part of the lessee that he will use the buildings in a tenantable and proper manner (*x*), and that he will manage and cultivate the lands in a good and husbandlike manner, according to the custom of the country (*y*): but not that he will make a certain quantity of fallow, and spend a certain quantity of manure thereon, and keep the buildings in repair, or any other stipulation not arising out of the bare relation of landlord and tenant (*z*). Only the prevailing course of good husbandry and management in the neigh-

Implied Covenants by Lessee.

(*l*) *Williams v. Burrell*, 1 C. B. 402; *Bragg v. Wiseman*, Brownlow & G. 22.

(*m*) Bac. Abr. tit. *Covenant* (E. 5); *Ivyman v. Arthur*, 1 B. & C. 410.

(*n*) See note (*k*), ante, p. 158.

(*o*) *Hart v. Windsor*, 12 M. & W. 68; *Sutton v. Temple*, Id. 52, overruling nisi prius decisions in *Edwards v. Etherington*, Ry. & M. 268; 7 D. & R. 117; *Collins v. Barrow*, 1 Moo. & R. 112; *Salisbury v. Marshal*, 4 C. & P. 65.

(*p*) *Arden v. Pullen*, 10 M. & W. 321; *Gott v. Gandy*, 2 E. & B. 845; *Keates v. Earl Cadogan*, 10 C. B. 591.

(*q*) *Surplice v. Farnsworth*, 7 M. & G. 576; 8 Scott, N. R. 307.

(*r*) *As in Furnicall v. Grove*, 8 C. B., N. S. 400; 30 L. J., C. P. 3.

(*s*) 11 M. & W. 5; 12 L. J., Ex. 223. And see *Campbell v. Wenlock*, 4 F. & F. 716.

(*t*) See, especially, per Parke, B., in *Hart v. Windsor*, ubi supra. It was,

however, expressly approved of by Lord Abinger in *Sutton v. Temple*, ubi supra.

(*u*) L. R., 2 Ex. D. 336; 36 L. T. 473; 46 L. J., Ex. 489; 25 W. R. 537. The distinction between a furnished and an unfurnished house was expressly approved of. The case, although re-argued before three judges, Kelly, C. B., Pollock, B., and Huddleston, B., on account of its importance, was ultimately decided without hesitation.

(*x*) *Horsefall v. Mather*, Holt, N. P. C. 7; *Leach v. Thomas*, 7 C. & P. 327; *Harnett v. Maitland*, 16 M. & W. 257; *Yellowly v. Gower*, 11 Exch. 294.

(*y*) *Powley v. Walker*, 5 T. R. 373; *Legh v. Hewitt*, 4 East, 154; *Angerslein v. Handson*, 1 C. M. & R. 789; *Halifax v. Chambers*, 4 M. & W. 662; *Martin v. Gilham*, 7 A. & E. 450; *Wilkins v. Wood*, 17 L. J., Q. B. 319.

(*z*) *Brown v. Crump*, 6 Taunt. 300.

CH. V. SEC. 9. *Implied Covenants and Agreements.* bourhood need be proved (*a*), and it will be considered applicable to all tenancies in whatever way created, whether verbal or in writing, unless expressly or impliedly excluded by the terms actually agreed on (*b*).

Covenants, when implied from express Words in other Covenants.

Where a lessee covenanted to plough, sow, manure and cultivate the demised premises (except the rabbit-warren and sheep-walk) in a due course of husbandry, it was held that it amounted to a covenant not to plough the sheep-walk (*c*). Where a lessee covenanted that he would, at all times and seasons of burning lime, supply the lessor and his tenants with lime at a stipulated price, for the improvement of their lands and repair of their houses: it was held, that this was an implied covenant also that he would burn lime at all such seasons; and that it was not a good defence to plead that there was no lime burned on the premises out of which the lessor could be supplied (*d*). So a covenant by a lessee to pen and fold his flock of sheep, which he should keep upon the premises, upon such parts where the same had been usually folded, was held to amount by implication to a covenant to keep a flock of sheep (*e*). A landlord having accepted the offer of a tenant, whose term was expiring, to continue tenant, provided he could not find any other tenant at the rent it appeared to him to be worth by a certain day, it was held to be an implied condition, that the tenant should allow persons applying for the farm to go over it, and that, the condition not having been performed, the contract was at an end (*f*). On a demise of a brewery, with the exclusive privilege of supplying ale, it would seem that no covenant can be implied with respect to such a privilege from the word "demise" (*g*). Where in an agreement for a lease from the plaintiff to the defendant of certain works, the plaintiff agreed to supply to the defendant the whole of the chlorine still waste as it came from the still, at a given rate per cwt., and not to part with any of the still waste, except to the defendant, it was held, that the defendant was bound to take the whole of the waste which, during his occupancy, came from the plaintiff's still (*h*). In *Newton v. Wilmott*, a demise was made of a mansion-house and land, with the sole licence of sporting over all other lands of the lessor's, and the lessor covenanted that if any of his tenants should obstruct the lessee in the enjoyment of his licence, then the lessor would, on the requisition of the lessee, give the tenant notice to quit, and would enforce such notice. The court held that there was no

Brewery.

Right of Sporting.

(*a*) *Legh v. Hewitt*, 4 East, 154.
 (*b*) *Wigglesworth v. Dallison*, 1 Doug. 190; 1 Smith L. C. 598 (7th ed.); *Senior v. Armytage*, Holt, N. P. C. 197; *Hutton v. Warren*, 1 M. & W. 466.
 (*c*) *Duke of St. Albans v. Ellis*, 16 East, 352.
 (*d*) *Earl of Shrewsbury v. Gould*, 2 B. &

A. 487.
 (*e*) *Webb v. Plummer*, 2 B. & A. 746.
 (*f*) *Doe d. Marquis of Hertford v. Hunt*, 1 M. & W. 690.
 (*g*) *Hinde v. Gray*, 1 M. & G. 195; 1 Scott, N. R. 123.
 (*h*) *Bealey v. Stuart*, 7 H. & N. 753; 31 L. J., Ex. 281.

breach of this covenant by the lessor subsequently demising some of his lands for a term of years, without any clause to prevent the tenant from obstructing the person having the licence of sporting to enjoy his licence, and without reserving a power to give notice to quit if he did (i).

CH. V. SEC. 9.
Implied Covenants and Agreements.

In *The Earl of Glasgow v. Hurlet Alum Company* a lease of Mining Lease. alum mines gave the lessee the right to obtain alum from certain coal wastes. A subsequent lease of the coal mines provided that nothing thereby granted should injure the rights of the parties who held the alum mines. The alum existed in the coal wastes. The coal lessees could not thoroughly work the coal without removing the pillars which supported the roof; but by doing this, the alum would be rendered impossible to be reached: it was held by the House of Lords that the coal pillars could not be removed (k). A covenant will not be implied in a lease of mines for the lessees to sink a pit or shaft, although various provisions of the lease cannot be carried into effect without their doing so (l).

The tendency of modern decisions is not to imply covenants or stipulations which might and ought to have been expressed if intended (m).

A recital in a deed may amount to a covenant where it appears to be the intention of the parties that it should do so (n), and upon such implied covenant an action of covenant may be maintained (o).

Implied Covenants from Recitals.

SECT. 10.—Of Exceptions and Reservations.

An exception relates to some existing component part of the thing demised, which is capable of being severed or distinguished from it: but a reservation is properly of some right or profit to arise from the subject of the demise, which had previously no separate existence (p). A right of way reserved to the lessor by the lease, over the lands demised, is not strictly an exception or a reservation, being neither

Distinction between Exception and Reservation.

(i) *Newton v. Wilmoth*, 8 M. & W. 711.

(k) *Earl of Glasgow v. Hurlet Alum Co.*, 3 H. L. Cas. 25.

(l) *James v. Cochran*, 7 Exch. 170; 8 Id. 556. See also, as to mining leases, *Rowbotham v. Wilson*, 8 H. L. Cas. 348; *Dugdale v. Robertson*, 3 K. & J. 695; *Smith v. Darby*, 42 L. J., Q. B. 140; *Eaton v. Jeffcock*, 42 L. J., Ex. 36; in the last of which cases it was held that when the owner of surface and minerals beneath grants a lease of the minerals, there is not, outside the contract, an implied re-

servation of any right to have the surface supported by the minerals.

(m) *Aspin v. Austin*, 5 Q. B. 671; *Dunn v. Sayles*, Id. 685; *Doe d. Marquis of Bute v. Guest*, 15 M. & W. 160; *Smith v. Mayor, &c. of Harwich*, 2 C. B., N. S. 651; *Sharp v. Waterhouse*, 7 E. & B. 816.

(n) *Lay v. Mottram*, 19 C. B., N. S. 479.

(o) *Sampson v. Easterby*, 9 B. & C. 505; *S.C.*, in error, 6 Bing. 644; 1 C. & J. 105; *Saltoun v. Houston*, 1 Bing. 433; *Farrall v. Hilditch*, 5 C. B., N. S. 840.

(p) 4 Jarm. Prec. 316 (3rd ed.).

CH. V. SEC. 10. *Exceptions and Reservations.* parcel of the thing demised nor issuing out of it, but is in strictness of law an easement newly created by way of grant from the lessee (*q*). But where a lease was made of lands, except and always reserved out of the demise unto the lessor all timber trees, &c., and also except and reserved all *royalties* whatsoever to the premises belonging or in anywise appertaining, it was held, that this was an exception or reservation, and was not pleadable as a grant (*r*).

Exception usually construed in favour of Lessee.

An exception, being the act and words of the lessor, is usually taken strictly against him (*s*). But where a lease contained an exception in favour of the lessor of the mines and quarries under the demised property, with full power to win and work, and also with free way-leave and passage to, from, and along the same; and the lessor covenanted in using the excepted rights to do as little damage to the soil as possible: it was held, that the lessor was entitled to the absolute use of an underground right of way and not merely to a right restricted to the purpose of working the mines under the demised premises; but that he was not entitled so to work the reserved mines as to let down the surface (*t*). Where a railway company excepted and reserved out of a demise of land a patent slip therein, and the machinery connected therewith, with free access thereto “for themselves, their successors and assigns, officers, servants, and workmen:” it was held that a licensee of the company might justify using the slip (*u*). It has been held, too, in a suit for specific performance of an agreement for a lease, where a rector agreed to let a farm, except thirty-seven acres (not saying which), that the rector had the right to select which thirty-seven acres should not be included in the lease (*x*).

What things must concur in an Exception.

“In every good exception,” it is said in Sheppard’s Touchstone, “these things must always concur: 1, the exception must be by apt words as ‘saving and excepting,’ or the like (*y*): 2, it must be a part of the thing demised, and not of some other thing: 3, it must be only part of the thing, and not all: 4, it must be of such a thing as is severable from the premises demised, and not of an inseparable incident: 5, it must be of such a thing as he who doth accept may have, and which properly belongs to him: 6, it must be certainly or sufficiently described and set down” (*z*).

If a man be possessed of a new house and an old house, and make a lease with an exception of the new house for the use of the lessor

(*q*) *Durham and Sunderland R. Co. v. Walker*, 2 Q. B. 940.

(*r*) *Pannell v. Mill*, 3 C. B. 625.

(*s*) *Shep. Touch.* 77.

(*t*) *Proud v. Bates*, 34 L. J., Ch. 406; 11 Jur., N. S. 441.

(*u*) *Mitcalfe v. Westaway*, 17 C. B., N. S.

668; 34 L. J., C. P. 114.

(*x*) *Jenkins v. Green*, 27 Beav. 437; 28 L. J., Ch. 817, per Romilly, M. R. Sed quære; see *Dann v. Spurrier*, 3 B. & P. 399.

(*y*) *Co. Lit.* 47 a.

(*z*) *Shep. Touch.* (7th ed.) by Preston, p. 78; *Dorrell v. Collins*, Cro. Eliz. 6.

when he pleases to reside there, and at other times for the use of the lessee, the new house is well excepted; and such exception is not avoided by the words "at all times to be used by the lessee, when the lessor doth not dwell there; for that sentence doth not enure as an exception out of an exception (which sets the matter at large), but only as a declaration of the lessor's intention in making the exception;—the latter words, however, make the lessee tenant at will (a). So, if a man lease his houses, excepting his new house, *during the term*, this exception is good: but if he except it *during life*, it is void; for the words "during life" qualify the exception, and show his intent that the house shall not be excepted during the whole term, and so it is void.

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Exceptions and
Reservations.

A clause in a lease purporting to reserve underwoods and under-ground produce, enures not as a reservation, but as an exception (b). A lease of lands excepted all timber, timber trees and other trees, &c., bushes and thorns, other than such bushes and thorns as should be necessary for the repairs of the fences; the lessee covenanted to keep fences in repair, and the lessor covenanted to find and provide, if growing on the premises, rough timber, stakes and bushes: it was held, that the provision as to bushes and thorns necessary for repairs was not an exception out of an exception, but that all trees, bushes and thorns were excepted out of the demise, whether part of a fence or not, or whether necessary for repairs or not (c). An exception of "all the wood" will be an exception of the soil whereon the wood grows (d). In like manner, if all the underwood and copse would be excepted, the land will also be excepted, unless it clearly appear that it was merely the intention of the parties to except only the wood itself (e). But where "timber trees" are excepted, the soil in which they grow will not be covered by the exception (f), nor will it where a tenement described as "all timber trees, wood, underwood, &c.," are excepted (g). It will be usually not difficult to collect from the words used whether the exception was intended to extend to the soil or only to the trees, the more generic expressions pointing to the soil, and the more specific to the trees. A parol demise of land, reserving to the landlord "all the hedges, trees, thorn bushes, fences, with lop and top," operates as a licence to enter the land for the purpose of cutting and carrying away the trees (h). Where a lessee for life made a lease for years, excepting the wood, underwood and trees growing upon the land, it was held a good exception, although he

Exception of
Trees.

(a) *Cudlip v. Rundall*, 3 Salk. 156.

(b) *Doe d. Douglas v. Lock*, 2 A. & E. 705.

(c) *Jenney v. Brook*, 6 Q. B. 323.

(d) *Ive v. Sams*, Cro. Eliz. 521; *Whistler v. Paulow*, Cro. Jac. 487.

(e) *Whistler v. Paulow*, *supra*; *Pincomb v. Thomas*, Cro. Jac. 524.

(f) *Whistler v. Paulow*, Cro. Jac. 487.

(g) *Leigh v. Heald*, 1 B. & Ad. 622.

(h) *Hewitt v. Isham*, 7 Exch. 77; *Liford's case*, 11 Co. R. 51 b.

CH. V. SEC. 10. had no interest in them but as lessee; because he remained always tenant, and was chargeable in waste—wherefore to prevent it he might make the exception: but if a lessee for years assign over his

Apple Trees.

term with such an exception, it is a void exception (*i*). An exception of “all trees, woods, coppice-wood grounds, of what kind or growth soever” (*k*), or of “all timber trees and other trees, but not the annual fruit thereof,” does not include apple-trees (*l*).

“Reservation” of Game.

A clause purporting to reserve and except to the lessor the power of hunting, &c. over the demised premises, enures as a grant from the lessee to the lessor—a grant of a *profit à prendre*. It is not *in law* either a reservation or exception (*m*). A demise of lands, excepting and reserving all *royalties*, with a clause for the lessor to be allowed to prosecute actions against persons trespassing for the purpose of hunting, &c., does not amount to a grant by the lessee of a liberty for the lessor to enter for the purpose of pursuing, killing and taking birds of warren (*n*). In a demise of a mansion-house and land, with the sole licence of sporting over all other lands of the lessor’s, subject to the liberty for each tenant on his *farm* to kill rabbits thereon, the exception extends not only to farms existing at the time of the demise, but also to other lands, as plantations, subsequently let as farms (*o*).

Exception of Minerals.

An exception of minerals includes stones got from quarries (*p*), and also everything that is necessary for working the mines or quarries, including way-leave for carrying away the stone or minerals (*q*); but the reservation of a full power to work mines does not include the power of working so as to let down the surface (*r*).

Exception of Water.

Where there was a lease of certain lands, together with all houses, water-courses, &c., excepting “a water-course flowing or descending from” a certain spot, through a meadow, it was held in the particular case to be an exception of the water itself, not of the channel through which it flowed (*s*). Where there was a demise of a mill and a stream of water, except so much of the water as should be sufficient for the supply of persons whom the lessor had already contracted with or thereafter should contract to supply, provided that such a quantity should be left as should be sufficient to supply the mill for twelve hours a day: it was held, that this was not an absolute undertaking to supply water to work the mill twelve hours a day, but that

(*i*) *Bacon v. Gyrling*, Cro. Jac. 296.

(*k*) *London v. Southwell*, Hob. 304; *Wyndham v. Way*, 4 Taunt. 316.

(*l*) *Bullen v. Denning*, 5 B. & C. 842.

(*m*) *Doe d. Douglass v. Lock*, 2 A. & E. 705, 743; *Wickham v. Hawker*, 7 M. & W. 103; *Ewart v. Graham*, 7 H. L. Cas. 333; *Hall on Profits à Prendre*, p. 324. And see post, Ch. XVIII. Sect. 6, “Game,” &c.

(*n*) *Pannell v. Mill*, 3 C. B. 625.

(*o*) *Newton v. Wilmott*, 8 M. & W. 711.

(*p*) *Micklethwait v. Winter*, 6 Ex. 644; 20 L. J., Ex. 313.

(*q*) *Cardigan v. Armitage*, 2 B. & C. 197.

(*r*) *Jeffryes v. Evans*, 34 L. J., C. P. 261; 19 C. B., N. S. 246.

(*s*) *Doe d. Earl of Egremont v. Williams*, 11 Q. B. 688.

it was a demise of the mill as the water was flowing at the time of the demise (*t*). CH.V. SEC. 10.
Exceptions and
Reservations.

SECT. 11.—*Provisoes and Conditions.*

The terms “proviso” and “condition” are synonymous, and signify some quality annexed to a real estate, by virtue of which it may be defeated, enlarged or created upon an uncertain event. Such qualities annexed to personal contracts and agreements are generally called conditions (*u*). A proviso or condition of re-entry may be inserted in an agreement for a lease not under seal (*x*). It will even form part of a new implied tenancy from year to year upon the terms of a previous lease or agreement (*y*), and could be taken advantage of in case of entry and payment of rent upon the ordinary agreement for a lease. Nature of
Conditions.

Conditions are either precedent or subsequent. Where a condition must be performed before the estate can commence, it is called “a condition precedent;” but where the effect of the condition is either to enlarge or defeat an estate already created, it is then called “a condition subsequent” (*z*). Conditions
precedent or
subsequent.

Conditions as well as covenants are to be construed according to the real intentions of the parties (*a*). What is or is not a condition precedent depends not on merely technical words, but upon the plain intention of the parties, to be deduced from the whole instrument (*b*). The court will not decide as to the meaning of an insensible condition or proviso for re-entry (*c*). Construction
of Conditions.

A condition may be contained in the same deed or indorsed upon the deed; or may be contained in another deed executed the same day (*d*); a condition indorsed upon a lease before the sealing and delivery is of equal force with a condition written within the deed (*e*). By what In-
strument they
may be made.

Conditions are most properly created by using the word “condition,” or the words “on condition;” but the word commonly and as effectually made use of, is, that of “provided” (*f*). The words “covenant” and “condition,” when used in an agreement, do not necessarily mean a covenant under seal, or a condition in the strict legal sense of the word, but may, in order to effectuate the intention By what
Words they
may be
created.

(*t*) *Blatchford v. Mayor, &c. of Plymouth*, 3 Bing. N. C. 691.

(*u*) *Bac. Abr. tit. Condition.*

(*x*) *Hayne v. Cummings*, 16 C. B., N. S. 421.

(*y*) *Thomas v. Packer*, 1 H. & N. 669.

(*z*) *Cruise's Dig. XII. tit. 1, s. 6; 1 Inst. 16 a, 237 a, n. 1.*

(*a*) *Cole Eject. 407.*

(*b*) *Roberts v. Brett*, 11 H. L. Cas. 337;

34 L. J., Ch. 241.

(*c*) *Doe d. Wynham v. Curlew*, 2 Q. B. 317; *Doe d. Darke v. Bowditch*, 8 Q. B. 973.

(*d*) *Com. Dig. tit. Condition (A. 9).*

(*e*) *Griffin v. Stanhope*, Cro. Jac. 456; *Goodright d. Nicholls v. Mark*, 4 M. & S. 30.

(*f*) *Shep. Touch. 122; Co. Lit. 146.*

CH. V. SEC. 11.
*Provisoes and
 Conditions.*

of the parties, be construed to mean "contract or stipulation" (*g*). If a proviso or condition have dependence upon another clause of the deed, or if the words of the lease be to compel the lessor to do something, then it is not a condition, but a covenant only; as if there be in the deed a covenant that the lessee should scour the ditches, and then these words follow, "provided that the lessor shall carry away the earth." If the words run thus: "provided always, and the lessee, &c., doth covenant, &c., that neither he nor his heirs shall do such an act;" this is both a condition and a covenant (*h*); so if the words are "provided always, and it is covenanted and agreed between the parties, that the lessee shall not alien," this is both a condition and a covenant; for it is a condition by force of the proviso, and a covenant by force of the other words (*i*). A covenant by the lessor for quiet enjoyment by the lessee, his executors, administrators and assigns, during the term, he or they paying the rent thereby reserved and performing the covenants on his and their part contained, is not a covenant subject to a condition precedent (*k*).

Condition or
 Covenant.

Where in an agreement to demise lands for a term of years at a certain annual rent, in which there was no clause of re-entry, there was a stipulation "that in case the said lessor should want any part of the said land to build or otherwise, or cause to be built, then the lessee shall give up that part of the said land as should be requested by the lessor, by his making an abatement in proportion to the rent charged; and also to pay for so much of the fence at a fair valuation, as he should have occasion from time to time to take away, by his giving or leaving six months' notice of what he intended to do:" it was held, that this was merely a covenant, and not a condition (*l*). But where a proviso in a lease was, that in case the lessor at any time shall be desirous of having any part of the land delivered up to him and shall sign three months' notice, the lessee covenants to give it up, and that the lessor shall and may take peaceable and quiet possession, paying a fair compensation, and the rent being reduced at a certain rate per acre, it was held not to be a covenant merely (*m*). By an agreement for a lease it was *stipulated and conditioned*, that A. should not assign, transfer or underlet any of the premises, otherwise than to his wife, child or children: it was held, that by such clause a condition was created for the breach of which the lessor might maintain an ejectment (*n*). But mere words of agreement, such as "the tenant hereby

(*g*) *Hayne v. Cummings*, 16 C. B., N. S. 421.

(*h*) *Shep. Touch.* 122; *Co. Lit.* 146.

(*i*) *Co. Lit.* 103 b.

(*k*) *Dawson v. Dyer, Bart.*, 5 B. & Adol. 584, post, Chap. XVII., Sect. 8 b; and see *Lock v. Furze*, 19 C. B., N. S. 96; *L. R.*, 1 C. P. 441.

(*l*) *Doe d. Wilson v. Phillips*, 2 Bing. 13; 9 Moo. 46; *Doe d. Wilson v. Abel*, 2 M. & S. 541.

(*m*) *Doe d. Gardner v. Kennard*, 12 Q. B. 244.

(*n*) *Doe v. Henniker v. Watt*, 8 B. & C. 308.

agrees that he will not underlet the premises without the consent in writing of the landlord" (o), do not constitute such a condition (p). CH. V. SEC. 11.
Provisoes and
Conditions.

A condition that assignments should be left with the solicitor of the ground landlord has been held to be a covenant (q).

A condition which does not concern the thing demised, but is only collateral, does not run with the land, nor with the reversion; and an assignee of the lessor cannot sue for any breach of it (r). "Running
with the
Land."

SECT. 12.—Schedules, Indorsements, &c.

When a house is let, together with fixtures, furniture or other articles therein, it is usual to make a schedule or inventory of them, with a covenant or promise from the lessee to re-deliver them at the end of the term. Such covenant or promise will give the landlord a better remedy (with clearer evidence) than he would otherwise have (s). The schedule or inventory is generally written at the foot or end of the lease, or it is indorsed thereon, or annexed thereto. Schedule of
Fixtures,
Furniture, &c.

Sometimes by oversight or mistake a schedule referred to in a deed as annexed thereto is not in fact annexed when the deed is executed. In such case the deed will operate and take effect, so far as may be, without the assistance of the schedule (t). But sometimes it is insensible and inoperative as to part without the aid of the schedule (u). The articles comprised in the schedule should be specified in such a manner as to prevent all doubt as to what was intended to be included (v). When they are numerous and comprise items of small value, the description of the property should be general enough to include all the items, after which may be added "the principal articles whereof are particularly enumerated and described in the schedule hereunder written, or hereunto annexed," or to that effect (x). But sometimes the schedule may be referred to in such a manner as to exclude anything not therein specified (y). A deed is not avoided by subsequently annexing the schedule therein referred to (z); but frequently the deed may be used without the schedule (a). When Sched-
ule not an-
nexed, by
Mistake.

How the
Articles
should be de-
scribed in
Schedule.

(o) *Shaw v. Coffin*, 14 C. B., N. S. 372.

(p) *Crawley v. Price*, L. R., 10 Q. B. 302; 33 L. T. 203; 23 W. R. 874.

(q) *Brooks v. Drysdale*, L. R., 3 C. P. D. 52; 37 L. T. 467; see ante, 113 (e).

(r) *Stevens v. Copp*, L. R., 4 Ex. 20; and see 149, ante.

(s) *Dampier v. Pole*, 4 Exch. 678.

(t) *Dyer v. Green*, 1 Exch. 71; *Dames v. Heath*, 3 C. B. 938; *Dampier v. Pole*, 4 Exch. 678.

(u) *Weeks v. Maillardet*, 14 East, 568; *Sellin v. Price*, L. R., 2 Ex. 189; 36 L. J., Ex. 93.

(v) *Wood v. Rowcliffe*, 6 Exch. 407; *Cort v. Sagar*, 3 H. & N. 370; *Hutchinson v. Kay*, 23 Beav. 413; cited 3 H. & N. 372; *Baker v. Richardson*, 6 W. R. 663; *Walsh v. Trevanion*, 15 Q. B. 733; *Barton v. Dawson*, 10 C. B. 261.

(x) *Dyer v. Green*, 1 Exch. 71.

(y) *Wood v. Rowcliffe*, 6 Exch. 407; *Baker v. Richardson*, 6 W. R. 663, *contra*.

(z) *West v. Steward*, 14 M. & W. 47. But see *Sellin v. Price*, L. R., 2 Ex. 189, 192; 36 L. J., Ex. 93.

(a) *Dames v. Heath*, 3 C. B. 938; *Dye v. Green*, 1 Exch. 71.

CH. V. SEC. 12.
Schedules, Indorsements, &c.

Indorsements.
Receipt for
Consideration.

Attestation.

Alterations
indorsed
before the
Lease is executed.

Where made
after Execution.

Stamps on
Leases, &c.

When a fine or premium is paid, a receipt for the amount should be indorsed on the lease. It may be concisely expressed thus:—
"Received of Mr. C. D. the sum of pounds as within mentioned."

No receipt stamp is necessary in addition to the lease stamp.

The usual attestation clause should not be omitted, especially when the lease is granted in pursuance of a power (*b*). Alterations in the deed should be specially mentioned in the attestation, or marked in the margin with the initials of the attesting witnesses.

It sometimes happens that after a deed has been engrossed, but before it is executed, some additional covenant or stipulation is agreed on, which cannot conveniently be interlined. In such case it may be *indorsed* on the lease, and referred to in the proper place thus:—
"See back (A)." Memorandums indorsed upon leases, if made previously to the execution of the lease, are considered in construction and effect as part of the instrument, although they add to or change the provisions of the deed (*c*). An indorsement upon a deed or other alteration therein is taken to have been made before the execution of the deed and to be parcel of it, in the absence of proof to the contrary (*d*). It is no objection to a lease that an alteration therein was made and signed, after the lease was signed, but before it was sealed and delivered (*e*).

A memorandum indorsed upon an instrument subsequently to its execution, although it refers thereto, is to all intents a new instrument, and must be executed and stamped accordingly (*f*).

SECT. 13.—Stamp.

The stamping of leases and agreements for leases, which was, before the 1st January, 1871, regulated by a number of complicated enactments, is now regulated by the Stamp Act, 1871 (33 & 34 Vict. c. 97), which came into operation on the 1st January, 1871, from which date also the Inland Revenue Repeal Act, 1870 (33 & 34 Vict. c. 99), repealed a large body of prior enactments on the subject, the titles of which may be seen on reference to that act.

Such portions of the Stamp Act, 1870, and of the schedule thereto as bear upon the subject of this work are set out at length hereafter (*g*).

(*b*) 22 & 23 Vict. c. 35, s. 12.

(*c*) *Griffin v. Stanhope*, Cro. Jac. 456; *Goodright d. Nicholls v. Mark*, 4 M. & S. 30; *Frogley v. Earl Lovelace*, 1 Johns. 333.

(*d*) *Brewster v. Kidgell*, Carth. 438; *Flint v. Brandon*, 1 Bos. & P., N. R. 73; *Doe d. Tatum v. Catamore*, 16 Q. B. 745. The presumption is the other way with respect to a will or codicil; *Doe d. Shallcross v.*

Palmer, 16 Q. B. 747.

(*e*) *Lyburn v. Warrington*, 1 Stark. R. 162.

(*f*) *Reed v. Deere*, 7 B. & C. 261; 2 C. & F. 624; *Hill v. Patten*, 8 East, 373; *French v. Patten*, 9 East, 351; *Tilsley's Stamp L.* 359 (2nd ed.).

(*g*) See post, Appendix A. sect. 7; and as to stamping after execution, and for purposes of evidence, see sects. 15—17 of the act, and post, p. 172.

It may be mentioned here, however, that by the Inland Revenue Act, 1876 (39 & 40 Vict. c. 16), s. 11, an instrument whereby the rent reserved by any other instrument chargeable with duty as a lease and duly stamped is increased "shall not be chargeable with stamp duty, otherwise than as a lease in consideration of the additional rent thereby made payable."

CH. V. SEC. 13.
Stamps on Leases.
In case of additional Rent.

Prior to the Stamp Act, 1870, the ad valorem stamp duty on a lease, or agreement for a lease, was to be regulated by the consideration appearing on the face of it, although it might not be that which was actually paid (*h*), and the ad valorem duty applied only to considerations passing between the lessor and lessee (*i*); but both these rules are abrogated by the terms of the schedule to the Act of 1870, tit. "Lease."

Stamp depends on actual Consideration.

If two distinct rents be reserved, one for the house and land, and another for the furniture and fixtures, the stamp must be sufficient to cover both (*l*). Where the plaintiff demised a slate pit at S. and stone quarries at M. to the defendant under an indenture of lease, to hold the one from Lady-day, 1815, and the other from Michaelmas, 1817, for the several terms of fourteen years from the respective dates thereof, at the yearly rent of 70*l.* for the slate pit and 130*l.* for the quarries: it was held, that one ad valorem stamp on the aggregate amount was sufficient, as the letting must be considered as one transaction, there being no evidence of an intent by the parties to defraud the revenue (*m*). Again, where a lease contained a demise of two separate farms, with two habendums differing from each other, a reservation of a separate rent in respect to each farm, and separate covenants, some applying to one farm and some to the other: it was held, that one ad valorem stamp for the amount of both rents was sufficient (*n*). So also a lease containing a demise of land, at a certain rent, and of other land at the same rent as was then paid for it, but not describing the amount, is well stamped by one ad valorem stamp, calculated upon the whole amount of rent to be paid for all the lands (*o*).

Separate Rents.

If a contract, which is signed by one party, have, previously to the signature of the other, inserted in it a new stipulation, it is entire, and requires but one stamp (*p*): and where an instrument contained in its general terms a written contract or demise to several different tenants for different estates at different rents, set against each signature, and one stamp only appeared on the paper; the court held, that it was matter of circumstantial evidence to which contract such stamp should be

New Stipulation after Signature.

(*h*) *Duck v. Braddyll*, M'Clel. 217; 13 Price, 455.

(*i*) *Boone v. Mitchell*, 1 B. & C. 18.

(*l*) *Coster v. Cowling*, 7 Bing. 456.

(*m*) *Boase v. Jackson*, 3 B. & B. 185.

(*n*) *Blount v. Pearman*, 1 Bing. N. C. 408; 1 Scott, 55.

(*o*) *Perry v. Deerr*, 5 A. & E. 551.

(*p*) *Knight v. Crockford*, 1 Esp. 189.

CE. V. SEC. 13. applied (*q*). An agreement for a lease containing a provision that the lessee should give up a farm at Michaelmas was held not to require a new stamp by the addition of the word "house and buildings," on the ground that the addition merely expressed what the parties intended at first (*r*). A new agreement of course requires a new stamp (*s*).

Description
of Stamp.

It was formerly the law that if a lease in writing contained a contract for the purchase of goods, it could not be given in evidence to prove the sale of the goods, unless it had a lease stamp (*t*). The 97th section of the Act of 1870 now provides for this case, by the enactment that where part of the consideration consists of goods, the value of the goods is to be deemed a consideration in respect of which the lease is chargeable with duty.

A lease with option for lessee to purchase requires but one stamp as a lease (*u*).

When a
Stamp is
necessary in
Evidence.

A stamp is only necessary where a paper is used as evidence of an agreement directly, and not where it is used incidentally (*x*). The court will not decide upon a special case stating that any of the deeds or documents therein mentioned are unstamped (*y*). The draft of an agreement for letting premises in which alterations were made, and which was finally agreed to by the solicitors on both sides, but was never signed, is not admissible as evidence of an express contract without a stamp (*z*). So a rough imperfect memorandum of an agreement to become surety for rent must be stamped, and will exclude oral evidence of such agreement (*a*). Where a proposal was made in writing by A. to let a piece of land to B. on certain terms contained in a written agreement between B. and C., and A. afterwards agreed, by parol, that B. should have the land upon the terms proposed; it was held, in an action for a breach of the agreement, that the original proposal was receivable in evidence without a stamp (*b*). Where, pending a negotiation for a tenancy for less than three years, the terms of which were arranged by parol, a memorandum was signed and delivered by the landlord to the tenant, saying he should be happy to allow him to quit on a certain event without notice: it was held this might be given in evidence without a stamp (*c*). A written paper, signed by an auctioneer, and delivered to a bidder, to whom lands were let by auction, containing the description of the lands, the term for which they were let to the bidder, and the rent payable, but not

(*q*) *Doe d. Copley v. Day*, 13 East, 241.

(*r*) *Doe d. Waters v. Houghton*, 1 Man. & R. 208.

(*s*) See *Reid v. Deere*, 7 B. & C. 261.

(*t*) *Stone v. Rogers*, 2 M. & W. 443.

(*u*) *Worthington v. Warrington*, 5 C. B. 636.

(*x*) *Wheldon v. Matthews*, 2 Chit. 399;

Forsyth v. Jarvis, 1 Stark. 437.

(*y*) *Nixon v. Albion Marine Insurance Co.*, L. R., 2 Ex. 338; 36 L. J., Ex. 180.

(*z*) *Chadwick v. Clarke*, 1 C. B. 700.

(*a*) *Glover v. Halkett*, 2 H. & N. 487.

(*b*) *Drant v. Browne*, 3 B. & C. 665; *Edgar v. Blicke*, 1 Stark. R. 464.

(*c*) *Bethell v. Blencowe*, 3 M. & G. 119.

the lessor's name, was held necessary to be stamped (*d*) : but a similar paper not signed by the auctioneer, or any of the parties, was held not to be such a minute of the agreement as was required to be stamped, nor such a writing as would exclude parol evidence (*e*). Where there was a parol agreement to demise certain premises upon the terms and conditions contained in a lease of the same premises, granted by the lessor to another person ; it was held, that in an action by the lessor against the lessee for rent and non-repairs, the lease could not be read in evidence unless it was stamped (*f*). Where an instrument stamped with a lease stamp demised certain premises upon the conditions contained in the annexed lease, which was not stamped, it was held, that the annexed lease was admissible in evidence without a stamp (*g*). Though an oral lease for three years may be good, yet if it be reduced into writing it must be stamped, or it will not be receivable in evidence (*h*).

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*Stamps on
Leases.*

Where a document is offered in evidence, and it is objected to by the opposite party on the ground that it is not sufficiently stamped, proof of that lies on the party who makes the objection, it being a fact (*i*). The objection is one of a preliminary nature to be decided by the judge (not by the jury), who will, immediately upon the objection being taken, permit evidence to be interposed, and arguments adduced, to prove or disprove the sufficiency of the stamp (*k*). Where a document has been altered so as to affect its validity and also the stamp, it should be objected to on two grounds, viz. 1. That the alteration has made the deed void ; 2. That it has rendered a new stamp necessary : unless the second point be duly taken, it cannot be relied upon, on an application for a new trial, &c. (*l*). The judge's decision that the stamp is sufficient, or that no stamp is necessary, is conclusive (*m*) ; but his decision the other way may be reviewed upon an application for a new trial, &c. (*n*). Since the Common Law Procedure Act, 1854, s. 28 (repealed and re-enacted by s. 15 of the Stamp Act, 1870), objections to written evidence for want of a sufficient stamp are usually made by the judge's marshal or associate, whose duty it is to make the objection, although neither party wishes it, upon the production of the document as evidence. But sometimes this may be avoided by the parties mutually agreeing in writing before the

Objection to
Stamp at
Trial.

(*d*) *Ramsbottom v. Mortley*, 2 M. & S. 445.

(*e*) *Ramsbottom v. Tunbridge*, 5 M. & S. 434.

(*f*) *Turner v. Power*, 7 B. & C. 625 ; 1 Moo. & M. 131.

(*g*) *Pearce v. Cheslyn*, 4 A. & E. 225 ; *Strutt v. Robinson*, 3 B. & Ad. 395.

(*h*) *Prosser v. Phillips*, Bull. N. P. 269.

(*i*) *Waddington v. Francois*, 5 Esp. 182 ; *Doe d. Fryer v. Coombs*, 3 Q. B. 687.

(*k*) *Bartlett v. Smith*, 11 M. & W. 483,

485 ; *Painter v. Hill*, 2 C. & K. 924 ; *Doe d. Fryer v. Coombs*, 3 Q. B. 687 ; *Key v. Mathias*, 3 F. & F. 279.

(*l*) *Eagleton v. Gutteridge* 11 M. & W. 465, 469 ; 2 Dowl. N. S. 1053.

(*m*) C. L. P. Act, 1854 (17 & 18 Vict. c. 125), s. 31 ; *Stordet v. Kuczynski*, 17 C. B. 251 ; 25 L. J., C. P. 2 ; *Heisir v. Groul*, 5 H. & N. 35.

(*n*) *Fishmongers' Co. v. Dimsdale*, 12 C. B. 557 ; *Gurr v. Scudds*, 11 Exch. 190 ; *Sharples v. Rickard*, 2 H. & N. 57.

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trial to admit copies in evidence instead of the originals (*o*). Under the Stamp Act, 1870, the associate can make only such objections for want of a stamp as the parties might have made if the statute had not passed (*o*).

Stamping
after Execu-
tion.

By the Stamp Act, 1870, s. 15, an unstamped or insufficiently stamped instrument may be stamped after execution, on payment of the unpaid duty and a penalty of 10%, and, in case the duty exceeds 10%, of 5 per cent. interest on the unpaid duty from the day of execution up to the time when the interest is equal to the unpaid duty. Where an instrument is not required by law to be stamped within a particular time after its execution, the court, upon its being offered in evidence, will not inquire when the stamp was affixed, nor, if a penalty was incurred, whether the proper penalty was paid on the stamping (*p*): and if an instrument has been originally unstamped, but has been stamped on payment of the penalty, it is admissible in evidence, though the receipt for the penalty has been erased; provided it be proved that such receipt has been indorsed on it; it is not necessary to prove the commissioners' signature to such a receipt (*q*).

Stamping for
Purposes of
Evidence.

By s. 16 of the Stamp Act, 1870, an unstamped lease (amongst other documents) if tendered in evidence in any Court of Civil Judicature in England may be received in evidence on payment to the officer of the court of the amount of unpaid duty, and the penalty payable on stamping the same, and a further sum of one pound.

Lease before
Alteration
of Law is
stamped
according to
Law at Time
of Execution.

Under prior stamp acts it had been held (*r*), that in a case of stamping after execution, the proper stamp to be applied was that which was necessary at the time the stamp was actually affixed. But the Stamp Act, 1870, s. 17, expressly enacts that "save as aforesaid" [i. e., save as in ss. 15, 16, mentioned] "no instrument executed in any part of the United Kingdom shall, except in criminal proceedings, be pleaded or given in evidence, or admitted to be good, useful or available, in law or equity, unless it is duly stamped in accordance with the law in force at the time when it was first executed" (*s*).

SECT. 14.—Execution of Lease.

Sealing is
essential to
Execution of
Lease by
Deed.

Where a lease is by deed, the respective parties should seal and deliver it, for an instrument not under seal is no deed (*t*). One piece

(*o*) *Travis v. Hargrave*, 4 F. & F. 1078.

(*p*) *Re v. Preston*, 5 B. & Ad. 1028.

(*q*) *Apothecaries' Co. v. Fernyhough*, 2 C. & P. 438.

(*r*) *Buckworth v. Simpson*, 1 C. M. & R.

834; *Drakin v. Penniall*, 2 Exch. 320.

(*s*) See this enactment acted on in *Clarke v. Roche*, 3 Q. B. D. 170.

(*t*) 1 Steph. Com. 492.

of wax may be the seal of several persons, but it must appear by the deed and profess to be the seal of each (*u*). It is not, however, absolutely essential, that there should be either wax or wafer; it seems to be enough that there should be an impression on the parchment or paper, with the intent of sealing (*x*). The method of our Saxon ancestors was for such as could write to subscribe their names, and, whether they could write or not, to affix the sign of the cross, which custom illiterate persons for the most part to this day keep up by signing a cross for their mark, when unable to write their names. A deed well executed by an illiterate person, if it be signed by a third person at his request and in his presence, and sealed and delivered by him. It need not be read over to him, unless he required it (*y*).

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Lease.

It is a point on which authorities are at variance, whether the Statute of Frauds, 29 Car. 2, c. 3 (*z*), requires leases by deed to be signed (*a*). The preponderance of authority (*b*) seems to be in favour of the signature not being necessary.

Whether
Lease by Deed
must be
signed.

A lessee entering and holding under a lease not executed by his landlord is not estopped, in an action by the assignee of the lessor, from showing such want of execution by the lessor (*c*). Where a lease for a term, containing a covenant to repair *during the term*, although executed by the lessee, is not executed by the lessor, the lessee is not bound *by the covenant*, for the lease being void he has not had the consideration for his covenant (*d*). And it seems that such lessee would not be bound by such a covenant by the fact of his having enjoyed the premises for a period of years equal to those which the term would have comprised, if it had been granted, if he was not bound during its continuance (*e*). But he may be liable upon an implied tenancy on the like terms and conditions as those expressed in the lease.

Failure of
Lessor to
execute.

The lease must also be *delivered* either by the parties themselves or by their attorney authorized by a power, for merely sealing does not make a deed: the delivery is also expressed in their attestation

Delivery.

(*u*) *Cooch v. Goodman*, 2 Q. B. 580.

(*x*) See *Reg. v. Trustees of Covent Garden*, 7 Q. B. D. 238, n.

(*y*) *Rex v. Longnor*, 1 N. & M. 577.

(*z*) *Ante*, 118.

(*a*) *Cooch v. Goodman*, 2 Q. B. 580; *Aveline v. Whisson*, 4 M. & G. 801.

(*b*) *Williams on Real Property*, p. 142; *Leake on Contracts*, p. 77.

(*c*) *Cardwell v. Lucas*, 2 M. & W. 111; *Soprani v. Skurro*, Yelv. 19; *Rose v. Poul-*

ton, 2 B. & Ad. 822.

(*d*) Com. Dig. tit. *Covenant* (F.); *Soprani v. Skurro*, Yelv. 18; *Waller v. Dean and C. of Norwich*, Owen, 136; *Knipe v. Palmer*, 2 Wils. 132; *Pitman v. Woodbury*, 3 Exch. 4; *Swatman v. Ambler*, 8 Exch. 72. But see *How v. Greek*, 3 H. & C. 391; 34 L. J., Ex. 4.

(*e*) *Pitman v. Woodbury and Swatman v. Ambler*, *supra*.

CH. V. SEC. 14. “sealed and delivered,” for delivery makes it a lease. Almost any manifestation, however, of the party’s intention to deliver, if accompanied by an act importing the same, will constitute a delivery. But when it is intended that the lease shall not take effect as a demise until something is done by the lessee—e. g. payment of the premium or of the expenses—the lease should be delivered only as an escrow, i. e., conditionally to take effect as a lease upon the performance of what is so to be done (*f*). Although sealed and delivered and attested in the usual manner, parol evidence is admissible to show that it was only to operate as an escrow, until, &c. (*g*). Whether it was intended to operate as a deed, or only as an escrow, is a question of fact for the jury (*h*).

Execution of
Lease.

Escrow.

By Attorney. An attorney or agent to execute a deed in the absence of his principal must be authorized by deed (*i*), and he must execute it in the name of his principal, or in his own name, adding such words as show that he acts solely as the agent of his principal (*k*). If an unauthorized person seal and deliver a deed in the name and on behalf of one of the parties, and the party himself deliver it afterwards, he thereby adopts the sealing, and makes it his own deed (*l*).

Date. Every deed is taken to be delivered on the day it bears date, unless the contrary be proved (*m*); and if proved, it operates only from the time of execution (*n*): but if the date be false or impossible, the delivery ascertains the time of it (*o*). Parol evidence is admissible to show that a written contract which has no date was not intended to operate from its delivery, but from a future uncertain period (*p*).

Attestation
by Witnesses. The last requisite is the attestation or execution of the lease in the presence of witnesses, though this is generally necessary rather for the preservation of the evidence, than to constitute the essence of the deed. But if the lease be made in pursuance of a power, it must be executed and attested as required by the power, or by the stat. 22 & 23 Vict. c. 35, s. 12 (*q*). And when it requires to be registered in

(*f*) Shep. Touch. 58, 59.

(*g*) *Gudgen v. Bessett*, 6 E. & B. 986;

Bowker v. Burdekin, 11 M. & W. 129;

Christie v. Winnington, 8 Exch. 287, 290;

Pym v. Campbell, 6 E. & B. 370; 25 L. J.,

Q. B. 277; *Furness v. Meeke*, 27 L. J., Ex.

34; *Millership v. Brookes*, 5 H. & N. 797;

29 L. J., Ex. 369; *Murray v. Earl of*

Stair, 2 B. & C. 62; *Davies v. Jones*, 17

C. B. 625, 634.

(*h*) *Ponsford v. Walton*, L. R., 3 C. P.

167, 174.

(*i*) *Harrison v. Jackson*, 7 T. R. 207;

Berkely v. Hardy, 5 B. & C. 355; *Smith*

L. & T. 82 (2nd ed.).

(*k*) *M'Ardle v. Irish Iodine Co.*, 15 Ir.

Com. L. R. 146.

(*l*) *Tupper v. Foulkes*, 9 C. B., N. S. 797.

(*m*) Co. Lit. 36; 2 Blac. Com. 307.

(*n*) *Cooper v. Robinson*, 10 M. & W. 694;

Shaw v. Kay, 1 Exch. 412; *Bird v. Baker*,

1 E. & E. 12; 28 L. J., Q. B. 7; *Jeron v.*

Tomkinson, 1 H. & N. 196, 206; *Steele v.*

Mart, 4 B. & C. 272; *Broune v. Burton*,

5 D. & L. 289.

(*o*) *Murray v. Earl Stair*, 2 B. & C. 82;

Bowker v. Burdekin, 11 M. & W. 128;

Doe d. Garnons v. Knight, 5 B. & C. 671;

Hare v. Horton, 5 B. & Ad. 715; *Goodright*

v. Gregory, Loft, 339; *Goodright d. Carter*

v. Straphan, Cowp. 201; Loft, 763.

(*p*) *Davis v. Jones*, 17 C. B. 625.

(*q*) Post, Sect. 19.

Middlesex or Yorkshire (infra, Sect. 15), it must be attested by one witness or more. In the North Riding two witnesses are necessary (r).

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SECT. 15.—*Registry of Lease.*

By 7 ANN. c. 20, s. 1, a memorial of all deeds and conveyances (s) of or concerning, and whereby any honors, manors, lands, tenements, or hereditaments in the county of *Middlesex*, may be in any way affected in law or equity, may be registered in such manner as therein directed; and every such deed or conveyance (t) shall be adjudged fraudulent and void against any subsequent purchaser or mortgagee for valuable consideration, unless such memorial thereof be registered as by this act is directed before the registering of the memorial of the deed or conveyance under which such subsequent purchaser or mortgagee shall claim. Notwithstanding the express words of this enactment, the Court of Chancery holds that if a person registering a deed has had actual or constructive notice of a prior incumbrance not registered, his deed shall be postponed in equity to such prior incumbrance; and that omitting to inquire for and examine the title deeds on the occasion of a purchase or marriage settlement amounts to constructive notice of any equitable deposit of such deeds (u).

In Middlesex,
Leases to be
registered.

By sect. 5, "every such memorial shall be put into writing (x) on vellum or parchment, and brought to the said office (y), and shall be under the hand and seal of some or one of the grantors, or some or one of the grantees (z), his or their heirs, executors or administrators, guardians or trustees, attested by two witnesses, one whereof is to be one of the witnesses to the execution of such deed or conveyance, which witness shall upon his oath, before one of the said registrars, or before a master extraordinary in Chancery (a), prove the signing and sealing of such memorial, and the execution of the deed or conveyance mentioned in such memorial."

Memorials,
how to be
written, exe-
cuted and
attested.

How proved.

By sect. 6, "every memorial of any deed or conveyance shall contain the day of the month and the year when such deed or conveyance bears date, and the names and additions of all the parties to such deed or conveyance, and of all the witnesses thereto and the

Contents of
Memorial.

(r) Post, 177.

(s) The act also extends to wills; *Joland v. Stainbridge*, 3 Ves. 478; but this part of the act is very inaccurately expressed, see 14 Jurist, part 2, p. 287; *Chadwick v. Turner*, 34 L. J., Ch. 62, 356.

(t) See exceptions, Sect. 17, post, 176 (h).
(u) *Wormald v. Maitland*, 35 L. J., Ch. 69; 13 W. R. 832.

(z) It may be lithographed; *Reg. v. Registrars of Middlesex*, 7 Q. B. 156.

(y) The Registrar's Office, No. 8, Serle

Street, Lincoln's Inn, London, W. C.

(z) A memorial of a conveyance by deed poll to Church Building Commissioners, under their common seal, is not sufficient. The grantor should execute such memorial under his hand and seal; *Reg. v. Registrar of Middlesex*, 1 E. & E. 322; 28 L. J., Q. B. 77.

(a) Now, "Commissioner to administer oaths in the Supreme Court," 16 & 17 Vict. c. 78; Judicature Act, 1873, s. 82.

- CH. V. SEC. 15. places of their abode, and shall express or mention the honors, manors, lands, tenements and hereditaments contained in such deed or conveyance, and the names of all the parishes, townships, hamlets, precincts or extra-parochial places within the said county where any such honors, &c. are lying or being, that are given, granted, conveyed or in any way affected or charged by any such deed or conveyance, *in such manner as the same are expressed or mentioned in such deed or conveyance*, or to the same effect.” In preparing a lease or other conveyance which will have to be registered, this enactment should be borne in mind, and the parcels described accordingly, so that they may be merely copied in the memorial, and yet give all the particulars required by the statute (*b*). The deed must be produced, together with the memorial thereof, to the registrar, who is to indorso on the deed a certificate of the registration, &c., “which certificate shall be taken and allowed as evidence of such respective registries in all courts of record whatsoever” (*c*). And the registrar “shall duly file every such memorial in order of time as the same shall be brought to the said office, and enter or register the said memorials in the same order that they shall respectively come to his hands.” When two deeds are registered on the same day and at the same hour, they must be presumed to have been registered in the order as numbered (*d*).
- Certificate of Registration.
- Memorials to be filed in due Order.
- Two Deeds as to same Land.
- By sect. 7, when two or more deeds relating to the same land are registered together, the parcels need not be stated at length more than once in the memorial and registry thereof.
- Leases, &c. which do not require to be registered.
- By sect. 17, “this act shall not extend to any *copyhold* estates, or to leases at a rack rent (*e*), or to any lease not exceeding one-and-twenty years, where the actual possession and occupation goeth along with the lease, or to any of the chambers in Serjeants’ Inn, the Inns of Court or Inns of Chancery; anything in this act contained to the contrary thereof in anywise notwithstanding.”
- Registry of Judgments, &c.
- By sect. 18, judgments, statutes and recognizances shall affect or bind lands in Middlesex only from the time of a memorial thereof being registered as therein mentioned (*f*).
- In the West Riding of Yorkshire.
- The 2 & 3 Ann. c. 4 (*g*), contains similar enactments (*h*) with respect to hereditaments in the West Riding of Yorkshire, and ap-

(*b*) *Reg. v. Registrars of Middlesex*, 15 Q. B. 976.

(*c*) The registered memorial of a deed conveying lands in Middlesex is secondary evidence of the contents of such deed against the personal representatives of the party by whom such deed is registered; *Wollaston v. Hakerill*, 3 M. & G. 297.

(*d*) *Nere v. Pennell and Hunt v. Nere*, 33 L. J., Ch. 19; 2 Hem. & M. 170.

(*e*) *I. e.* a rent of the full annual value

of the thing demised..

(*f*) *Denham v. Keane*, 31 L. J., Ch. 129; 8 Jur., N. S. 604.

(*g*) As amended by 5 & 6 Ann. c. 18; 6 Ann. c. 35, s. 34.

(*h*) The enactments are not exactly alike in each act; for instance, in the *North Riding* the deed to be registered (as well as the memorial) must be attested by two witnesses, 8 Geo. 2, c. 6, s. 11.

points the registrar's office to be kept at *Wakefield*. Deeds executed more than forty miles from the West Riding may be proved by affidavit (*i*). This act does not extend to copyhold estates or leases at rack-rent, or to any lease not exceeding one-and-twenty years, where the actual possession and occupation goeth along with the lease (*j*).

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Lease.*

The 6 Ann. c. 35, contains similar enactments (*k*) with respect to hereditaments in the East Riding of Yorkshire and Kingston-upon-Hull, and appoints the registrar's office to be kept at *Beverley*.

In the East
Riding of
Yorkshire.

The 8 Geo. 2, c. 6, contains similar enactments (*k*) with respect to hereditaments in the North Riding of Yorkshire, and appoints the registrar's office to be kept at *Northallerton*.

In the North
Riding of
Yorkshire.

By the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78) (*i*), "where the will of a testator devising land in Middlesex or Yorkshire has not been registered within the period allowed by law in that behalf, an assurance of such land to a purchaser or mortgagee by the devisee or by some one deriving title under him shall, if registered before, take precedence of and prevail over any assurance from the testator's heir at law."

By 15 Car. 2, c. 17, s. 8, "no lease, grant or conveyance of or charge out of or upon the said ninety-five thousand acres [of the Bedford Level], or any part thereof, *except leases for seven years or under in possession*, shall be of any force but from the time it shall be entered with the register, as thereby directed; the entry whereof being indorsed by the said register upon such lease, grant, conveyance or charge, shall be as good and effectual in the law as if the original book of entries were produced at any trial at law or otherwise."

In the Bed-
ford Level.

The intention of these acts plainly is to secure subsequent purchasers and mortgagees against secret conveyances and fraudulent incumbrances. A lessee of land in the Bedford Level cannot object to an action by his landlord for a breach of covenant in not repairing, that the lease was void by statute for want of being registered, as the act does not avoid it *as between the parties themselves*, but only postpones its priority with respect to subsequent incumbrancers registering their title before (*l*). All leases by deed for a valuable consideration not excepted by sect. 17 are subject to the provisions of the Middlesex and Yorkshire acts. Therefore, where lands within a register county are demised by way of mortgage, the mortgagor to enjoy the same until default in payment of the principal and interest, the deed requires registration (*m*). But a deposit of a lease with or without a memorandum in writing, by way of equitable mortgage of

Cases decided
upon the
Middlesex,
Yorkshire and
Bedford Level
Registry
Acts.

(i) Sect. 18.

(j) Sect. 16.

(k) See note (*h*), ante, p. 176.

(l) *Hodson v. Sharpe*, 10 East, 350.

(m) Rigge on Registration, 88, n. (o);
Wilson on Registration, 29; Sug. V. & P.
727 (14th ed.).

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In Middlesex
and Yorkshire
—contd.

lands in Middlesex, need not be registered, not being a "deed or conveyance" within the meaning of the 7 Ann. c. 20 (*m*), although actual or constructive notice thereof will in equity affect a subsequent purchaser (*n*). A further charge which is not registered will be postponed to a subsequent mortgage which is registered (*o*). The mere receipt of rent would not, it seems, be deemed an actual possession and occupation within the registry acts (*p*). A lease within the exception of these acts will so continue, notwithstanding it may afterwards become a valuable and saleable interest (*q*). Registering an assignment is not registering the lease (*r*). In registering an assignment of a lease, the parcels ought to be inserted in full, and it is not enough to refer to them as being described in the lease (*s*). A memorial of an assignment of lease indorsed on the lease was tendered for registration to the registrar for Middlesex, under stat. 7 Ann. c. 20, in the following form: "An indenture of assignment." Then followed a statement of the date and parties to the assignment, "assigning all that brick messuage," &c. (specifying the premises and giving a full description of them as to locality and occupation), "by the description of the messuage or tenement, out-offices and premises, comprised in and demised by the within-written indenture of lease, with the appurtenances." The memorial did not state the date of the lease itself or the parties to it. It appeared on affidavit, in support of a rule for a mandamus to the registrar to register this memorial, that the full description of the premises was taken from the lease: it was held, that the memorial did not comply with the requirements of stat. 7 Ann. c. 20, s. 6, as it did not show that the premises were described in such manner as the same were expressed in the deed to be registered, or in the lease thereby referred to. It was also held, that where the deed, of which a memorial is to be registered, is indorsed on an earlier deed, it is not sufficient to describe the premises by such memorial in the terms used in the earlier deed, without express reference to it, if the deed to be registered describes the premises simply by reference to the earlier deed (*t*). Where there were two assignments of the same lease of certain premises in Middlesex, and the last executed was registered first, it was held, that at law the deed last registered must be considered as fraudulent and void, under the statute 7 Ann. c. 20, s. 1; although the party

(*m*) *Sumpter v. Cooper*, 2 B. & Adol. 223; *Wright v. Stansfield*, 27 Beav. 8; 28 L. J., Ch. 183. But see *Nere v. Pennell* and *Hunt v. Nere*, 33 L. J., Ch. 19; 2 Hem. & M. 170; *Wormald v. Maitland*, 35 L. J., Ch. 69; 13 W. R. 832.

(*n*) *Wormald v. Maitland*, *supra*.

(*o*) *Moore v. Culverhouse*, 27 Beav. 639; 29 L. J., Ch. 419; *Nere v. Pennell* and *Hunt v. Nere*, *supra*.

(*p*) *Fury v. Smith*, 1 Huds. & Br. 735, 751.

(*q*) Sug. V. & P. 727 (14th ed.); *Wilson on Registration*, 29.

(*r*) *Honeycomb d. Halpen v. Waldron*, 2 Stra. 1064; *Fleming v. Neville*, *Hayes*, 23; *Fury v. Smith*, 1 Huds. & Br. 735, 755.

(*s*) Sug. V. & P. 731 (14th ed.).

(*t*) *Reg. v. Registrar of Middlesex*, 15 Q. B. 976.

claiming under the second assignment know, when it was executed, of the prior execution of the first assignment (*u*). So a mortgage of leaseholds in Middlesex, which is registered there before a prior judgment obtained against the mortgagor, and registered in the Common Pleas (but not in Middlesex until after the mortgage), will take precedence of the judgment and any elegit thereon (*x*). The enrolment of a lease granted by the Duke of Cornwall is evidence in the same manner as if it had been granted by the crown, when there is no Duke of Cornwall (*y*).

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Registry of
Lease.

Elaborate provisions have been made by the Land Registry Acts of 1862 (25 & 26 Vict. c. 53), and subsequently by the Land Registry Act of 1875 (38 & 39 Vict. c. 87), which supersedes it, for the registration of titles generally, but these acts, unlike the particular acts above referred to, are simply permissive. The Middlesex and Yorkshire Registration Acts do not apply to land registered under either of the general acts (*z*). Leasehold land may not be registered under the Act of 1875, unless it be held under a lease which is either immediately or mediately derived out of land of freehold tenure (sect. 2). Sects. 34—39 refer to the transfer of leases, and sects. 50, 51 to notice of leases.

Registration
generally.
Land Re-
gistry Acts.

SECT. 16.—*Costs of Lease and Counterpart.*

The lease and counterpart are usually prepared by the lessor's solicitor on behalf of both parties, and at the expense of the lessee; but frequently the draft lease is settled and approved of by the lessee's own solicitor; who sometimes claims the right to engross the counterpart (*a*), which however seems unusual and improper. The costs of surveyor's charges and counsel's fees for advising on title, &c., will not be allowed as part of the costs of the lease (*b*). In the absence of any express stipulation to the contrary, the expense of the lease falls upon the lessee, and of the counterpart upon the lessor (*c*); and the lessee generally agrees to pay all the expenses of both lease and counterpart.

Costs of
Lease,

and Counter-
part.

The lessor's solicitor, when he acts for both parties, should, in the first instance, take care to be employed by the lessee to act on his

By whom
Solicitor
employed.

(*u*) *Doe d. Robinson v. Allsop*, 5 B. & A. 142; *Elsay v. Lutyens*, 8 Hare, 159; *Warburton v. Loveland*, 3 Dow & Cl. 480; *Carlisle v. Whaley*, L. R., 2 H. L. Cas. 391.

(*x*) *Westbrook v. Blythe*, 3 E. & B. 737; 23 L. J., Q. B. 386.

(*y*) *Roue v. Brenton*, 8 B. & C. 755. In the Duchy of Lancaster, see *Kinnersley v. Orpe*, 1 Doug. 56. As to registration of conveyances, see *Le Neve v. Le Neve*,

3 Atk. 651; Amb. 436; *Hine v. Dodd*, 2 Atk. 275; *Jolland v. Stainbridge*, 3 Ves. 478; *Morecock v. Dickens*, Amb. 678.

(*z*) Act of 1862, s. 104; Act of 1875, s. 127.

(*a*) *Foster v. Rowland*, 7 H. & N. 103; 30 L. J., Ex. 396.

(*b*) *Lock v. Furze*, 19 C. B., N. S. 56; L. R., 1 C. P. 441; 34 L. J., C. P. 201; 35 Id. 141.

(*c*) *Jennings v. Major*, 8 C. & P. 61.

CH. V. SEC. 16.
*Costs of Lease
 and Counter-
 part.*

behalf in the preparation of the deeds, so that he may recover the amount of his charges from him, whether the negotiation for a lease goes off or is completed. Slight evidence of such employment is generally sufficient (*d*). If the solicitor of the lessor, who is not the solicitor for the lessee, nor employed by him on the particular occasion, prepares the lease and counterpart, he must look to his own client, the lessor, for payment of his charges; and the lessor, having paid them, may *sometimes* recover the amount from the lessee, under the special agreement entered into between them, or as money paid to his use, at his request (*e*). So where there is a negotiation for a mortgage, whether it goes off or is completed, the solicitor for the mortgagee cannot recover his charges from the mortgagor (who was to pay all expenses), unless he can prove that he was retained or employed by the mortgagor on that occasion (*f*). When a proposed lease or mortgage goes off, it is sometimes very important to ascertain correctly who is directly liable to the solicitor, because such party, after paying the amount, may have no remedy over against the other, by reason that the failure of the negotiation was attributable to him rather than to the other party; or that there was not a complete contract in writing sufficient to satisfy the Statute of Frauds (*g*). It is always a question for the jury by whom the solicitor was employed (*h*): and he should take care to secure in the first instance sufficient evidence of such employment by the lessee. Sometimes the charges of the lessor's solicitor may be taxed at the instance of the lessee, even after they have been paid (*i*).

SECT. 17.—*Entry of Lessee.*

Interesse
 Termini.

Before entry a lessee for years has at common law only an *interesse termini* (an interest of a term), and no possession. He cannot before entry maintain an action of trespass (*k*); but he may maintain ejectment (*l*), or he may assign his interest, and his assignee may enter, or maintain ejectment (*m*). If a lease be so framed as to be a bargain and sale under the Statute of Uses, the possession is immediately

(*d*) *Webb v. Rhodes*, 3 Bing. N. C. 732; *Smith v. Clegg*, 27 L. J., Ex. 300.

(*e*) *Griswell v. Robinson*, 3 Bing. N. C. 10, 16; *Baker v. Meryweather*, 2 C. & K. 737.

(*f*) *Rigley v. Dakin*, 2 Y. & J. 83; *Wilkinson v. Grant*, 18 C. B. 319.

(*g*) 29 Car. 2, c. 3, s. 4; *Forster v. Rowland*, 7 H. & N. 103; 30 L. J., Ex. 396. A contract relating to the costs of investigating a title, preparatory to an intended mortgage, is not within the statute; *Jakes v. White*, 6 Exch. 873, 878.

(*h*) *Wilkinson v. Grant*, 18 C. B. 319, 320; *Smith v. Clegg*, 27 L. J., Ex. 300.

(*i*) *In re Newman*, L. R., 2 Ch. 707; 36 L. J., Ch. 843.

(*k*) Co. Lit. 296 b; *Wheeler v. Montefiore*, 2 Q. B. 133, 156; *Turner v. Cameron's Coalbrook Steam Coal Co.*, 5 Ex. 932; *Lichfield v. Ready*, Id. 939; *Lowe v. Ross*, Id. 553; *Harrison v. Blackburn*, 17 C. B., N. S. 678; *Cole Ejec.* 287.

(*l*) *Cole Ejec.* 72, 287, 459; *Doe d. Parsley v. Day*, 2 Q. B. 156; *Ryan v. Clark*, 14 Q. B. 73; 7 D. & L. 8.

(*m*) 8 & 9 Vict. c. 106, s. 6.

executed in the lessee, without actual entry (*n*). In *Neale v. Mackenzie* CH. V. SEC. 17. premises were demised by parol for a year. The lessee accepted the lease, and, by virtue of the demise, entered upon the demised land. Before and at the time of the demise, eight acres included in it had been demised to a third party, in whose possession they were, so that the lessee could not, and did not, enter upon them. It was held that the latter demise was wholly void as to the eight acres, and that the rent was not apportionable, and could not be distrained for, the impediment of the lessee taking possession not being analogous to an eviction by an elder title (*o*). So where the tenant could not obtain possession of part of the premises demised, it was held an action of covenant could not be maintained by the lessor against the lessee for the rent, as in such an action it could not be apportioned (*p*). The *interesse termini* is in the lessee, whether the lease be made to commence immediately or at a future day (*q*).

Entry of
Lessee.

SECT. 18.—Void or Voidable.

When a lease contains a proviso or condition that on breach of any of the covenants, the lease “shall cease, determine and be utterly void, to all intents and purposes whatsoever,” such words will be construed to mean *void at the election of the lessor* (*r*). This has been held in a series of cases, affirmed by the Judicial Committee of the Privy Council in *Davenport v. The Queen* (*s*). The lessee will not be allowed to take advantage of his own wrongful act or omission, and to say that thereby the lease has become void (*t*). The lessor must do some act evidencing his intention to enter for the forfeiture and determine the lease (*u*); and the lease will be *avoided from that time only*; but previous arrears of rent may be sued for, although upon re-entry the lessor is to have the premises again “as if the said indenture had never been made” (*r*). The subject of forfeiture is further considered hereafter (Chapter VIII., Sect. 5). Where a lease was granted to a Fraud.

“Void”
means at the
Election of
the Lessor.
Davenport v.
The Queen.

(*n*) 2 Blac. Com. 270.

(*o*) *Neale v. Mackenzie*, 1 M. & W. 747.

(*p*) *Holgate v. Kay*, 1 C. & K. 341.

(*q*) Com. Dig. tit. *Entate* (G. 14); *Lock v. Furze*, 19 C. B., N. S. 96, 103, 105; L. R., 1 C. P. 441; 34 L. J., C. P. 201; 35 Id. 141.

(*r*) *Roberts v. Davey*, 4 B. & Ad. 667; *Pennington v. Cardale*, 3 H. & N. 666; *Hughes v. Palmer*, 19 C. B., N. S. 393, 404, 407; *Cole Ejec.* 408.

(*s*) L. R., 3 App. Ca. at p. 128.

(*t*) *Rede v. Farr*, 6 M. & S. 121; *Doe d. Bryan v. Banks*, 4 B. & A. 401; *Arnsby v. Woodward*, 6 B. & C. 619; *Roberts v.*

Davey, 4 B. & Ad. 664; *Doe d. Nash v. Birch*, 1 M. & W. 402; *Reid v. Parsons*, 2 Chit. R. 247.

(*u*) *Roberts v. Davey*, 4 B. & Ad. 667; *Arnsby v. Woodward*, 6 B. & C. 619; *Fenn d. Matthews v. Smart*, 12 East, 444, 451; *Baylis v. Le Gros*, 4 C. B., N. S. 537.

(*r*) *Hartshorne v. Watson*, 4 Bing. N. C. 178; *Load v. Green*, 15 M. & W. 216, 223; *Selby v. Browne*, 7 Q. B. 620; *Franklin v. Carter*, 1 C. B. 750; 3 D. & L. 213; *Johns v. Whitley*, 3 Wils. 127; *Att.-Gen. v. Cox*, 3 H. L. Cas. 240.

CH. V. SEC. 18.
Whether Lease
Void or
Voidable.

Illegality.

What avoids
a Lease.
Erasure, &c.

Altered Deed
may be good
as Evidence.

man on his fraudulent representation that he intended to use the premises for carrying on a lawful trade, he intending at the time to use them, and afterwards using them, as a brothel, the representation being collateral to the agreement, was held not to avoid the lease (z). Where the lessor knew that the lessee took the premises for the purpose of using them as a brothel (notwithstanding an express covenant therein contained not so to use them), the lease was held void, and no rent or damages for breaches of covenant recoverable (a). In covenant for rent it is a good defence that the premises were demised by the plaintiff to the defendant for the express purpose of being used for boiling oil and tar, contrary to the provisions of the Building Act (b).

A lease by deed may be avoided by matter ex post facto, as by erasure, interlineation or other alteration in any material part (c). The same rule extends to a lease not by deed, and it has been held that the addition by a stranger of a seal to a written instrument will avoid it (d). A deed executed with blanks in material parts, whereby it is incapable of having any operation, and afterwards filled up and delivered by another person, in the absence of the party who has executed, and unauthorized by instrument under seal, is invalid (e). If a deed be altered by a stranger in a point not material, the deed is not avoided; but it is otherwise if it be altered by a stranger in a point material; for the witnesses cannot prove it to be the act of the party where there is any material difference: an immaterial alteration, however, does not change the deed, and consequently the witnesses may attest it without danger of perjury; but if the deed be altered by the party himself, though in a point not material, yet it avoids it, for the law takes every man's act most strongly against himself.

It is material to observe that an altered deed, although the covenants in it cannot be sued upon, may be good as evidence to show the estate which passed by it, and which was not divested by these alterations (f). Where, by agreement between plaintiff and defendant, a house, No. 38, was let to the plaintiff, and after the agreement

(z) *Feret v. Hill*, 15 C. B. 207. As to plea of fraud to an action for not granting a lease, see *Calveleiro v. Puget*, 4 F. & F. 537; and as to plea of illegality, see *Cowan v. Milbourn*, L. R., 2 Ex. 230; 36 L. J., Ex. 124; in which case it was held to be a defence that rooms agreed to be let were intended to be used for blasphemous lectures.

(a) *Smith v. White*, L. R., 1 Eq. 626; 35 L. J., Ch. 454.

(b) *Gas Light Co. v. Turner*, 7 Scott, 779; 8 Id. 609; 5 Bing. N. C. 666; 6 Id. 324.

(c) *Pigot's case*, 11 Co. R. 27; Bull. N. P. 267; 2 Blac. Com. 308; *Davidson v. Cooper*, 13 M. & W. 352 (Exch.).

(d) *Davidson v. Cooper*, supra.

(e) *Hibblewhite v. M'Morine*, 6 M. & W. 200; 8 Dowl. 802. But see *Eagleton v. Gutteridge*, 11 M. & W. 466; 2 Dowl., N. S. 1053.

(f) *Davidson v. Cooper*, 11 M. & W. at p. 800; *Stewart v. Aston*, 8 Ir. Com. L. R., N. S. 35; *Doe d. Courtail v. Thomas*, 9 B. & C. 288; *West v. Steward*, 14 M. & W. 47.

was executed and delivered to the plaintiff the number was altered to 35, but it did not appear by whom, No. 35 being in fact the house let; it was held that the agreement might be given in evidence in an action for an excessive distress, in which the demise was admitted, to show the terms of the holding (*g*).

CIL. V. SEC. 18.
*Whether Lease
Void or
Voidable.*

It has been held that the cancelling of a lease by the mutual consent of both parties does not destroy the term vested in the lessee, and that, therefore, notwithstanding such cancellation, the lessor may maintain an action of debt on the demise for the recovery of the rent (*h*), and the deed may be given in evidence to show that the estate passed (*i*).

Cancellation.

SECT. 19.—*Leases under Powers (k).*

(a) *Generally.*

The rules for the construction of powers of leasing have been variously laid down by different judges, who have severally declared that they must be construed strictly (*l*), liberally (*m*), indifferently, without leaning to either side (*n*); equitably in favour of the donee (*o*), favourably for the donee (*p*); strictly for the tenant for life, and liberally for the remainder-man (*q*). It seems, however, to be agreed that powers must be construed according to the intention of the parties (*r*); and so that the estate itself, which is subjected to the power, shall not be destroyed by the exercise of it (*s*). It is the duty of the court to support a power, if possible, and to give effect to its execution, if it is not exercised from improper motives or for improper objects (*t*). Many defects in leases under powers are now remedied by 12 & 13 Vict. c. 26, as amended by 13 Vict. c. 17 (*u*).

Construction
of Powers.

(*g*) *Hutchins v. Scott*, 2 M. & W. 809; *Stewart v. Aston*, 8 Ir. Com. L. R., N. S. 35.

(*h*) *Lord Ward v. Lumley*, 5 H. & N. 87, 656; 29 L. J., Ex. 322.

(*i*) *The Agricultural Cattle Insurance Co. v. Fitzgerald*, 16 Q. B. 432; *Stewart v. Aston*, supra; *Roe d. Earl of Berkeley v. Archbp. of York*, 6 East, 86.

(*k*) These are fully and very learnedly treated of in Sugden (Lord St. Leonards) on Powers, 711—835 (8th ed.), A.D. 1861, to which we shall frequently refer; and see also Farwell on Powers, A.D. 1874.

(*l*) *Fitzwilliam's case*, 6 Rep. 32; *Taylor d. Atkyns v. Horde*, 1 Burr. 60, 120; 2 Smith L. C. 495 (6th ed.); *Doe d. Ellis v. Sandham*, 1 T. R. 705; *Doe d. Pulteney v. Cavan*, 5 T. R. 567; 6 Bro. P. C. 175.

(*m*) *Right d. Bassett v. Thomas*, 3 Burr. 1441; 1 W. Blac. 446; *Berry v. White*,

Bridgm. by Bann, 90; cases cited L. R., 3 H. L. Cas. 288.

(*n*) *Goodtitle d. Clarges v. Fumecan*, 2 Doug. 573; *Doe d. Earl of Jersey v. Smith*, 7 Price, 313.

(*o*) *Ward v. Hartpole*, 3 Bligh, 470, 485.

(*p*) O. *Bridgm. by Bann*, 90, 93.

(*q*) *Orby v. Mohun*, Gilb. Eq. Rep. 58; *Taylor d. Atkyns v. Horde*, 1 Burr. 60, 125; 2 Smith L. C. 495 (6th ed.).

(*r*) *Goodtitle v. Fumecan*, 2 Doug. 573, 574; *Hawkins v. Kemp*, 3 East, 441; *Pomery v. Partington*, 3 T. R. 665; *Doe v. Rendle*, 3 M. & S. 99; Sug. Pow. 713, 734; 1 Platt on Leases, 397, 398.

(*s*) Powell on Powers, 407; Sug. Pow. 736; *Winter v. Loveday*, Carth. 428.

(*t*) *Carrer v. Richards*, 29 L. J., Ch. 357; 6 Jur., N. S. 410.

(*u*) See post, Appendix A., Sects. 2, 3, in which those acts are set out verbatim.

CH. V. SEC. 19.
*Leases under
 Powers.*

What sort of
 Leases may
 be granted.

Powers to lease for lives or years may be executed by a lease, either absolutely for certain lives, or a certain number of years; or conditionally for a number of years determinable upon a life or lives (*x*). Where one had power to make leases for the lives of three persons, and he made a lease to them for their three lives, and the life of the longer liver of them, it was held to be within the power (*y*). So a lease to one for three lives, or to three for their lives, is all one (*z*); but a power to make a lease for three lives is not well executed by a lease for ninety-nine years, determinable upon three lives (*a*). Where an estate, the greater part of which was in lease, either for years certain, not exceeding twenty-one, or for longer terms of years determinable on lives, was settled on several tenants for life in succession, with remainders in tail; with power to every tenant for life "who should be entitled to the freehold of the premises or any part thereof, when he should be in the actual possession of the same, or any part thereof, from time to time by indenture to make leases of all or any part or parts of the demesne lands, whereof he should be in the actual possession as aforesaid, for any term or number of years, not exceeding twenty-one years, or for the life or lives of any one, two or three person or persons; so as no greater estate than for three lives should be at any one time in being in any part of the premises; and so as the ancient yearly rent, &c. was reserved: it was held, first, that the power only authorized either a chattel lease not exceeding twenty-one years, or a freehold lease not exceeding three lives: and that a lease by a tenant for life for ninety-nine years determinable on lives, as it might exceed twenty-one years, was void at law, and was not even good pro tanto for the twenty-one years (*b*). Where by a marriage settlement the husband had the wife's estate for life, with a power to grant leases for twenty-one years, but no longer; and in breach of the power he granted a lease to A. for ninety-nine years, determinable upon lives; and the wife survived him, and conveyed the fee to B.: and in the conveyance was recited the lease to A., who was recognized as being then tenant in possession of the estate, at the yearly rent reserved: on an action of ejectment brought by B. against the assignee of the lease, it was held that the lease was void, and the recital only matter of description (*c*). Under a power to lease for years or lives, with or without covenants for renewals, leases for 999 years are valid (*d*).

(*x*) *Commons v. Marshall*, 6 Bro. P. C. 168; Sug. Pow. 409, 737.

(*y*) *Alsop v. Pine*, 3 Keb. 44; *Doe v. Hardwicke*, 10 East, 549; Sug. Pow. 744; Bac. Abr. tit. *Leases* (I. 11).

(*z*) *Raugh v. Haynes*, Cro. Jac. 76.

(*a*) *Whitlock's case*, 8 Co. R. 69 b; *Rattle v. Popham*, 2 Stra. 992; *Churchman v. Harcey*, Ambl. 335; Bac. Abr. tit.

Leases (I. 11); Sug. Pow. 409, 410.

(*b*) *Roe d. Brune v. Prideaux*, 10 East, 158; Sug. Pow. 738.

(*c*) *Doe d. Briggs v. White*, 2 D. & R. 716.

(*d*) Sug. Pow. 744; *Lord Muskerry v. Chinnery*, 2 D. & R. 932; *Muskerry v. Sheeny*, 1 H. L. Cas. 576; Sug. H. L. Cas. 465.

A man having a power may do less than such power enables him to do. A lease for fourteen years is warranted by a power to lease for twenty-one years (*e*). A power to lease for any term or number of years certain, not exceeding twenty-one years, will warrant a lease for twenty-one years determinable at the option of the lessee at the end of the first seven or fourteen years (*f*). A power to lease for three lives may be executed by a lease for two lives (*g*). A power to lease for any term not exceeding three lives and forty-one years will warrant a lease for three lives and forty-one years to commence from the 1st of November preceeding the day of the death of the survivor of the cestuis quo vic (*h*).

CH. V. SEC. 19.
Leases under Powers.

Power to Lease for twenty-one Years authorizes Lease for less Years.
Isherwood v. Oldknow.

A power given by will to lease mines and minerals not saying for what term, but expressed generally, and following a gift of a life estate in the real property of which they form part, does not of necessity imply a power in the tenant for life to make a lease exceeding his own life (*i*). A tenant for life, having a power to grant building leases for sixty-one years, reserving the best improved ground rent, granted a lease for that term, which was not expressed to be a building lease, but which contained a covenant by the lessee to keep in repair the premises demised (old houses) or such other "house as should be built during the term:" it was held, that this was not a building lease within the power, and that such a lease being granted by tenant for life, who had a bare naked power without any legal interest, was void, and not capable of being confirmed by acceptance of rent by the remainderman (*k*). So a power to grant long leases "for the purpose of new building or effectually rebuilding and repairing any messuage, &c. being or to be on the premises," is not well executed by a lease containing a covenant *effectually to repair*, as it is not equivalent to a covenant *effectually to rebuild and repair* (*l*). But a power to grant leases for twenty-one years, or building or repairing leases for sixty-one years, is well executed by a lease for forty years containing the usual covenants to repair and keep in repair the demised premises, and so to leave them at the end of the term (*m*). In this case there was no absolute covenant to put in repair, or to expend any definite sum in repairing, nor was the lease expressed to be granted in consideration of any such outlay (*n*). Upon a power to grant building leases, such a lease expressly exempt-

(*e*) *Isherwood v. Oldknow*, 3 M. & S. 382; *Easton v. Pratt*, 2 H. & C. 676; 33 L. J., Ex. 233.

(*f*) *Edwards v. Milbank*, 4 Drew. 606; 29 L. J., Ch. 45; Sug. Pow. 742.

(*g*) Sug. Pow. 746, pl. 26.

(*h*) *Re Crommellin Estate*, 1 Ir. Com. L. R., N. S. 182; Sug. Pow. 746.

(*i*) *Jegon v. Vivian*, L. R., 2 C. P. 422;

36 L. J., C. P. 145; L. R., 3 II. L. Cas. 285; 37 L. J., C. P. 313.

(*k*) *Jones d. Cowper v. Verney*, Willes 169; Sug. Pow. 738.

(*l*) *Doe d. Dynoke v. Withers*, 2 B. & Ad. 896.

(*m*) *Easton v. Pratt*, 2 H. & C. 676; 33 L. J., Ex. 233.

(*n*) *Id.* 678.

CH. V. SEC. 19.
*Leases under
 Powers.*

ing the lessee from rebuilding in case of fire, and by another clause enabling him to surrender the lease upon notice, could not be sustained (o). Lands held on a lease for lives, renewable for ever, were settled on one for life, with a power for him and all other persons to whom any use was limited, when in actual possession, to demise for any number of lives or years consistent with their respective interests therein, to commence in possession and not in reversion, reserving the best rents without taking any fine: the tenant for life granted a lease at a farm rent for the lives of three persons named, with a covenant that on the failure of any of the lives, the lessor, his heirs and assigns, would, on payment of five pounds as a fine, add to the time and term of the lease another life from time to time for ever; held that this lease was not warranted by the power (p). A lease under a power to lease in possession or reversion, for one life or for two or three lives, or for any term or number of years determinable upon one life or two or three lives, any part of the premises usually so letten, does not authorize a lease at a single rent of premises under the power, together with other premises to which the power does not extend; but joining different lands in one lease which are all under the power, though they had never before been let by a single demise, is not objectionable (q). A power to demise lands or any part of them is not well executed by a demise of part with liberty of shooting over the whole (r). But the right to shoot and fish over the lands demised may be excepted and reserved to the lessor and his assigns (s). If a tenant for life make a lease without taking notice of his power, it shall be an execution of his power to make leases; for otherwise the lease shall not have an effectual continuance (t). If a tenant for life with a power to grant leases in possession for twenty-one years at the best rent, convey his life estates to trustees to pay an annuity for his life, and the surplus to himself, the power is not thereby extinguished, but he may still grant a lease agreeable to the terms thereof (u). If a man having a power annexed to his estate, charge his estate, and afterwards execute his power, the estate which rises by the execution of the power shall be subject to the charge during the estate: as if a tenant for life, with power to make leases, grant a rent-charge, and afterwards make a lease, the lessee shall take subject to the rent-charge during the life of the lessor (x).

(o) Sug. Pow. 743; *Stiles v. Cooper*, 3 Atk. 692.

(p) *Clarke v. Smith*, 9 Cl. & F. 126; Sug. H. L. Cas. 479.

(q) *Doe d. Earl of Egremont v. Stevens*, 6 Q. B. 208; *Doe d. Earl of Egremont v. Williams*, 11 Q. B. 688.

(r) *Dayrell v. Hoare*, 12 A. & E. 366.

(s) *Goodtitle v. Fumecan*, 2 Doug. 566.

(t) 1 Vent. 228.

(u) *Ren d. Hall v. Bulkeley*, 1 Doug. 292, 565.

(x) *Sabbarton v. Sabbarton*, Cas. temp. Hardw. 415.

If the power be to a man and his assigns to make leases, &c., it may be exercised toties quoties (*y*), and will run with the estate to the assignee in deed or in law, and go to his executor, or to the assignee of the executor (*z*); or to his heir, together with the estate (*a*). It is no objection to a lease under a power, that it is in trust for him who executes the power; provided the legal tenant be bound during the term in all requisite covenants and conditions (*b*). But where by a marriage settlement a power was given to the wife, after the death of her husband, to grant leases for twenty-one years, reserving the best rent, &c., it was held that a lease by the wife to a second husband was not a good execution of the power (*c*). Where trustees are invested with a power of leasing, they must exercise it in like manner as a trust to let (*d*). Where devisees in trust, with discretionary powers, disclaim, and the trust estate descends to the heir, he cannot exercise any of the discretionary powers, such as granting leases, &c. (*e*). Where the heir of a surviving trustee is the proper party to demise, a lease granted by the executors of such trustee is void, and not cured by 12 & 13 Vict. c. 26 (*f*).

CH. V. SEC. 19.
Leases under Powers.
—
In whom Powers may vest.

Where the settlement creating the power makes no mention of the covenants to be contained in the leases, any covenants may be inserted or omitted according to the agreement of the parties, provided they do not amount to a fraud on the power by lessening the value of the reversion (*g*). A mining lease granted by a tenant for life under a power should not exceed the power of granting way-leaves, roads and accommodation for other adjoining mines through or over the mines appointed (*h*). In general there must be a covenant for payment of rent as well as a reservation of the rent; for under a mere reservation it cannot be payable till entry, and therefore, in fact, may never be payable during the term: besides, if there be no covenant to pay the rent, the lease may be assigned to a succession of beggars (*i*). There must also be a clause of re-entry, else the ground may be unoccupied without any, or at least a sufficient, distress upon it, so that the remainder-man can neither have his rent nor his land (*k*). The lessee should always be required to execute a counterpart or duplicate of the

Usual Covenants.

Proviso for Re-entry.

Counterpart.

(*y*) Sug. Pow. 718.

(*z*) *How v. Whitfield*, 1 Ventr. 340; *Freeman*, 476.

(*a*) *Ex parte Cowper*, *Re North London R. Co.*, 34 L. J., Ch. 373.

(*b*) *Taylor d. Atkins v. Horde*, 1 Burr. 124; 2 Smith L. C. 495 (6th ed.); *Wilson v. Serrell*, 1 W. Blac. 617; 4 Burr. 1975; *Earl of Cardigan v. Montague*, Sug. Pow. 918; *Bevan v. Habgood*, 1 Johns. & H. 222; 30 L. J., Ch. 107.

(*c*) *Doe d. Hartridge v. Gilbert*, 5 Q. B. 423.

(*d*) *Sutton v. Jones*, 15 Ves. 588; Sug. Pow. 722.

(*e*) *Robson v. Flight*, 34 L. J., Ch. 226; 13 W. R. 393.

(*f*) *Ex parte Cooper*, *Re North London R. Co.*, 34 L. J., Ch. 373.

(*g*) *Goodtitle v. Funnecan*, 2 Doug. 575.

(*h*) *Jigon v. Pirian*, 1 R., 2 C. P. 422, 430; 36 L. J., C. P. 115; L. R., 3 H. L. Cas. 285; 37 L. J., C. P. 313.

(*i*) *Taylor d. Atkins v. Horde*, 1 Burr. 125; 2 Smith L. C. 495 (6th ed.).

(*k*) *Doe d. Douglas v. Lock*, 2 A. & E. 705.

CH. V. SEC. 19. lease, even where that is not expressly prescribed by the power; as is generally the case.

Leases under Powers (in Possession or Reversion).

(b) *In Possession or Reversion.*

Leases in Possession or Reversion.

In all well-drawn powers of leasing, where it is intended that a lease in reversion may be granted, it is expressly declared so; and if a reversionary lease is not to be granted, it is expressly declared that the lease shall be made to take effect in possession, and not in reversion, or by way of future interest (*l*). Upon a general power to make leases, without saying more, the law adjudges that the leases ought to be leases in possession, and not leases in reversion, or in futuro (*m*). A general power to make leases for one-and-twenty years does not enable the party to make such a lease in reversion (*n*). But such a defective lease granted since 12 & 13 Vict. c. 26, would probably be cured by the 4th section of that act (*o*). Under a power to make leases to one, two or three persons, the donee of the power cannot make a lease for the life of the first (unborn) son of J. S. (*p*). A power to trustees "to lease premises for a term not exceeding twenty-one years, and determinable as a former term of ninety-nine years was determinable," was held to authorize a lease in possession only, and not in futuro; and as the trustees had let the premises for ten years determinable as in the original lease, and afterwards relet them for the term of eleven years, before the expiration of the ten years' lease, the last lease was held void, and a bad execution of the power (*q*); but such a lease might become valid under 12 & 13 Vict. c. 26, s. 4, if at the time appointed for its commencement the trustees had power to grant such a lease. A tenant for life, having power to lease for ninety-nine years from the time of executing, so as that such lease or leases be made to take effect in possession, or immediately after the determination of the leases then subsisting, reserving the best and most beneficial yearly rents to be incident to the immediate reversion, in pursuance of one entire bargain, granted, at the same time, in 1787, two leases, one for thirty years, to commence from October, 1791, on the expiration of an existing lease, and the other for sixty-three years from October, 1821: it was held, that the second lease was void (*r*). But it would be otherwise under 12 & 13 Vict. c. 26, s. 4, if the tenant for life lived to become entitled to grant such second lease.

On what Land they attach.

If there be a power to make leases expressly stated to be in possession, which attaches upon an estate, part of which is in possession

(*l*) Sug. Pow. 747.

(*m*) *Shecomb v. Hawkins*, Cro. Jac. 318; Yelv. 222; Brownl. 148.

(*n*) *Countess of Sussex v. Wroth*, Cro. Eliz. 5; Sug. Pow. 749—752.

(*o*) See post, Appendix A., Sect. 2.

(*p*) *Snow v. Cutler*, T. Raym. 163.

(*q*) *Shaw v. Summers*, 3 Moo. 196.

(*r*) *Doe d. Sutton v. Harvey*, 1 B. & C. 426.

and part in reversion at the creation of the power; the donee of the power may immediately make leases in possession of the estate in reversion, as well as of that in possession; for in such case the word "possession" in the power refers to the lease, and not to the land (s): but it seems, that if a power enable any one to make leases in reversion as well as in possession, and some parts of the land subject to the power be in possession, and other part of it in reversion, he cannot make a lease in possession and another lease in reversion of the same land; but his power to make leases in reversion will be confined to such land as was not then in possession (t).

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Leases under Powers (in Possession or Reversion).

Where there is a power to grant leases in possession only, a lease in possession is not contrary to the power, although the estate at the time of granting the lease was held by tenants at will, if, at the time, they receive directions from the lessor to pay their rent to the lessee, to which they assent (u). Where a tenancy from year to year has expired, but the outgoing tenant has a customary right over part till a future day, a lease in possession may be granted (x). Where one under a power to lease for twenty-one years in possession, but not in reversion, granted a lease to his only daughter for twenty-one years, "to commence from the day of the date;" it was adjudged a good lease, as the word "from" may mean either inclusive or exclusive, according to the context and subject-matter, and the court will construe it so as to effectuate the deeds of parties, and not to destroy them (y). But if made to commence only a day after the execution of the lease, it was not good at common law or in equity as a lease in possession (z). Any such defect would now be cured by 12 & 13 Vict. c. 26, s. 4, if the lessor lived till the day appointed for the commencement of the term. Under a power to demise for twenty-one years in possession, and not in reversion, a lease dated 17th February, 1802, to hold from the 25th of March next ensuing the date thereof, is good, if not executed and delivered till after the 25th of March, for it then takes effect as a lease in possession, with reference back to the date actually expressed (a): but under a power to lease in possession and not in reversion, a lease for years executed on the 29th of March to the then tenant in possession, to hold as to the arable land from the 13th of February preceding, and as to the pasture from the 5th

What is a Lease in Reversion.

(s) Powell on Powers, 425; Bac. Abr. tit. *Leases* (I); *For v. Prickwood*, Cro. Jac. 347; 2 Bulstr. 210; 2 Roll. Abr. 260, pl. 5; Sug. Pow. 755.

(t) Bac. Abr. tit. *Leases* (I. 11).

(u) *Goodtitle d. Clarges v. Funnican*, 2 Doug. 565; Bac. Abr. tit. *Leases* (I. 11); Sug. Pow. 762.

(z) *Doe v. Snowden*, 2 W. Blac. 1224; *Doe v. Calvert*, 2 East, 376; Sug. Pow. 763.

(y) *Pugh v. Duke of Leeds*, Cowp. 714; *Freeman v. West*, 2 Wils. 165; *Denn v. Fearnside*, 1 Wils. 176; *Att.-Gen. v. Countess of Portland*, Cowp. 723; Sug. Pow. 760, 761.

(z) *Pollard v. Greenvil*, 1 Ch. Cas. 10; 1 Ch. Rep. 184; *Doe v. Calvert*, 2 East, 375; *Bowes v. East London W. W. Co.*, Jacob, 374; Sug. Pow. 760.

(a) *Doe d. Coze v. Day*, 10 East, 427; Sug. Pow. 761, pl. 43.

CH. V. SEC. 19. of April then next, under a yearly rent payable quarterly on the 10th
Leases under Powers (in Possession or Reversion). of July, 10th of October, 10th of January and 10th of April, was held void for the whole; though such lease were according to the custom of the country, and the same had been before granted by the person creating the power (b). But now any such defect would be cured by the 12 & 13 Vict. c. 26, s. 4, provided the lessor were living on the 5th of April, and then competent to grant such a lease.

Effect of existing Leases.

The circumstance of a second lease for years being granted to the same lessee who holds under a former lease (c), to commence after the expiration of such former lease, does not operate to make the latter a continuation of the former lease, where the terms are granted by different deeds; although the residue of the time to come after the former lease, together with the period for which the latter lease is granted, do not in length of time exceed the limits fixed by the power; for the latter will notwithstanding be considered as a reversionary lease, as much as if it had been granted to a reversionary lessee (d).

Leases in Possession or Reversion.

If a man have power to make leases in possession or reversion, and he make a lease in possession once, he shall never afterwards make a lease in reversion, for he has an election to do the one or the other, but not both (e). Under a power to lease in possession for lives, or for years determinable on lives, a man cannot make an absolute lease in possession for years; but he may make an absolute lease in reversion for years (e). Where powers were given to make leases of present but not of future interest, and so as the same should go with and be incident to the remainder and reversion; a lease with a reversion in execution of those powers to the tenant in possession of the freehold, his heirs and assigns, was held good, because "heirs and assigns" meant those to whom the remainder and reversion would go (f). Where one, having power to make leases for twenty-one years in possession, made a lease to A. for twenty-one years in trust for the payment of debts, but the lease was made to commence from a time to come, and so not pursuant to the power, yet being made for the payment of debts, it was supported in equity (g). Most defects of this sort would now be cured by 12 & 13 Vict. c. 26, s. 4 (h).

(c) Usual Covenants.

What are usual Covenants within such Powers.

What are *usual covenants* in a lease, under a power requiring such covenants is a question of fact for the jury, and not for the court (i).

(b) *Doe d. Allan v. Calvert*, 2 East, 376.

(c) As to the effect of a new lease operating as a surrender of a former lease, see post, Chap. VIII., Sect. 3 (b).

(d) *Doe d. Pulteney v. Lady Cavan*, 5 T. R. 567; *Smith v. Day*, 2 M. & W. 684.

(e) *Winter v. Loveday*, 1 Ld. Raym. 267; 2 Salk. 537.

(f) *Holley v. Scott*, Lofft, 316.

(g) *Pollard v. Greenvil*, 1 Ch. Cas. 10; 1 Ch. Rep. 184.

(h) Post, Appendix A., Sect. 2.

(i) *Goodtitle d. Clarges v. Fumican*, 2 Doug. 565; *Bennett v. Womack*, 3 C. & P. 96; 7 B. & C. 627; *Powell on Powers*, 678.

It depends on what are the usual and customary covenants of the neighbourhood (*k*): but it has been held, that what are the “usual and reasonable covenants” must depend on the leases of the same land in existence at the time of the creation of the power (*l*). Where a power to lease was given upon reserving the ancient, usual and accustomed rents, heriots, boons and services, a covenant “to keep in repair” was held to be “an ancient boon,” and the omission of it was deemed fatal (*m*). Where there was a power to tenant for life to lease for years, with the usual covenants, &c., it was held, that a lease made by him, containing a proviso, that in case the premises were blown down, or burned, the lessor should rebuild, otherwise the rent should cease, was void, the jury finding such covenant to be unusual (*n*). Where the settlement creating the power does not require the usual covenants to be inserted in the leases, any covenants may be inserted or omitted, as agreed on, provided they do not amount to a fraud on the power (*o*).

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Leases under Powers (Usual Covenants).

A private act of parliament enabled a tenant for life to grant build- Ways, &c.
ing leases, and “to lay out and appropriate any part of the land authorized to be leased as and for a way or ways, street or streets, avenue or avenues, square or squares, passage or passages, sewer or sewers, or other conveniences for the general improvement of the estate and the accommodation of the tenants thereof.” A tenant for life having appropriated certain land, and laid it out for a way for the general improvement of the estate, in exercise of the powers of the act, by deed granted rights of way over it to two several tenants: held, that tenants under other leases granted in pursuance of the act, but containing no grant by deed of a right to use the way, were not entitled by the provisions of the act to use it (*p*).

(d) *Proviso for Re-entry.*

A power to tenants for life to grant or renew leases for lives, pro- Power to
vided that a right of re-entry is reserved upon such leases for non- grant leases
payment of rent, is well executed by a lease for lives, providing a re- with a Proviso
entry in case the rent remains in arrear fifteen days, and there is no for Re-entry.
sufficient distress upon the premises, the conditional proviso being the usual form in leases (*q*). Where a power of leasing required the

(*k*) *Boardman v. Mostyn*, 6 Ves. 467, 471; 4 Jar. Prec. 297 (3rd ed.).

(*l*) *Doe d. Earl of Egremont v. Stephens*, 6 Q. B. 208; *Smith v. Doe d. Earl of Jersey*, 7 Price, 281; 3 Bligh, 290; 2 B. & B. 474; *Doe d. Earl of Egremont v. Williams*, 11 Q. B. 688.

(*m*) *Earl of Cardigan v. Montague*, Sug. Pow. 918 (8th ed.).

(*n*) *Doe d. Ellis v. Sandham*, 1 T. R. 706; *Yellowly v. Gower*, 11 Exch. 274.

(*o*) *Goodtitle v. Fumcan*, 2 Doug. 575.

(*p*) *White v. Lerson*, 5 H. & N. 53; 29 L. J., Ex. 105. Several recent public acts contain similar powers.

(*q*) *Smith v. Doe d. Earl of Jersey*, 7 Price, 281; 3 Bligh, 290; 2 Brod. & B. 473; 5 M. & S. 467; *Lord Tankerville v. Wingfield*, 7 Price, 343; 2 Brod. & B. 498, n.; but see contra, *Coxe v. Day*, 13 East, 118.

CH. V. SEC. 19. insertion in the leases of a clause of re-entry for non-payment of rent, and a lease was made with a proviso for re-entry if the rent should be *forty-two* days in arrear, it was held such a lease was valid (*r*). But a lease with a proviso for re-entry, if the tenant should suffer the premises to be out of repair, and should not repair the same *within six months next after notice*, was held bad, the clause as to notice not being usual (*s*).

(e) *Lands usually let.*

What is included in "Lands usually let."

In modern settlements the power of leasing usually extends to all the hereditaments therein comprised; and if the mansion-house or any other part is not intended to be let, it is expressly excepted (*t*). Where leases are granted under powers to lease lands "usually demised," it must be shown by old leases or other satisfactory evidence that the lands have usually been demised; otherwise they cannot be supported (*u*). Lands not demised for the space of twenty years before the execution of a power to demise at the rent then usually reserved and paid, cannot be leased under such a power (*x*). Where the power was to extend to land usually demised, it was held, that land settled for years, determinable on lives, by a family settlement, came within that description (*y*); so are lands which have been previously let two or three times (*z*), but not lands which have been let only once for a short term (*z*); if lands have been leased by virtue of a contract from year to year for three years, they cannot be said to have been usually demised (*z*): but lands which have been held under a lease for a long term may be said to have been usually demised within the meaning of the power (*a*). It is not necessary that the land should have been demised by indenture; a demise at will or by copy is sufficient to make land to be accounted usually demisable (*b*); and a covenant to stand seised may amount to a sufficient demise (*c*). Under a power in a will, "to demise and lease such parts of the testator's premises as had been usually granted or demised, and were then in lease, for any term of years determinable on lives, to any persons, for the like terms, and in like manner, and under the like rents, services and conditions as the same had been usually granted; and the residue of the same premises, unto any persons for any term of years not exceeding twenty-one years in possession, at the best and most improved rent that could be reasonably gotten for the

(*r*) *Rutland v. Doe* d. *Wythe*, 5 M. & W. 688; 12 Id. 356; 10 Cl. & F. 419.

(*s*) *Doe* d. *Earl of Egremont v. Burrough*, 6 Q. B. 229.

(*t*) Sug. Pow. 727 (8th ed.).

(*u*) Id. 735; *Earl of Cardigan v. Montague*, Id. 918.

(*x*) *Tristan* d. *Gore v. Balinglas*, Vaugh. 28; T. Jon. 27; Sug. Pow. 728, 729.

(*y*) *Right* d. *Basset v. Thomas*, 1 W. Blac. 446; 3 Burr. 1441, 1448.

(*z*) 2 Roll. Abr. 261; Sug. Pow. 728.

(*a*) Sug. Pow. 728; Vaughan, 28.

(*b*) *Powell* on Powers, 392; Sug. Pow. 730.

(*c*) *Right* d. *Basset v. Thomas*, 3 Burr. 1441, 1447; 1 W. Blac. 446.

same, so as that no *such* demise or lease should be made punishable for waste, nor without a condition of re-entry on non-payment of the rent or services thereby reserved, and so as each lessee should execute a counterpart of his lease:" it was held, that the word "*such*" could not be thrown back, so as to apply to or govern the first class of the testator's premises, which had been usually let and were then in lease, but must be confined to the latter class of property, viz. the residue of the premises, as to the terms of leasing which the testator had given separate and specific directions (*u*): also that a lease under the power of lands which were in lease at the time of the creation of the power (the second lease accurately following the terms of the former lease of the same lands) was well executed under such power, although the second lease did not contain a clause of re-entry on non-payment of 40s. reserved in lieu of a heriot; the first lease containing no clause of re-entry on non-payment of a like reservation (*u*). In a settlement of personal property the parties covenanted to settle all future-acquired property upon the same trusts, &c.: held, that this authorized the insertion of a power to grant mining leases in the settlement of subsequently-acquired freeholds, the prior owner having granted such leases, though the mines had never been effectually worked (*x*). Under a power of leasing "for one, two, or three lives, or for any term of years determinable on one, two, or three lives, such lands as were then demised for any such term," lands are not included which were then held under a demise to "W. and G. for ninety-nine years, if W. and his widow, and any eldest son living, or in ventre sa mère at the time of his (W.'s) death, or if no son, any eldest daughter then living or in ventre sa mère, or any or either of those three, viz. of the said W. and such his wife, son or daughter, should so long live, remainder to the said G. and his widow, son or daughter, in the same manner," of which description of persons five were in fact living at the time of the power reserved, who were all entitled in succession, three at a time, to come in under the lease: under such a general power the three lives must be certain and co-existing (*y*).

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Leases under Powers (Lands usually let).

What is included in "*Lands usually let*?"—*could*.

It seems to be settled that the question—whether lands not before in lease may be demised under a power to lease lands and other hereditaments, provided that such rent or more be reserved upon every lease as has been reserved, or paid for it, within a given time previous to the creation of the power,—is a question of construction on the intention of the author of the power, to be collected from the instrument creating the power, and the circumstances of the estate (*z*).

Whether Lands not before in Lease may be demised.

(*u*) *Doe d. Bligh v. Coleman*, 1 Bing. 28.

(*x*) *Scott v. Steward*, 27 Beav. 367.

(*y*) *Doe d. Wyndham v. Halcombe*, 7 T. R. 713.

(*z*) *Powell on Powers*, 402; 2 Roll. Abr. 262; *Wakeman v. Walker*, 3 Keb. 597; 1

Ventr. 294; 2 Lev. 150.

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Leases under Powers (Lands usually let).

Thus, where there was a power to lease a manor, except the demesne lands, it was held that copyholds, though within the description, could not be demised: but that the rents and services of the manor might, notwithstanding a qualification annexed to the power, which said that the ancient rent should be reserved, and there could be no reservation of rent upon a lease of rents and services out of which no rent issues: for it appeared to be the intent of the settlement, that part of the manor should be demisable (*d*). Under a power in a family settlement to make leases of all or any part of the premises, reserving the ancient rent, lands always occupied with the family seat cannot be demised; for in such case the qualification annexed to the power, "that the ancient rent must be reserved," manifestly excludes the mansion-house and lands about it *never* let: the nature of the thing in such case speaks the intent (*e*). So, under the settlement of an estate, with a power to the tenant in possession to let all or any part of the premises, so as the usual covenants be reserved, a lease of tithes which had never been let before was held void.

Whether such
Leases are
good for Part
only.

Where there was a devise of lands to trustees and their heirs, in trust to the use of a man and his first and other sons in strict settlement, remainder to another and his first and other sons in strict settlement, with power to the trustees from time to time, during the minorities of the persons to whom the premises should descend, and to any tenant for life, to grant any *lease of all or any part of the lands so limited, so as there be reserved the ancient and accustomed yearly rent*, &c.: a lease of part of the lands devised, in several parcels, in one of which parcels were included, together with lands anciently demised, two closes never before demised, at one entire rent, viz. the ancient rent for that part which had been anciently demised, was held to be void for the whole of the lands included in that parcel, as well the lands never before let as those anciently let; but it was considered good as to the other parcels, which contained only lands anciently demised, and on each of which there was a *separate* reservation of the ancient rent (*f*). Where lands were demised to a person for life, with power to lease for lives all but a certain excepted portion, reserving the like rents as were then reserved, or more, the rents then being 29%. and the devisee made a lease for three lives at the yearly rent of 40% of the lands within the power and part of the excepted lands, it was held that the rent could not be apportioned, and that the lease being void for the excepted lands was void as to all (*g*). But where

(*d*) *Loveday v. Winter*, 5 Mod. 245, 378; 12 Mod. 148; 1 Comb. 37; 1 Ld. Raym. 267; 2 Salk. 537; *Leigh v. Earl of Balcarres*, 6 C. B. 847.

(*e*) *Baggott v. Oughton*, 8 Mod. 249; *Forcescue*, 332; *Goodtitle v. Furman*, 2 Doug.

574. See also *Pomery v. Partington*, 5 T. R. 685.

(*f*) *Doe d. Barlett v. Rendle*, 3 M. & S. 99; *Fuller v. Abbott*, 4 Taunt. 105.

(*g*) *Doe d. Williams v. Matthews*, 5 B. & Ad. 298.

a lease was held void because lands under a power were let together with other lands not under the power, it was held that the lease was good as to the latter lands against the heir of the lessor (*h*).

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Leases under Powers (Lands usually let).

(f) *Mode of Execution.*

By 22 & 23 Vict. c. 35, s. 12, "a deed hereafter executed in the presence of and attested by two or more witnesses in the manner in which deeds are ordinarily executed and attested (*i*), shall, as far as respects the execution and attestation thereof, be a valid execution of a power of appointment by deed or by any instrument in writing not testamentary (*k*), notwithstanding it shall have been expressly required that a deed or instrument in writing made in exercise of such power should be executed or attested with some additional or other form of execution or attestation or solemnity: provided always, that this provision shall not operate to defeat any direction in the instrument creating the power that the consent of any particular person shall be necessary to a valid execution (*l*), or that any act shall be performed (*m*), in order to give validity to any appointment, having no relation to the mode of executing and attesting the instrument; and nothing herein contained shall prevent the donee of a power from executing it conformably to the power by writing or otherwise than by an instrument executed and attested as an ordinary deed, and to any such execution of a power this provision shall not extend."

22 & 23 Vict.
c. 35, s. 12.

It is to be observed that if the power prescribes less than the statute, it is sufficient to comply with the terms of the power: but if the power prescribes more than the statute, it is sufficient to comply with the statute.

(g) *Defects in—how cured.*

By 12 & 13 Vict. c. 26 (*n*), "a lease invalid by reason of the non-observance or omission of some condition or restriction, or by reason of any other deviation from the terms of the power, shall, after entry thereunder, be considered in equity as a contract for a grant in respect of a valid lease under the power to the like purport and effect as such invalid lease, save so far as any variation may be necessary in order to comply with the terms of such power; and all persons who would have been bound by a lease lawfully granted under such power shall be bound in equity by such contract."

12 & 13 Vict.
c. 26. Invalid
Leases good
as Contracts
for Leases.

(*h*) *Doe d. Lord Egremont v. Stephens*, 6 Q. B. 208.

(*i*) *In re Rickett*, 1 Johns. & H. 70; 29 L. J., Ch. 712.

(*k*) They are provided for by 1 Vict. c. 26, s. 10; *Cole Ejec.* 501.

(*l*) *Freshfield v. Reed*, 9 M. & W. 404.

(*m*) As to the execution of a counterpart by the lessee, see *Fryer v. Coombs*, 11 A. & E. 403.

(*n*) Amended by 13 Vict. c. 17. See post, Appendix A., Sects. 2, 3, where both acts are set out verbatim.

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Leases under Powers (Curing of Defects).

Invalid Leases incurred by Continuance of Lessor's Estate after they might have been lawfully granted.

By sect. 4, "where a lease granted in the intended exercise of any such power of leasing as aforesaid is invalid by reason that at the time of the granting thereof the person granting the same could not lawfully grant such lease, but the estate of such person in the hereditaments comprised in such lease shall have continued after the time when such or the like lease might have been granted by him in the lawful exercise of such power, then and in every such case such lease shall take effect, and be as valid as if the same had been granted at such last-mentioned time, and all the provisions herein contained shall apply to every such lease."

Confirmation of invalid Leases by Writing and Acceptance of Rent.

By 13 Vict. c. 17, "where upon or before the acceptance of rent under any such invalid lease, any receipt, memorandum or note in writing confirming such lease is signed by the person accepting such rent, or some other person by him thereunto lawfully authorized, such acceptance shall, as against the person so accepting such rent, be deemed a confirmation of such lease."

It is to be observed that an invalid lease under a power may be confirmed by the remainderman or reversioner by a mere memorandum or note in writing coupled with acceptance of rent; but not by acceptance of rent only, without any intention of thereby confirming the lease. The mere acceptance of rent by a remainderman may create a new implied tenancy from year to year as between him and the lessee, which tenancy must be determined by notice to quit, or otherwise, before the tenant can be turned out of possession (*o*).

The above acts do not apply to leases granted by a mere stranger to the leasing power; as where a lease is granted by the executors of a surviving trustee instead of by his heir (*p*), or by the heir instead of the executors (*q*).

SECT. 20.—*Leases in Reversion.*

What are Leases in Reversion.

All leases which are not to take effect in possession immediately, but *from a future day*, are considered as reversionary leases, within the meaning of powers to grant leases in possession and not in reversion (*r*). In legal acceptance a lease for years in reversion, and a future interest for years, are one and the same: a future lease and a lease in reversion are synonymous (*s*). But strictly speaking a reversionary lease is one granted for a term which is to commence

(*o*) *Doe d. Martin v. Watts*, 7 T. R. 83; *Doe d. Tucker v. Morse*, 1 B. & Adol. 365; *Doe d. Pennington v. Taniere*, 12 Q. B. 998; *Cole Ejec.* 33; *Sug. Pow.* 715.

(*p*) *Ex parte Cooper, re North London R. Co.*, 34 L. J., Ch. 373.

(*q*) *Robson v. Flight*, 34 L. J., Ch. 226.

(*r*) *Winter v. Loveday*, Comyn, 39, Holt, C. J.; 2 Salk. 537; 1 Ld. Rayn. 267; *Goodtitle d. Clarges v. Pimican*, 2 Doug. 565; *Sug. Pow.* chap. 18, s. 4.

(*s*) *Carth.* 14, 15; *Sug. Pow.* 747 (8th ed.).

from or after the expiration or other determination of a previous lease. It does not create any term or estate, but only an interesse termini, until entry thereunder after the time appointed for its commencement (*t*). The granting of a reversionary lease does not disentitle the landlord to distrain for rent under a subsisting lease (*u*). If a man make a lease for life, and afterwards grant the lands to another for twenty-one years after the death of the tenant for life; these words (without the word “demise”) are sufficient to pass a reversionary interest by way of future lease (*x*). If the reversionary lease be expressed to begin from the end of the “term” of the subsisting lease, and the subsisting lease be afterwards determined by surrender or forfeiture, the reversionary lease will begin at once; but if it be expressed to begin after the end of twenty-one years, it will not begin upon the surrender, forfeiture or other determination of the first term till the twenty-one years have actually run out by effluxion of time (*y*). Where a lease for years was made, and during the term the lessor granted a lease in reversion of part of the premises to an underlessee, who was in possession of them, to commence on the day the original lease determined; it was held that the reversionary lease took effect in possession immediately on the determination of the first lease (*z*).

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*Leases in
Reversion.*

SECT. 21.—*Concurrent Leases.*

A concurrent lease is one granted for a term which is to commence *before* the expiration or other determination of a previous lease of the same premises to another person. If under seal it operates as an assignment of part of the reversion during the continuance of such previous lease, and from thenceforth as a lease in possession during the residue of the time therein expressed to be granted. It entitles the lessee, as assignee of part of the reversion, to the rent reserved in the previous lease, and to the benefit of the covenants therein contained, which are to be respectively paid and performed during the then residue of the term granted by the first lease, and the continuance of the concurrent lease (*a*). Formerly a concurrent lease was inoperative to pass any estate during the prior term, unless the attornment of the previous tenant could be obtained, when it would operate as an assignment of the reversion, &c. (*b*). Now no attorn-

Nature of
concurrent
Leases.

(*t*) *Smith v. Day*, 2 M. & W. 684.

(*u*) See *Id.* 684, 694, 699; *Doc d. Rawlings v. Walker*, 5 B. & C. 111; *Blatchford, app., Cole, resp.*, 5 C. B., N. S. 514; 28 L. J., O. P. 140.

(*x*) *Bac. Abr. tit. Leases (K.)*.

(*y*) *Bac. Abr. tit. Leases (L. 1)*.

(*z*) *Hinchliffe v. Earl of Kinnoul*, 5 Bing. N. C. 1; 6 Scott, 650.

(*a*) *Harner v. Bean*, 3 C. & K. 307.

(*b*) *Bac. Abr. tit. Leases (N.)*.

CH. V. SEC. 21. ment of the tenant in possession is necessary (c); but until he has notice of such assignment he may safely continue to pay his rent to the lessor (d), who will, however, be liable over to the second lessee for so much money had and received for his use (e). If a concurrent lease be granted to and accepted by the *same lessee*, it will operate as an implied surrender by him of his previous term, and take effect as a lease in possession for the term thereby granted (f). The reason is that the same person cannot be, at the same time, both tenant and reversioner of the same premises. So where a party entitled to a remainder in tail expectant upon the determination of a life estate, grants a term of years to commence immediately, the grantee, without entry, takes an immediate vested *estate* carved out of the remainder, and not a mere *interesse termini*; and no attornment is necessary to complete such grant, the stat. 4 Ann. c. 16, s. 9, having rendered attornment unnecessary (g). A devisee for life, with power to make leases for twenty-one years, whereon the old accustomed rent should be reserved, made a lease for twenty-one years under the old rent, &c., and a year before the expiration of that lease he made a lease to another for twenty-one years to begin presently; the last was considered to be good within his power as a concurrent lease, because it was no charge upon the reversion, nor was there any more than twenty-one years in the whole against the reversioner: but this power would not warrant the making of leases in reversion, for then he might charge the inheritance *ad infinitum* (h). One who has a power to grant a concurrent lease within seven years of the expiration of the old one, may grant a lease at any time on the surrender of the old one (i). If a power enables a tenant for life to make leases for years, determinable upon one, two, or three lives in possession, of such part and parts, and so much only of the lands of the creator of the power as are then demised or granted for any such time, &c., no lands can be demised under such a power, but what are at the time of the execution of the power under lease for one, two, or three concurrent lives; or for any term of years, determinable upon one, two, or three concurrent lives; the meaning of such restriction is, in figurative language, that the candles shall be all burning at the same time (k).

(c) 4 Ann. c. 16, s. 9; post, Chap. VII., Sect. 6, "Attornment;" *Doe d. Agar v. Brown*, 2 E. & B. 331, 348. *Edwards v. Wickwar*, L. R., 1 Eq. 403; 14 W. R. 79, 363, contra—in which there is no reference to 4 Ann. c. 16, s. 9—would seem to be incorrect.

(d) 4 Ann. c. 16, s. 10; *Cook v. Moylan*, 1 Exch. 67; 5 D. & L. 101.

(e) *Smith v. Jones*, 1 Dowl., N. S. 526;

Watson v. McLean, E., B. & E. 75; *Neale v. Harding*, 6 Exch. 349.

(f) Post, Chap. VIII., Sect. 3 (b).

(g) *Doe d. Agar v. Brown*, 2 E. & B. 331, 348.

(h) Powell on Powers, 428; Bac. Abr. tit. *Leases* (L.).

(i) Com. Dig. tit. *Estates* (G. 13).

(k) Powell on Powers, 541; *Doe d. Wyndham v. Halcombe*, 7 T. R. 713.

SECT. 22.—*Estoppel.*

CH. V. SEC. 22.

*Estoppel.*Nature and
Use of
Estoppels.

Indentures of lease for years sometimes enure by way of *estoppel*, which word signifies an impediment or bar to a man's invalidating his own solemn act (*l*). Estoppels in general are not favoured (*m*); they continue no longer on either party than during the lease (*n*), or during any renewed tenancy (*o*): they ought to be mutual, otherwise neither party is bound by them (*p*).

A grantor by deed is estopped from saying that he had no interest (*q*). So a lessor is estopped by the lease from denying that he had any estate in the land at the time the lease was executed by him, or that he had no right to dispose of the possession during the term thereby expressed to be granted (*r*). Upon the execution of a lease which operates by estoppel, there is in contemplation of law, created in the lessor, a reversion in fee simple by estoppel, which passes by descent to his heir, and by purchase to his assignee or devisee, who may sue on the covenants in the lease (*s*). An underlease made by a lessee who, at the time of making it and subsequently, had no legal interest, operates as a demise by estoppel (*t*). If a man make a lease for years by indenture of lands wherein he has nothing at the time of such lease made, and afterwards purchase those lands, this makes his lease as good and unavoidable, as if he had been in the actual possession and seisin thereof at the time of such lease made (*u*).

Effect of
Estoppels on
the Lessor.

Where a lessee for years made an under-lease by way of mortgage, and afterwards another sub-lease by indenture for a short term, it was held, that the latter sub-lease, though originally a lease by estoppel, was convertible into a lease in interest by a reconveyance by the mortgagees, so as to give a right of action to the assignee of the lessee (*x*). But where a mortgagor makes a lease after the mortgage, a subsequent purchaser of the legal estate from the mortgagee and of the equitable estate from the mortgagor, the latter joining in the conveyance of the legal estate, is not bound by the lease of the mortgagor (*y*). A lessor is estopped from contending that he had

Estoppel in
case of
Mortgage(*l*) *Lyon v. Reed*, 13 M. & W. 285.(*m*) Co. Lit. 353, n.1; *Rex v. Lubbenham*, 4 T. R. 254; *Skipworth v. Green*, 8 Mod. 311; Com. Dig. tit. *Estates* (K. 8); Bac. Abr. tit. *Joint Tenants and Tenants in Common* (H. 1).(*n*) Co. Lit. 47; *James v. Landon*, Cro. Eliz. 36.(*o*) *London and North Western R. Co. v. West*, L. R., 2 C. P. 553; 36 L. J., C. P. 245.(*p*) Co. Lit. 352.(*q*) Cole Ejec. 221; *Doe d. Hurst v. Clifton*, 4 A. & E. 813; *Doe d. Leeming v. Skirrow*, 7 A. & E. 157; *Doe d. Gaisford v. Stone*, 3 C. B. 176; *Doe d. Levy v. Horne*, 3 Q. B. 757, 766.(*r*) *Darlington v. Pritchard*, 4 M. & G. 783; 2 Dowl., N. S. 661; *Green v. James*, 6 M. & W. 656; Cole Ejec. 220.(*s*) *Cuthbertson v. Irving*, 4 H. & N. 712; 6 Id. 135; 28 L. J., Ex. 306; 29 Id. 485.(*t*) *Doe d. Prior v. Ongley*, 10 C. B. 25.(*u*) Bac. Abr. tit. *Leases* (O.); *Treviran v. Lawrence*, 6 Mod. 258; 2 Ld. Raym. 1048; 1 Salk. 276; *Goodtitle d. Faulkner v. Morac*, 3 T. R. 371; *Sturgeon v. Wingfield*, 15 M. & W. 224.(*x*) *Webb v. Austin*, 7 M. & G. 701, 8 Scott, N. R. 419.(*y*) *Doe d. Lord Downe v. Thompson*, 9 Q. B. 1037.

CH. V. SEC. 22. Estoppel. merely an equitable estate when he granted the lease (z). But where the lease stated that the lessors were *owners* subject to a mortgage, and that they *demised* the land to the lessee, it was held that neither party was estopped from denying that the lessors had a legal reversion, but that they were estopped from asserting it (a). After a term had been mortgaged, H., who had interest, made a lease for years by deed; the mortgagees and H. then surrendered to the lessor, who re-demised to H., and the latter then assigned his interest to the defendant: held that there was a reversion in H. by estoppel on the lease made by him which passed to the defendant, who was thereby liable to the lessee on the covenants of that lease (b).

Tenant
estopped from
disputing
Landlord's
Title.
Cooke v.
Loxley.

It is one of the first principles of the law of estoppel, as applied to the relations between landlord and tenant, that a tenant is estopped from disputing the title of his landlord (c). In an action on a bond conditioned for the payment of the rent of certain premises recited in the condition to be demised by indenture at a certain rent, the defendant is estopped from saying that by the indenture a less rent than that mentioned in the condition was reserved (d). In an ejectment for mines against a member of a mining company, it was held that the defendant was estopped from disputing the title of the lessor of the plaintiff, who had leased the mines to the company, of which the lessor was a partner at the time of the action, but not at the time he granted the lease (e).

Tenant may
show Land-
lord's Title to
be expired.
Delaney v. Fox.

The tenant may, however, show that his landlord's title has expired (f): but where a defendant in an action for use and occupation, had occupied apartments in a house belonging to a wife, and had paid rent to the husband, who subsequently, with the knowledge of the defendant, granted a lease of the whole house to the plaintiff: it was held, that having occupied with notice of the lease, he could not impeach its validity, nor controvert the plaintiff's title (g). Upon an information to set aside a lease of charity lands, it was held in Chancery that the lessees could not dispute the title by setting up an adverse title whilst they retained possession (h).

(z) *Green v. James*, 6 M. & W. 656.
(a) *Pargeter v. Harris*, 7 Q. B. 708.
But see *Morton v. Woods*, L. R., 4 Q. B. 293, and note (t), post.
(b) *Sturgeon v. Wingfield*, 15 M. & W. 224.
(c) *Cooke v. Loxley*, 5 T. R. 4; *Cuthbertson v. Irving*, supra, note (s); *Beckett v. Bradley*, 7 M. & G. 994; 8 Scott, N. R. 843; 2 D. & L. 586; *Langford v. Selmes*, 3 Kay & J. 220; *Delaney v. Fox*, 1 C. B., N. S. 166; 2 Id. 768.
(d) *Lainson v. Tremere*, 1 A. & E. 792.

(e) *Francis v. Doe d. Harvey*, 4 M. & W. 331.
(f) *Delaney v. Fox*, 2 C. B., N. S. 768; *Neave v. Moss*, 1 Bing. 363; *England d. Syburn v. Slade*, 4 T. R. 682; *Doe d. Jackson v. Rambotham*, 3 M. & S. 516; *Doe d. Strode v. Seaton*, 2 C., M. & R. 728; *Dourne v. Cooper*, 2 Q. B. 256; *Claridge v. Mackenzie*, 4 M. & G. 143; *Doe d. Leeming v. Skirrow*, 7 A. & E. 157.
(g) *Rennie v. Robinson*, 1 Bing. 147.
(h) *Att.-Gen. v. Ld. Hotham*, 3 Russ. 415.

The interest of a tenant for life and a reversioner are the same, and therefore a lessee who has paid rent to the first, cannot set up title in another person as an answer to an action by the latter after the death of the former (*i*). A lessee, by executing an indenture of lease, admits a will under which it is recited that the lease was granted (*k*). A lessee of tolls, under an instrument signed by two persons as trustees, admits they are trustees (*l*). An assignee is estopped by the deed which estops his assignor (*m*): and an assignor, by executing the assignment in which the original lease is recited, is precluded in an action by the assignee from calling upon him to prove the lease (*n*): so an assignee of a void lease by a tenant for life is estopped from disputing the title of the remainderman, though his assignment was after the death of the tenant for life, and payment to and acceptance of rent by the remainderman, and with notice of that fact (*o*). So where a lease was granted by A. and B. as granting parties, and reserved the rent and right of re-entry to a close, it was held that the assignee of the lessor was estopped from showing that A. had no interest in the premises (*p*). In defence of an action of ejectment, it may be shown that the parties under whom the plaintiff claims had no title when they conveyed to him, although the defendant himself claims by a conveyance from the same parties, if the latter conveyance was subsequent to that which the defendant seeks to impeach (*q*).

It was at one time thought, from *Cuthbertson v. Irving* (*r*) and other cases, that when the document of lease showed a want of title in the landlord, there was nothing to estop the tenant from denying that title; but this doctrine has now been distinctly overruled in *Jolly v. Arbutnot* (*s*), as was pointed out by the Exchequer Chamber in *Morton v. Woods* (*t*).

In an action of debt for rent, where the title to the land is not in question, the defendant is estopped from saying the lease is not a good one; for the covenant for payment of the rent is good (*u*). But he may plead a new substituted tenancy from year to year and the determination thereof by notice to quit before the rent claimed became due; and that notwithstanding he omitted so to plead in a

CH. V. SECT. 22.
Estoppel.

Estoppel as
against Re-
versioner by
paying Rent
to Tenant for
Life.

Want of Title
appearing on
Lease.

*Jolly v. Ar-
butnot.*

Effect of
Estoppels on
the Validity
of the Lease.

(*i*) *Doe d. Colemore v. Whitroe*, 1 D. & Ry. 1.

(*k*) *Bringloe v. Goodson*, 5 Bing. N. C. 738.

(*l*) *Willington v. Brown*, 8 Q. B. 169.

(*m*) *Taylor v. Needham*, 2 Taunt. 278; *Barwick d. Mayor, &c. of Richmond v. Thompson*, 7 T. R. 488; *Bryan d. Child v. Winwood*, 1 Taunt. 208.

(*n*) *Nash v. Turner*, 1 Esp. 217.

(*o*) *Johnson v. Mason*, 1 Esp. 89.

(*p*) *Parke v. M'Loughlin*, 1 Ir. Law R., N. S. 186.

(*q*) *Doe d. Oliver v. Powell*, 1 A. & E. 531.

(*r*) 29 L. J., Ex. 485; see, too, *Pargeter v. Harris*, 7 Q. B. 708.

(*s*) 4 De G. & J. 224; 28 L. J., Ch. 547.

(*t*) L. R., 4 Q. B. 293; 38 L. J., Q. B. 81; 9 B. & S. 659; 17 W. R. 414.

(*u*) *Monroe v. Lord Kerry*, 1 Bro. P. C. 67.

CH V. SEC. 22. *Estoppel.* previous action founded on the same lease or agreement (*x*). Where a tenant for life under a devise, with a leasing power, let to defendant by a lease, not noticing the power; and after the death of the lessor, a succeeding tenant for life under the same devise brought ejectment against the defendant, on the ground that the lease was not a valid execution of the power; it was held, that the defendant was not estopped from setting up an outstanding term of years in trustees created by a tenant in fee, from whom the devisor had inherited, as the lessor of the plaintiff himself denied the right of the defendant's lessor to grant the lease (*y*).

Effect of
Estoppels as
to Description
of Premises.

The tenant is not estopped by the description of the lands in the lease, as "meadows," from pleading and proving that they had been converted into arable before the lease, and have been used as such ever since (*z*).

SECT. 23.—*Bond for Performance of Covenants.*

Nature of the
Bond and its
Effect.

Sometimes a bond is taken by the lessor from the lessee, with or without sureties, conditioned for payment of the rent and performance of the covenants in the lease (*a*), or a guarantee in writing for the due payment of the rent (*b*). Such a guarantee will cease when the tenancy is determined by due notice to quit, notwithstanding such notice is waived and a new tenancy created (*c*). Sometimes also a bond is made by a sub-lessor to a sub-lessee, conditioned to indemnify him from the rent reserved in the original lease, and from all distresses, ejectments and other proceedings in respect thereof; or by the assignee of a lease to the assignor to indemnify him from the rent and covenants in the lease; or by the assignor to the assignee (*d*). Such bonds respectively are within the 8 & 9 Will. 3, c. 11, s. 8, and operate as securities only, and the actual damages only are recoverable (*e*).

SECT. 24.—*Rectification of Erroneous Lease.*

In what
Cases.

If a lease or other deed be drawn up and executed upon terms materially different from those actually agreed on, and contrary to the real intention of both parties, a court of equity may cause it to be reformed and corrected, or set aside (*f*); but it will do so only upon

(*x*) *Howlet v. Tarte*, 10 C. B., N. S. 813; 31 L. J., C. P. 146.

(*y*) *Doe d. Lord Egremont v. Wyndham*, 12 Q. B. 711.

(*z*) *Skipworth v. Green*, 1 Stra. 610; 8 Mod. 311.

(*a*) *Lainson v. Tremere*, 1 A. & E. 792.

(*b*) *Tayleur v. Wildin*, L. R., 3 Ex. 303; 37 L. J., Ex. 173.

(*c*) *Tayleur v. Wildin*, L. R., 3 Ex. 303; 37 L. J., Ex. 173; see this case dis-

tinguished in the very special case of *Holmes v. Brunsell*, L. R., 3 Q. B. D. 495.

(*d*) *Smith v. Day*, 2 M. & W. 684.

(*e*) 2 Chit. Pl. 320 (7th ed.); 2 Wms. Saund. 187 a, n. (*e*).

(*f*) *Murray v. Parker*, 19 Beav. 305; *Garrard v. Frankel*, 30 Beav. 445; 31 L. J., Ch. 604; *Mortimer v. Shortall*, 2 Dru. & W. 363; *Lister v. Hodgson*, L. R., 4 Eq. 30; 15 W. R. 547; *Harris v. Pepperell*, L. R., 5 Eq. 1.

very strong evidence clearly showing a mistake by *both* parties, and the onus of proof lies on the plaintiff (*g*). This strict rule does not seem to apply as between vendor and purchaser, or lessor and lessee, where the parties can be replaced in statu quo (*h*). Parol evidence is admissible (*i*). The court will not reform a deed on petition, but an action must be brought; and so long as the deed stands the court is bound to act upon it, notwithstanding it may be satisfied that the deed is at variance with the intention of the parties (*k*).

CH. V. SEC. 24.
Rectification of
Erroneous
Lease.
Evidence.

By section 34 of the Judicature Act, 1873, any action for "the rectification or setting aside or cancellation of deeds or other written instruments" must be brought in the Chancery Division of the High Court. But the 24th section of the same act gives power to any other division to treat an instrument as rectified or set aside (*l*).

Action for
Rectification
must be
brought in
Chancery
Division.

In a very clear case of mistake, compensation may be awarded to a tenant for having accepted an erroneous lease, instead of rectifying the lease itself. This principle was recognized in *Besley v. Besley* (*m*), in which case, however, compensation was refused. The facts were these. By contract in 1861 the defendant agreed to grant to the plaintiff a sub-lease for the residue of his own term less ten days. In pursuance of this contract an underlease was prepared by the defendant's solicitor for twenty-three years less ten days, and the lease was executed by the lessee, who neither inspected the head lease nor employed a solicitor. In 1877 it was discovered that the head lease had only sixteen years to run at the time of the contract, and had in fact expired, and that the sub-lease had, *by pure mistake*, been made for seven years longer than the lessor had power to make it. The plaintiff, who had been obliged to procure a new lease from the head landlord at a greatly increased rent, claimed compensation, but Malins, V.-C., held that he was to blame in not having inspected the head lease at the time of the contract, and applying the rule of caveat emptor, disallowed the claim.

Compensation
for having
accepted erro-
neous Lease
Besley v.
Besley.

(*g*) *Wright v. Goff*, 22 Beav. 207; *Sells v. Sells*, 1 Drew. & Sm. 43; 29 L. J., Ch. 500; *Rooke v. Ld. Kensington*, 2 Kay & J. 743; Story Eq. Jur. s. 157; 8 E. & B. 257, 294; *Earl of Bradford v. Earl of Romney*, 30 Beav. 431; *Garrard v. Frankel*, 30 Beav. 445; *Price v. Ley*, 32 L. J., Ch. 530; *Seaton v. Staniland*, 4 Giff. 61; *Elwes v. Elwes*, 3 De Gex, F. & J. 667; *Fallon v. Robins*, 16 Ir. Ch. R. 422.

(*h*) *Harris v. Pepperell*, L. R., 5 Eq. 1.

(*i*) *Price v. Ley*, *supra*.

(*k*) *In re Malet*, 31 L. J., Ch. 455, M. R.

(*l*) *Mostyn v. West Mostyn, & Co.*, L. R., 1 C. P. D. 145; 45 L. J., C. P. 401; 34 L. T. 325.

(*m*) L. R., 9 Ch. D. 103; 38 L. T. 844; 27 W. R. 184.

CHAPTER VI.

OF TENANCIES FOR LESS TERM THAN YEARS, AND OF PERMISSIONS
TO OCCUPY.

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SECT. 1.—*Tenancy generally.*Evidence of
Tenancy.

IN many cases, where no express contract of letting has been made, a tenancy may be implied from the acts of the parties, especially the occupation and payment of rent (*a*). Such payment frequently affords evidence of a promise by the tenant to hold the premises from year to year on the terms of some previously-existing lease or agreement (*b*). The presumption which arises from the payment and acceptance of rent is the same against a corporation as against an ordinary person (*c*). Where premises are taken under a written agreement, an oral alteration of the rent will not constitute a fresh demise (*d*). So an agreement by the tenant to pay an additional sum yearly, in consideration of his landlord making certain improvements in the demised premises, does not create a new demise (*e*).

SECT. 2.—*Tenancy from Year to Year.*Nature of the
Tenancy.

A tenant from year to year is one who holds under a demise (express or implied) for a term (*f*), which may be determined at the end of the first or any subsequent year of the tenancy, either by the landlord or the tenant, by a regular notice to quit (*g*). He is substantially a tenant at will; except that such will cannot be determined by either party without due notice to quit (*h*). If no such notice be

(*a*) Smith L. & T. 24—29 (2nd ed.).(*b*) *Doe d. Rigge v. Bell*, 5 T. R. 471; and see the cases cited post, p. 206.(*c*) *Doe d. Pennington v. Taniere*, 12 Q. B. 998; and see *Hill v. South Staffordshire R. Co.*, 11 Jur., N. S. 192, L. J.(*d*) *Crowley v. Fitty*, 7 Exch. 319; 21 L. J., Ex. 136; *Greechie v. Monk*, 1 C. & K. 307; *Doe d. Monk v. Greechie*, Id. 307;5 Q. B. 841; *Clarke v. Moore*, 1 Jon. & Lat. 723; *Burrows v. Gradin*, 1 D. & L. 213.(*e*) *Donellan v. Read*, 3 B. & Ad. 899; *Foquet v. Moor*, 7 Exch. 870.(*f*) *How v. Kennett*, 3 A. & E. 602.(*g*) *Cole Ejec.* 29, 441.(*h*) *Parkes d. Walker v. Constable*, 3 Wils. 25; Smith L. & T. 24 (2nd ed.).

given the tenancy will continue from year to year, for any number of years until surrendered, or extinguished by the Statute of Limitations, or the lessor's title ceases (i). The death of either party will not determine it (k); unless, indeed, the lessor be tenant for his own life only, and the lease is not made pursuant to any statute or power (l).

CH. VI. SEC. 2.
Tenancy from Year to Year.

"Leases from year to year," observes Mr. Preston, "give only one time of continuance. That time, however, may be confined to one year, or extended to several years, according to circumstances attending the tenancy in its progress. In the first place, the lease is for one year certain, and after the commencement of every year, or perhaps after the expiration of that part of the year in which a notice of determining the tenancy may be given, it is a lease for the second year; and in consequence of the original agreement of the parties every year of the tenancy constitutes part of the lease, and eventually becomes parcel of the term: so that a lease, which in the first instance is only for one year certain, may in the event be a term for one hundred years or more. Under this species of tenancy the law considers the lease, with a view to the time which has elapsed, as arising from an estate for all that time, including the current year; and with a view to the time to come, as a lease from year to year. For as all the time for which the land may be held under a running lease is originally given, and in effect passes, by the same instrument or contract, the whole time is consolidated, and every year as it commences forms part of the term" (m). In settlement cases, the renting of a tenement from three months to three months, or for an indefinite period, and an occupation under it and payment of rent for a year or more, constitute a tenancy from year to year, so as to confer a settlement (n).

Lease from Year to Year gives one Time of Continuance.

Where parties usually agree for a tenancy "from year to year," and possession is taken, such a tenancy is thereby created, and may be determined at the end of the first or any subsequent year of the tenancy by a regular notice to quit (o). But where a tenancy is created "for one year certain, and so on from year to year" (which is frequently done by mistake), it enures as a tenancy for two years at the least, and cannot be determined at the end of the first year (p);

Creation of Tenancy from Year to Year by express Contract.

(i) Smith L. & T. 30, 441.

(k) *Maddon d. Baker v. White*, 2 T. R. 159; *Doe d. Shore v. Porter*, 3 T. R. 13; *Mackay v. Mackreth*, 4 Doug. 213; 2 Chit. R. 461; 15 Ves. 241; *Doe d. Hull v. Wood*, 14 M. & W. 682; *Cattley v. Arnold*, 1 J. & H. 651; 28 L. J., Ch. 352; *Boothroyd v. Woolley*, 5 Tyr. 522.

(l) *Doe d. Thomas v. Roberts*, 10 M. & W. 778; 14 & 15 Vict. c. 25, s. 1.

(m) 3 Prest. Conv. 76, 77. And see *Tomkins v. Lawrence*, 8 C. & P. 729; *Cattley v. Arnold*, *supra*.

(n) *Re v. Herstonccaux*, 7 B. & C. 551; *Overseers of Willeaden v. Overseers of Puddington*, 3 B. & S. 593; 32 L. J., M. C. 109; *Reg. v. St. Giles, Cripplegate*, 4 B. & S. 509; 33 L. J., M. C. 3; *Hastings Union v. Guardians of St. James, Clerkenwell*, L. R., 1 Q. B. 38; 35 L. J., M. C. 65.

(o) *Doe d. Clarke v. Smardgc*, 7 Q. B. 957; *Doe d. Plumer v. Mainby*, 10 Q. B. 472.

(p) *Doe d. Chadborn v. Green*, 9 A. & E. 658; *Reg. v. Chawton*, 1 Q. B. 247.

CH. VI. SEC. 2. though it may be determined by notice to quit at the end of the second or any subsequent year of the tenancy. A demise "for a year," or "for one year certain," does not create a tenancy from year to year, nor require any notice to determine it at the end of the year (q).

Tenancy from Year to Year.

Implied Contract by Entry under Contract for Lease or void Lease.

Doe v. Bell.

The doctrine is firmly established, that where a person is let into possession under a mere agreement for a future lease (not amounting to an actual demise), or under a void lease, he becomes only a tenant at will; but it is equally well established, that when he pays, or expressly agrees to pay, any part of the annual rent thereby reserved, his tenancy at will changes into a tenancy from year to year, upon the terms of the intended lease so far as they are applicable to and not inconsistent with a yearly tenancy (r). That the freehold interest is, subsequent to the making of the void lease or agreement, assigned to another person, makes no difference in law (s).

Terms applicable to Yearly Tenancy.
Martin v. Smith.

A stipulation for two years' notice to quit is inapplicable to such a tenancy (t). So is a covenant to build; or to do such material repairs as are not usually done by tenants from year to year (u). But a stipulation, in an agreement for a lease for more than three years, to keep the premises in good tenantable repair, order and condition during the tenancy, is applicable to the implied yearly tenancy (v); as is also a stipulation, in a lease not by deed for seven years, to paint at the end of the seventh year (x); and a stipulation "to keep open the shop, and use the best endeavours to promote the trade of it during the tenancy" (y). So a stipulation that the tenant shall be paid for tillages on the expiration of his tenancy is not inconsistent with such a tenancy (z); although, perhaps, it may not apply to a new reversioner, who accepts rent in ignorance of such a stipulation (a). A proviso for re-entry on non-payment of rent or non-performance of covenants is applicable to an implied yearly tenancy (b). Such tenant is entitled to the usual notice to quit; but at the expiration of the term mentioned in the agreement the implied tenancy from year to year will cease without any notice to quit (c).

(q) *Cobb v. Stokes*, 8 East, 358, 361; *Wilson v. Abbott*, 3 B. & C. 89; *Johnstone v. Hudleston*, 4 B. & C. 937; and see *Wright v. Tracey*, Ir. R., 8 C. L. 478.

(r) *Doe d. Thomson v. Amey*, 12 A. & E. 476; *Doe d. Rigge v. Bell*, 5 T. R. 471; 2 Smith L. C. 96 (7th ed.); *Richardson v. Giffard*, 1 A. & E. 62.

(s) See *Arden v. Sullivan*, 14 Q. B. 832; and compare *Wyatt v. Cole*, 36 L. T. 613.

(t) *Tooker v. Smith*, 1 H. & N. 732.

(u) *Bowes v. Croll*, 6 E. & B. 264.

(v) *Richardson v. Gifford*, 1 A. & E. 62.

(x) *Martin v. Smith*, L. R., 9 Ex. 50;

43 L. J., Ex. 43; 30 L. T. 268; 22 W. R. 336.

(y) *Sanders v. Karnell*, 1 F. & F. 356.

(z) *Brockington v. Saunders*, 13 W. R. 46, Q. B.

(a) *Oakley v. Monck*, 3 H. & C. 706; 34 L. J., Ex. 137; L. R., 1 Ex. 169; 4 H. & C. 261; 35 L. J., Ex. 84.

(b) *Thomas v. Packer*, 1 H. & N. 669.

(c) *Doe d. Tilt v. Stratton*, 4 Bing. 446; *Doe d. Bramfield v. Smith*, 6 East, 530; *Berry v. Lindley*, 3 M. & E. 498, 514; *Doe d. Davenish v. Moffatt*, 15 Q. B. 267, 266; *Tress v. Savage*, 4 E. & B. 36.

The implied contract can of course be rebutted, and there must be some evidence given of it. Actual payment of rent is not always essential, although that is perhaps the clearest proof (*d*). Where the payment of the rent is allowed to stand over by mutual consent, that is sufficient (*e*). Payment of rent does not of itself create a tenancy from year to year, but is *only evidence* from which a jury may find the fact (*f*). Where payment of rent unexplained would ordinarily imply a yearly tenancy upon the previous terms, it is open to the payer or receiver of such rent to prove the circumstances under which such payment was made, for the purpose of repelling such implication (*g*).

CH. VI. SECT. 2.
Tenancy from Year to Year.

Rebutting of implied Terms of Holding.

Where a tenant for a term of years holds over after the expiration of his lease, he becomes a tenant on sufferance; but when he pays, or expressly agrees to pay, any subsequent rent, at the previous rate, a new tenancy from year to year is thereby created upon the same terms and conditions as those contained in the expired lease, so far as the same are applicable to and not inconsistent with a yearly tenancy (*h*). This, however, appears to be matter of evidence rather than of law (*i*). The landlord may show that he accepted the rent from time to time under a mistake, and upon the supposition that one of the lives for which the lease was granted continued in existence (*k*); or a new reversioner may show that he knew nothing of any special and unusual terms in the original lease, and therefore ought not to be deemed to have assented to them, so as to render himself liable to such terms (*l*), or the tenant may show any facts leading to an opposite conclusion, as that the continued occupation was only provisional and in expectation of a new lease on new terms.

Where a Tenant holds over, and pays subsequent Rent.

Hyatt v. Griffiths.

In the absence, however, of any evidence one way or the other, it seems that upon a holding over and payment of rent, the jury would be directed to find a tenancy on the terms of the expired lease, and that this would be so even if there had been an assignment of the reversion prior to the holding over (*m*). Any such new tenancy (when implied) will be deemed to have commenced at the same time of the year as the original term, and notice to quit should be given accordingly (*n*). Even if the rent be increased, the tenancy will be subject

(*d*) *Cox v. Bent*, 5 Bing. 185; *Vincent v. Godson*, 24 L. J., Ch. 122; Smith L. & T. 27 (2nd ed.).

(*e*) *Cox v. Bent*, 5 Bing. 185; *Vincent v. Godson*, 24 L. J., Ch. 122; Smith L. & T. 27 (2nd ed.).

(*f*) *Finley v. Bristol and Exeter R. Co.*, 7 Exch. 415; *Jones v. Shears*, 4 A. & E. 832.

(*g*) *Doe d. Lord v. Crago*, 6 C. B. 90; *Oakley v. Monck*, *supra*.

(*h*) *Bishop v. Howard*, 2 B. & C. 100; *Hyatt v. Griffiths*, 17 Q. B. 505; Chit. on

Contracts, 295 (7th ed.).

(*i*) *Mayor of Thetford v. Tyler*, 8 Q. B. 95; 2 Smith L. C. 96 (6th ed.).

(*k*) *Doe d. Lord v. Crago*, 6 C. B. 90.

(*l*) *Oakley v. Monck*, 3 H. & C. 706; 34 L. J., Ex. 137; L. R., 1 Ex. 159; 4 H. & C. 251; 35 L. J., Ex. 84.

(*m*) See *Hyatt v. Cole*, 36 L. T. 613.

(*n*) *Doe d. Castleton v. Samuel*, 5 Esp. 173; *Doe d. Spicer v. Lea*, 11 East, 312; *Roe d. Jordan v. Ward*, 1 H. Blac. 96; *Doe d. Martin v. Watts*, 7 T. R. 83; *Doe d. Tucker v. Morse*, 1 B. & Ad. 365.

CH. VI. SEC. 2. to covenants or stipulations similar to those contained in the former lease, unless others are expressly agreed on (*o*). It will also be subject to the custom of the country, so far as such custom is not excluded by the terms of the expired lease (*p*). It may be determined by notice at the end of the first or any subsequent year of the tenancy (*q*), or under an implied proviso for re-entry similar to that contained in the expired lease (*r*).

Acceptance of Rent by Remainderman.

If a remainderman accept money, or anything else reserved as rent in a lease granted by the previous tenant for life, which became void on the death of such tenant for life, he does not thereby confirm and establish the lease for the residue of the term therein expressed to be granted (without a previous memorandum in writing pursuant to 13 Vict. c. 17, s. 1), but he creates a new implied tenancy from year to year as between him and the tenant on the old terms, so far as they are applicable to and not inconsistent with a yearly tenancy, and the tenant is entitled to the usual notice to quit (*s*): unless, indeed, the rent reserved be so grossly inadequate, with reference to the annual value of the property, that the jury ought to presume and find that no such new tenancy was intended to be created (*t*). So any special and unusual terms, of which the reversioner was ignorant when he accepted the rent, will not bind him (*u*). Any such new tenancy will be deemed to have commenced from the same day of the year as the original term, and the notice to quit should be given accordingly (*x*).

By Attornment to a prior Mortgagee.

If a mortgagee induce or compel a subsequent tenant of the mortgagor to attorn to and pay him rent, that will not operate to confirm the lease for the whole term thereby granted, but will create between the mortgagee and the tenant a new tenancy from year to year (*y*); and such new tenancy will be subject to the terms and conditions of the lease, so far as the same are applicable to and not inconsistent with a yearly tenancy (*z*).

Not by Agreement to pay an increased Rent.

If, whilst a tenant from year to year is in possession of lands under an agreement reserving a certain rent, he agrees with his landlord to pay an increased or reduced rent, this will not have the effect of then creating a new tenancy (*a*).

(*o*) *Digby v. Atkinson*, 4 Camp. 275.

(*p*) *Hutton v. Warren*, 1 M. & W. 468.

(*q*) *Doe d. Clarke v. Smaridge*, 7 Q. B. 967; *Doe d. Plumer v. Maindy*, 10 Q. B. 473.

(*r*) *Thomas v. Packer*, 1 H. & N. 689; *Hayne v. Cumming*, 16 C. B., N. S. 421.

(*s*) *Doe d. Martin v. Watts*, 7 T. R. 85; *Doe d. Tucker v. Morse*, 1 B. & Adol. 365; *Smith L. & T.* 24, 25 (2nd ed.).

(*t*) *Doe d. Brune v. Prideaux*, 10 East, 168; *Denne d. Brune v. Rawlins*, Id. 261; *Doe d. Lord v. Crago*, 6 C. B. 90.

(*u*) *Oakley v. Monck*, 3 H. & C. 706; 34

L. J., Ex. 137; L. R., 1 Ex. 159; 4 H. & C. 251; 35 L. J., Ex. 84.

(*x*) *Roe d. Jordan v. Ward*, 1 H. Blac. 96; *Doe d. Collins v. Weller*, 7 T. R. 478.

(*y*) *Doe d. Hughes v. Bucknell*, 8 C. & P. 667; *Doe d. Prior v. Ongley*, 10 C. B. 25 (3rd point).

(*z*) *Cole Ejec.* 445.

(*a*) *Doe d. Monck v. Geeckie*, 5 Q. B. 841; 1 C. & K. 307; *Clarke v. Moore*, 1 Jon. & Lat. 723; *Crowley v. Pitty*, 7 Exch. 319; *Burroues v. Gradin*, 1 D. & L. 213.

A demise by a tenant from year to year to another also to hold from year to year, is in legal operation a demise from year to year only during the continuance of the original demise to the intermediate landlord (*b*). A tenant from year to year, underletting from year to year, has a reversion which entitles him to distrain (*c*). If a tenant from year to year make a lease for twenty-one years, such term will cease whenever the tenancy from year to year is legally determined (*d*).

CH. VI. SEC. 2.
Tenancy from Year to Year.

Underleases by Tenants from Year to Year.

SECT. 3.—*Tenancy for less than a Year.*

In leases of houses and apartments for an *indefinite* period less than a year, the hiring will be construed to be quarterly, monthly or weekly, according to the circumstances of each case and the custom of the place or country. Of these circumstances the principal appears to be the payment of rent: therefore, where a tenancy was created of wharfs, warehouses, &c., at a certain rent per quarter, the tenancy to commence on the 14th June, the tenant paying a quarter's rent on that day and giving security for the payment of a quarter's rent in advance during his tenancy, it was held that he became tenant from quarter to quarter, and not from year to year (*e*). So where the tenant is "*always* to be subject to quit at three months' notice" he will be deemed a quarterly tenant (*f*). Where premises are let, not for any definite period, but the tenant is to give up possession at any time on one month's notice, that creates a tenancy from month to month (*g*). So a demise of houses or of lodgings at a monthly or weekly rent affords a presumption of a monthly or weekly tenancy (*h*). Where a person hired a furnished house for three lunar months, and a receipt was given for the rent for that period, but he continued in possession afterwards, it was held that a jury were warranted in finding that the subsequent occupation was on a *weekly* hiring (*i*). By agreement on the 19th of April, certain premises were let at the yearly rent of 42*l.*, payable quarterly; the first payment, 7*l.* 13*s.* 6*d.*, to be made on the 24th of June next, being the proportion of rent due up to that time. The lessee was to enjoy at the said rent until one of the parties should give to the other six months' notice to quit, and at the expiration of "any" such notice to leave the premises in as good condition, &c. This was held to be a half-yearly tenancy, commencing from the 24th of June; and that a notice to quit given at Midsummer and expiring at

Tenancy for less than a Year.

(*b*) *Pike v. Eyre*, 9 B. & C. 909.

(*c*) *Curtis v. Wheeler*, Moo. & M. 493.

(*d*) *Mackay v. Muckreth*, 4 Doug. 213.

(*e*) *Wilkinson v. Hall*, 3 Bing. N. C. 608.

(*f*) *Kemp v. Derrett*, 3 Camp. 510; Cole Ejec. 31.

(*g*) *Doe d. Landseil v. Gower*, 17 Q. B. 589.

(*h*) *Huffell v. Armitstead*, 7 C. & P. 56. And see as to what notice to quit is required, post, Chap. VIII., Sect. 7.

(*i*) *Tourne v. Campbell*, 3 C. B. 921.

CH. VI. SEC. 3. Christmas was valid (*k*). Where the defendant hired of the plaintiff apartments in his dwelling-house at a fixed rent, payable half-yearly, and entered into possession at Michaelmas, 1822: and at Lady-day, 1823, paid one half-year's rent, and at the Midsummer following gave up possession without having given notice to quit; but at Michaelmas in the same year he paid another half-year's rent, though at Lady-day, 1824, he refused to pay a third half-year's rent; in an action for use and occupation for that half-year's rent, it was held that a tenancy from year to year could not be inferred from these facts, and therefore that the action was not maintainable (*l*). A general letting at a yearly rent, though payable half-yearly or quarterly, or an acceptance of yearly rent or rent measured by any aliquot part of a year, is evidence of a taking from year to year (*m*). Where premises are let, at a yearly rent payable weekly, with power to determine the tenancy at three months' notice from any quarter day, that creates a yearly tenancy, determinable as agreed (*n*).

Furnished
Apartments.

Where a house is let ready furnished the rent is deemed to issue out of the realty, and not partly out of the furniture (*o*).

Lodgings may be let in the same manner as lands and tenements. A lodger is a tenant if the premises are let to him (*p*).

Protection of
Lodger's
Goods from
Distress.

Prior to the Lodgers' Goods Protection Act, 1871, care had to be taken by the lodger to ascertain that the rent of the house had been paid up, as if not, the goods of the lodger would be liable to a distress for rent due from his own landlord. But that act, which is fully set out hereafter (*q*), provides a simple process for freeing the lodger's goods from a distress of this kind. Previously to taking the premises, however, it may sometimes be prudent to make inquiries of the tax-gatherer and collector of the parochial rates, as if distresses be levied for them, it may cause considerable inconvenience and annoyance to the lodger, although his goods are not liable to such distresses.

Use of
Knocker,
Door Bell, &c.

A lodger has a right to the use of the door bell, the knocker, the skylight of the staircase, and the water-closet, unless it be otherwise stipulated at the time of taking the lodgings; therefore if the landlord deprive the lodger of the use of either, an action lies (*r*). If a person let lodgings to an immodest woman to enable her to consort with the other sex, or if not knowing her habits at the time of letting, but becoming acquainted with her habits afterwards, he permit her to continue his tenant, he cannot recover in an action for the lodgings so

Lodgings to
Prostitutes.

(*k*) *Doe d. King v. Grafton*, 18 Q. B. 496; 21 L. J., Q. B. 276.

(*l*) *Wilson v. Abbott*, 3 B. & C. 88.

(*m*) *Richardson v. Langridge*, 4 Taunt. 128; *Doe d. Hull v. Wood*, 14 M. & W. 682.

(*n*) *Rex v. Herstmonceaux*, 7 B. & C. 551.

(*o*) *Newman v. Anderton*, 2 Bos. & P.

New R. 224.

(*p*) *Cook v. Humber*, 11 C. B., N. S. 33; 31 L. J., C. P. 73; *Stamp v. Overseers of Sunderland*, L. R., 3 C. P. 388, 406; 37 L. J., M. C. 137. As to agreement to let lodgings, see ante, p. 80.

(*q*) Chap. X., Sect. 7 (f).

(*r*) *Underwood v. Burrows*, 7 C. & P. 26.

let; but if the woman merely lodge in the house, and receive her visitors elsewhere, the rent may be recoverable (s).

CH. VI. SEC. 3.
Tenancy for less than a Year.

A lodging-house keeper is not responsible to his lodger if property of the latter be stolen from his apartments, either by another lodger or by a third person: the principle is, that the lodger must himself take care of his own goods; there is a distinction in this respect between an innkeeper and a lodging-house keeper (t).

Larceny of Lodger's Goods.

SECT. 4.—*Tenancy at Will.*

A tenancy at will is where lands or tenements are let by one man to another, to hold at the will of the lessor; in this case the lessee is called tenant at will, because he has no certain or sure estate, for the lessor may put him out at any time he pleases (u). Either party may at any time determine a strict tenancy at will, although expressed to be held at the will of the lessor only (x). Such tenancy must be determined by a demand of possession or otherwise before an action of ejectment can be maintained against the tenant (y). The granting of a lease to a third person by the lessor of a tenant at will, though it determines the tenancy at will as against the lessor, does not give him such a right of entry as is contemplated by 3 & 4 Will. 4, c. 27, s. 2 (z). Where there is a tenancy at will, at a fixed rent, such rent may be distrained for (a). Where there is no such fixed rent an action for use and occupation may be maintained (b).

What constitutes a Tenancy at Will.

Where a person lets land to another without limiting any certain or determinate estate, a tenancy at will is thereby created (c). A person who lives in a house rent free, by the sufferance of the owner, is a tenant at will (d). A mere permission to occupy land constitutes a tenancy at will only (e). An interest of freehold or quasi freehold character cannot be created orally or by a mere written agreement (not under seal): a person, therefore, holding under such an agreement is a tenant at will, and (after determination of such tenancy) removable by ejectment, without prejudice to his equitable rights (f). Courts of

How created.

(s) *Appleton v. Campbell*, 2 C. & P. 347; *Jennings v. Throgmorton*, Ry. & Mop. 251; *Girardy v. Richardson*, 1 Esp. 13.

(t) *Holder v. Souby*, 8 C. B., N. S. 254; 29 L. J., C. P. 246; *Dansey v. Richardson*, 3 E. & B. 144.

(u) Lit. s. 68; 2 Blac. Com. 145; Cole Ejec. 448.

(x) Co. Lit. 55 a; 6 C. B. 672, note (a); Cole Ejec. 448, 552; Smith L. & T. 17 (2nd ed.).

(y) Cole Ejec. 58, 463.

(z) *Hogan v. Hand*, 2 W. R. 673; 4 L. T. 465, P. C.

(a) *Anderson v. Midland R. Co.*, 3 E. & E. 614; 30 L. J., Q. B. 91; *Doe d. Davies v. Thomas*, 6 Exch. 858.

(b) Chap. XIV., post.

(c) Com. Dig. tit. *Estates* (H. 1); *Richardson v. Langridge*, 4 Taunt. 128; Smith L. & T. 20 (2nd ed.).

(d) *Rex v. Collett*, Russ. & Ry. C. C. 498; *Rex v. Jobling*, Id. 525; *Doe d. Groves v. Groves*, 10 Q. B. 486.

(e) *Doe d. Hull v. Wood*, 14 M. & W. 682.

(f) *Dowse v. East I. Co.*, 8 W. R. 245, P. C.

CH. VI. SEC. 4.
Tenant at Will.

*Richardson v.
Langridge.*

law have of late years leaned as much as possible against construing demises, where no certain term is mentioned, to be tenancies at will, but have rather held them to be tenancies from year to year so long as both parties please, especially where an annual rent is reserved (*g*). If an agreement be made to let premises so long as both parties please, and reserving a compensation, accruing *de die in diem*, and not referable to a year, or any aliquot part of a year, it does not create a holding from year to year, but a tenancy at will strictly so called; and though the tenant has expended money on the improvement of the premises, that does not give him a right to hold them until he be indemnified (*h*). If one demise a tenement to another, excepting the new house for his habitation when he pleases to stay there, and at other times for the use of the lessee; the lessee has the new house as tenant at will (*i*). The words "I give you a close to enjoy as long as I please, and to take again when I please, and you shall pay nothing for it," create a tenancy at will (*k*). So a party having become tenant to two others *at their will and pleasure*, at the rate of 25*l.* 4*s.* per annum, payable quarterly, and having remained in possession under this agreement for two years, and paid a year's rent, after which the lessors distrained for a quarter's rent, was held to be tenant at will and not from year to year (*l*). If a tenant whose lease has expired be permitted to continue in possession pending a treaty for a further lease, he is not a tenant from year to year, but a tenant strictly at will (*m*): it is the same if he be admitted tenant pending a treaty for purchase, which is afterwards broken off (*n*).

Entry under
void Lease.
Doe v. Bell.

If a man enter under a void lease, he is not a disseisor, but a tenant at will (*o*), under the terms of the lease in all other respects except the duration of time (*p*): and when he pays or agrees to pay any of the rent therein expressed to be reserved he becomes a tenant from year to year upon the terms of the void lease, so far as they are applicable to and not inconsistent with a yearly tenancy (*p*). A minister of a dissenting congregation, placed in possession of the chapel and dwelling-house by certain persons in whom the fee was vested, in trust to permit and suffer the chapel to be used for the purpose of religious worship, is a mere tenant at will to those persons;

(*g*) *Timmins v. Rawlinson*, 3 Burr. 1609; 1 W. Blac. 533; Co. Lit. 56; *Doe d. Hull v. Wood*, 14 M. & W. 682; *Anderson v. Midland R. Co.*, 30 L. J., Q. B. 94.

(*h*) *Richardson v. Langridge*, 4 Taunt. 128.

(*i*) *Cudlip v. Rundall*, 3 Salk. 156.

(*k*) *Rez v. Fillongley*, Cald. 569.

(*l*) *Doe d. Bastow v. Cox*, 11 Q. B. 122.

(*m*) *Doe d. Hollingsworth v. Stennett*, 2 Esp. 717; *Simpkin v. Ashhurst*, 1 C., M. &

R. 261.

(*n*) *Peacock v. Peacock*, 16 Ves. 57; *Doe d. Stanway v. Rock*, 1 Car. & M. 549; 4 M. & G. 30; *Ball v. Cullimore*, 2 C., M. & R. 120. And see 221, post.

(*o*) *Denn d. Warren v. Fearnside*, 1 Wils. 176; *Goodtitle d. Galloway v. Herbert*, 4 T. R. 680; *De Medina v. Poleon*, Holt N. P. C. 47.

(*p*) *Doe v. Bell*, 5 T. R. 471; ante, 121.

and his interest is determinable by a demand of possession, without any previous notice to quit; he is not entitled as of right, before the determination of his tenancy, to have a reasonable time allowed him for the removal of his furniture (*q*). Where a tenant at will let into possession a person whom the landlord had refused to take as tenant unless he found security, and who remained in possession two years, continuing to endeavour to find securities, but without success; it was held, that he was not even tenant at will (*r*). Slight evidence has been held sufficient to make a tenant on sufferance a tenant at will (*s*). An admission of half a year's rent being in arrear is some evidence of a tenancy at will (*t*). Actual payment of rent is not always necessary to create such a tenancy, so as to authorize a distress (*u*). Where a term of years is created by way of use, and limited to a trustee, the owner of the freehold who holds subject to such term is a quasi tenant at will to his own trustee (*x*).

CH. VI. SEC. 4.
Tenant at Will.

An estate at will may be determined by a demand of possession, or by the express declaration of either of the parties (*y*), or by implication of law: of the latter description will be the death of either party, which in general determines the will (*z*)—acts of ownership exercised by the landlord (*a*)—his alienation of the reversion and notice thereof (*b*)—waste committed by the tenant (*c*)—his demising or leasing or assigning the premises over (*d*)—or, in short, doing any act which is inconsistent with an estate at will (*e*). An entry by the landlord on the land without the tenant's consent, and cutting and carrying away stone therefrom, amounts to a determination of the will (*f*). It is requisite that the landlord should give the tenant notice that he determines the tenancy if the act relied on be done off the premises (*g*). Where the act is done on the land, it is presumed

Determina-
tion of Te-
nancy at Will.

(*q*) *Doe d. Jones v. Jones*, 10 B. & C. 718; *Doe d. Nicholl v. M'Kag*, Id. 721; *Revett v. Brown*, 5 Bing. 7; *Perry v. Shipway*, 1 Giff. 1; *Cole Ejec.* 451, 604; 23 & 24 Vict. c. 136, s. 14.

(*r*) *Doe d. Fleming v. Brett*, Hurl. & Walm. 3.

(*s*) *Turner v. Doe d. Bennett* (in error), 9 M. & W. 643.

(*t*) *Cox v. Bent*, 5 Bing. 185.

(*u*) *Anderson v. Midland R. Co.*, 3 E. & E. 614; 30 L. J., Q. B. 94; *Cox v. Bent*, *supra*.

(*x*) *Sug. V. & P.* 1129 (14th ed.); *Doe d. Jacobs v. Phillips*, 10 Q. B. 130.

(*y*) *Cole Ejec.* 58, 452, 453; *Doe d. Bastow v. Cox*, 11 Q. B. 122.

(*z*) *Doe d. Stanway v. Rock*, 1 Car. & M. 549; 4 M. & G. 30; *Cockerell v. Overell*, Holt, 417; *James v. Dean*, 11 Ves. 391; *Att-Gen. v. Ld. Foley*, 2 Dick. 363.

(*a*) Co. Lit. 55 b, 57 b, 245 b; cited 9

M. & W. 646; *Doe d. Moore v. Lawder*, 1 Stark. R. 308; *Smith L. & T.* 17 (2nd ed.).

(*b*) Co. Lit. 55 b; *Disdale v. Isles*, 2 Lev. 88; 1 Vent. 247; *Bull v. Cullimore*, 2 C., M. & R. 120; *Doe d. Goody v. Carter*, 9 Q. B. 863; *Doe d. Davies v. Thomas*, 6 Exch. 854, 857.

(*c*) Lit. s. 71; Co. Lit. 55 b; *Smith L. & T.* 20, 268 (2nd ed.).

(*d*) *Cole Ejec.* 449, 453; *Pinhorn v. Souster*, 8 Exch. 763; *Melling v. Leake*, 16 C. B. 652.

(*e*) *Cruise's Dig.* tit. ix. s. 17; Co. Lit. 57 a, 55 b, n. 15; *Hutchinson v. Isles*, 1 Vent. 247; *Countess of Shrewsbury's case*, 5 Rep. 13 b; *Birch v. Wright*, 1 T. R. 382; *Pollen v. Brewer*, 7 C. B., N. S. 371; *Wallis v. Delmar*, 29 L. J., Ex. 276; *Smith L. & T.* 19 (2nd ed.).

(*f*) *Doe d. Bennett v. Turner*, 7 M. & W. 226; 9 Id. 643.

(*g*) Co. Lit. 55 b.

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Determina-
 tion of Te-
 nancy at Will
 —*contd.*

that the tenant is there and knows of it (*h*). A demand of possession made on the premises from the wife of a sub-lessee at will is sufficient (*i*). So the lessor by making a lease for years to commence presently determines the tenancy at will, although there be a stipulation that the new lessee shall not enter until after the day for payment of the rent by the tenant at will (*k*). The will is also determined by an agreement by the lessor for the sale of the freehold to the tenant at will (*l*). The words "Unless you pay what you owe me, I shall take immediate measures to recover possession of the property," addressed to the tenant by the party entitled to the fee, have been held a sufficient determination of the will, and equivalent to a demand of possession, so as to maintain ejectment (*m*). A., having been in possession of a house and lands adjoining as tenant at will to the lord of a manor, was told by a subsequent lord that he must leave. On his refusal to do so, a writ of ejectment was served upon him; it was then verbally arranged that A. should give up part of the land, and retain the house and remaining land during the life of himself and wife. It was held that these acts amounted to a determination of the tenancy at will, and as a new tenancy at will was thereby created as to part, the Statute of Limitations, 3 & 4 Will. 4, c. 27, ss. 7, 10, began to run from that time, and not from the date of the original tenancy (*n*). A sub-demise or assignment by a tenant without notice thereof to his landlord does not determine the will, so as to prejudice the landlord (*o*). Committing high treason and being outlawed have each been held to be an implied determination of an estate at will, and so has becoming an insolvent debtor (*p*). If two joint tenants create a tenancy at will at a certain rent, and one dies, the survivor takes the whole premises and may maintain an action for the entire rent against the lessee continuing in possession (*q*). So where a lease is made to three joint tenants, rendering rent, the death of one does not determine the tenancy; but the survivors are liable to pay the whole rent (*q*). A lease at will by a feme sole does not determine by her marriage, unless the husband does some express act to determine the tenancy (*q*). Nor does the marriage of a feme sole determine a tenancy at will made to her (*q*). So if the husband

(*h*) *Cole Ejec.* 452; *Pinhorn v. Souster*, 8 Exch. 763; *Carpenter v. Collins*, Yelv. 73; *Ball v. Cullimore*, 2 C., M. & R. 120.

(*i*) *Roe d. Blair v. Street*, 2 A. & E. 329; 4 N. & M. 42.

(*k*) *Disdale v. Isles*, 2 Lev. 88; 1 Ld. Raym. 224.

(*l*) *Daniels v. Davison*, 16 Ves. 249.

(*m*) *Doe d. Price v. Price*, 9 Bing. 356.

(*n*) *Locke v. Matthews*, 13 C. B., N. S. 753; 9 Jur., N. S. 874.

(*o*) *Pinhorn v. Souster*, 8 Exch. 763; *Melling v. Leake*, 16 C. B. 652; *Cole Ejec.* 453.

(*p*) *Co. Lit.* 55 b; *Denn d. Warren v. Fearnside*, 1 Wils. 176; *Doe d. Davies v. Thomas*, 6 Ex. 854.

(*q*) *Henstead's case*, 5 Co. R. 10 b.

and wife lease the wife's land, rendering rent, the death of the husband does not determine the will (*r*).

CH. VI. SEC. 4.
Tenant at Will.

The sudden determination of the will of one party will not operate to the material injury of the other: therefore if a tenant at will sow his land, and the landlord determine the tenancy before the corn be ripe, the tenant notwithstanding has free liberty to enter upon the land to cut and carry his crop (*s*); and, on a like principle of justice, the tenant may, in all cases, have reasonable time allowed him to remove his goods after the determination of the estate by the act of the landlord (*t*). Where there is a tenancy at will, rent being paid quarterly, the lessee, after a quarter of a year is commenced, may determine his will, but then he must pay that quarter's rent; and if the lessor determine his will after the commencement of a quarter, he loses his rent for that quarter; and so it is if the rent be payable half-yearly (*u*).

Rights of the
Parties on the
Determination.

SECT. 5.—*Tenancy on Sufferance.*

A tenant on sufferance is one who entered by a lawful demise or title, and after that has ceased wrongfully continues in possession without the assent or dissent of the person next entitled (*x*); as where a tenant *pur autre vie* continues in possession after the death of the *cestui que vie* (*y*), or where any one continues in possession without agreement, after a particular estate is ended (*z*). If a tenant for years surrender and then hold over, he will be either tenant on sufferance or disseisor, at the election of the landlord (*a*). An under-tenant who is in possession at the determination of the original lease, and is suffered by the reversioner to hold over, is only a tenant on sufferance (*b*). Where a tenancy at will is determined by the landlord exercising acts of ownership, and the tenant remains in possession, he becomes tenant on sufferance only: but slight evidence would be sufficient to show a new creation of a tenancy at will (*c*), or he may by

How a Te-
nancy on
Sufferance is
constituted.

(*r*) Co. Lit. 55 b; 5 Co. R. 10; 1 Roll. Abr. 361, *Estate* (Z. 5).

(*s*) Lit. s. 68; Co. Lit. 55 b; *Oland v. Burdwick*, Cro. Eliz. 460; *Bulwer v. Bulwer*, 2 B. & A. 470, 471. And see Chap. XX., post.

(*t*) Lit. s. 69; Noy's Max. c. 11; *Doe d. Nicholl v. McKaeg*, 10 B. & C. 721.

(*u*) *Carpenter v. Collins*, Yelv. 73; *Layton v. Field*, 3 Salk. 222; *Leighton v. Theed*, 2 Salk. 413; 1 Ld. Raym. 707; *Parker v. Harris*, 4 Mod. 79; 1 Salk. 262; *Title v. Grovett*, 2 Ld. Raym. 1008; Co. Lit. 55 a, b, note 374; *Kightly v. Bulkly*, 1 Sid. 338.

(*x*) Co. Lit. 57 b, 270 b; 1 Steph. Com. 273.

(*y*) Co. Lit. 57 b; *Allen v. Hill*, Cro. Eliz. 238; 3 Leon. 153.

(*z*) Com. Dig. tit. *Estates* (H.); *Doe d. Martin v. Watts*, 7 T. R. 83; *Roe d. Jordan v. Ward*, 1 H. Blac. 96; *Roe d. Brune v. Prideaux*, 10 East, 187; *Doe d. Collins v. Weller*, 7 T. R. 487; *Doe d. Tucker v. Morse*, 1 B. & Ad. 365.

(*a*) *Pennington v. Morse*, Dyer, 62 a; *Winch*, 33; *Right v. Darby*, 1 T. R. 159; *Doe d. Tilt v. Stratton*, 4 Bing. 466.

(*b*) *Simpkins v. Ashhurst*, 1 C., M. & R. 261.

(*c*) *Doe d. Bennett v. Turner*, 7 M. & W. 226; 9 Id. 643.

CH. VI. SEC. 5. payment of rent or other acknowledgment of tenancy become tenant from year to year (*d*).
Tenancy on Sufferance.

Distinction
between
Tenant at
Will and
Tenant on
Sufferance.

There is a great difference between a tenant at will and a tenant on sufferance: the former is always in by right; but the latter holds over by wrong after the expiration of a lawful title (*e*). The reversioner who suffers this is considered to be guilty of some laches or negligence, as is generally the case. Against the crown there can be no tenant on sufferance, for the crown not being capable of committing laches, such person will be an intruder (*f*). Where a cottager occupied a piece of land inclosed from the waste on the side of a turnpike road for more than thirty years, without paying rent, and at the end of the time paid sixpence rent on four several occasions to the owners of the adjoining land: it was held, that this was conclusive evidence of a permissive occupation only, so as to maintain ejectment; and that it was a proper question for the jury, whether there had been an acknowledgment of the tenancy (*g*).

Empty House. Where a person obtained possession of a house which was empty, without the privity of the landlord, intending to take a lease of it from him, and some negotiations afterwards took place between them upon the subject: it was held that the relation of landlord and tenant never subsisted, but that if there was a tenancy of any sort it was on sufferance (*h*). An instrument in these terms, "I hereby certify that I remain in the house, No. 3, Swinton Street, belonging to W. G., on sufferance only, and agree to give him possession at any time he may require," does not create any tenancy, nor require a stamp (*i*).
 Ejectment. A landlord may maintain ejectment against his tenant on sufferance without any previous demand of possession (*k*). A tenant on sufferance, who is turned out of possession by his landlord, without any demand of possession, cannot maintain ejectment, but may sometimes maintain trespass (*l*). It would seem, however, that the action should be for assault and battery rather than for trespass to the land (*m*).
 Demise by Estoppel. A tenant on sufferance has no demisable estate, but he may create a tenancy by estoppel (*n*).

(*d*) *Mann v. Lovejoy*, Ry. & M. 355; *Right v. Darby*, 1 T. R. 159; *Doe d. Calvert v. Froud*, 4 Bing. 557; *Doe d. Clarke v. Smaridge*, 7 Q. B. 957.

(*e*) Co. Lit. 57 b; cited 3 C. B. 229, note (*h*); *Colo Ejec.* 456.

(*f*) Co. Lit. 57 b; *Colo Ejec.* 456.

(*g*) *Doe d. Jackson v. Wilkinson*, 3 B. & C. 413; and see *Doe d. Thompson v. Clark*, 8 B. & C. 717; *Locke v. Matthews*, 13 C. B., N. S. 753; 9 Jur., N. S. 874.

(*h*) *Doe d. Knight v. Quigley*, 2 Camp. 505.

(*i*) *Barry v. Goodman*, 2 M. & W. 768.

(*k*) *Doe d. Leeson v. Sayer*, 3 Camp. 8; *Doe d. Bennett v. Turner*, 7 M. & W. 226; *Doe d. Heming v. Brett*, Hurl. & W. 3; *Colo Ejec.* 457.

(*l*) *Doe d. Crisp v. Barber*, 2 T. R. 749; *Doe d. Harrison v. Murrell*, 8 C. & P. 134.

(*m*) *Colo Ejec.* 456.

(*n*) *Shopland v. Ryoler*, Cro. Jac. 55, 99; *Thunder d. Weaver v. Belcher*, 3 East, 449.

SECT. 6.—*Mortgagor and Mortgagee.*

CH. VI. SEC. 6.
Mortgagor and Mortgagee.

The notion of a mortgagor being in some cases a tenant at will seems to be recognized by 3 & 4 Will. 4, c. 27, s. 7, which provides that no mortgagor shall be deemed to be a tenant at will to his mortgagee within the meaning of that clause; but it seems more correct to say that a mortgagor in possession is a tenant on sufferance only (*o*). It is clear, too, that the mortgagor cannot create a subtenancy; that his subtenants would be tortfeasors, and could not sue the mortgagee in trespass (*o*).

By the Judicature Act, 1873, s. 25, subs. (5), “a mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land as to which no notice of his intention to take possession, or to enter into the receipt of the rents and profits thereof, shall have been given by the mortgagee, may sue for such possession, or for the recovery of such rents or profits, or to prevent or recover damages in respect of any trespass, or other wrong relative thereto, in his own name only, unless the cause of action arise upon a lease or other contract made by him jointly with another person.”

Mortgagor may sue for Rent in his own Name.

Where the mortgagor agreed to become tenant to the mortgagee at his will and pleasure, at and after the rate of 25*l.* per annum, payable quarterly, and occupied for two years, paying the rent, it was held to be a tenancy at will, and not from year to year (*p*). So where by a mortgage deed it was agreed that the mortgagor should hold the premises as tenant at will to the mortgagee at a specified rent, for which it should be lawful for the mortgagee to distrain, it was held that the clause creating a tenancy was operative, as not being inconsistent with the main object of the instrument, and that a tenancy at will was thereby created (*q*). Where the mortgagor by the mortgage deed attorned and agreed to become tenant from year to year to the mortgagee at a fixed rent, payable half-yearly, to enable him to distrain for his interest when in arrear, and with the usual power of entry after default; it was held, that such attornment did not create a tenancy from year to year *with all its incidents*, and that the mortgagee might, after default, maintain ejectment against the mortgagor without giving him six months' notice to quit (*r*). The mere fact that the mortgagee has received *interest* down to a time later than the day of demise in ejectment, is not a recognition of the mortgagor as his tenant (*s*); nor is the distraining after such day of demise, for interest due before the day, under a power to do so as for

Where Tenancy expressly agreed on.

(*o*) *Gibbs v. Cruikshank*, L. R., 8 C. P. 454; 42 L. J., C. P. 273.

(*p*) *Doe d. Bastow v. Cox*, 11 Q. B. 122; *Doe v. Dixie v. Davies*, 7 Exch. 89.

(*q*) *Pinhorn v. Souster*, 8 Exch. 763.

(*r*) *Metropolitan Counties Assurance Co. v. Brown*, 4 H. & N. 428.

(*s*) *Doe d. Rogers v. Cadwallader*, 2 B. & Ad. 473; but see *Doe d. Whitaker v. Hales*, 7 Bing. 322.

CH. VI. SEC. 6. rent reserved on a lease, there being no clause that the mortgagor shall keep possession so long as he pays interest (t). Where a mortgage deed contained a covenant that the mortgagor, during his occupation, should pay a rent rather larger than the interest, half-yearly, and that the mortgagee should have the usual remedies of landlords of distress and sale; provided that this reservation should not prejudice the mortgagee's right to enter and evict the mortgagor; it was held that, after distraining for one half-year's rent, the mortgagee might eject the mortgagor, without notice to quit, after a subsequent default (u). So where a mortgage deed contained a clause that for the better securing the principal and interest, and in contemplation of part discharge thereof, the mortgagor attorned tenant to the mortgagee, at a quarterly rent, to be recoverable by distress and sale, or action, with a power of immediate entry and sale for the mortgagee, upon default of payment of the mortgage money; it was held there was no need of a notice to quit after default (x). But in *Cloves v. Hughes*, where the mortgage deed provided that the mortgagor, in event of default, should immediately, or at any time after such default, hold the mortgaged premises as yearly tenant to the mortgagees from the date of the deed, and that they should have the same remedies for recovering the rent as if it had been reserved upon a common lease, it was held that notice of an intention to treat the mortgagor as tenant was a condition precedent to distress (y). A mortgage deed executed by the mortgagor only contained a clause whereby, "for the more effectual recovery of the interest, the mortgagor did attorn and become tenant to the mortgagee of the premises at the yearly rent of 40*l.* to be paid half-yearly, so long as the principal sum remained secured;" the mortgagor continued in possession, and made several of these half-yearly payments; it was held, that the subsequent occupation, connected with the covenant, created the relation of landlord and tenant, and that the mortgagee might distrain for a half-yearly payment in arrear (z).

Notice of Intention to treat Mortgagor as Tenant.
Cloves v. Hughes.

Effect of Covenant permitting Mortgagor to take Rents, &c.

If a mortgagee covenant that the mortgagor shall take the profits till default in payment, the mortgagor becomes tenant at will (a). If a mortgage be made with a proviso that the mortgagee, his heirs and assigns, "shall not intermeddle with the actual possession of the premises or perception of the rents," until default of payment: the

(t) *Doe d. Wilkinson v. Goodier*, 10 Q. B. 957; *Metropolitan Counties Assurance Co. v. Brown*, 4 H. & N. 428.

(u) *Doe d. Garrod v. Olley*, 12 A. & E. 481; *Metropolitan Counties Assurance Co. v. Brown*, *supra*.

(x) *Doe d. Snell v. Tom*, 4 Q. B. 615; *Metropolitan Counties Assurance Co. v. Brown*, *supra*.

(y) *Cloves v. Hughes*, L. R., 5 Ex. 160; 39 L. J., Ex. 62; 22 L. T. 103; 18 W. R. 459.

(z) *West v. Fritche*, 3 Exch. 216; *Morton v. Woods*, L. R., 3 Q. B. 668; 37 L. J., Q. B. 242.

(a) Com. Dig. *Estates* (H. 1); *Archer v. Dalby*, Cro. Jac. 660.

mortgagor is only a tenant on sufferance (*b*). A mortgage indenture, after a power of sale on non-payment of the mortgage-money, contained a covenant by the mortgagee that there should be no sale or notice of a sale, nor means taken for obtaining possession until a year after notice thereof to the mortgagor: the mortgagee also covenanted for quiet enjoyment by the mortgagor or his tenant at will, on payment of a yearly rent; it was held, that under this deed the mortgagor was tenant at will only to the mortgagee, and that no tenancy from year to year was thereby created (*c*). An estate was mortgaged in fee, with the usual proviso for redemption, on payment in June, 1834, and it was also provided that the mortgagee should not call in the principal money until December, 1840, if the interest were regularly paid; and there was a covenant that the mortgagor should hold, occupy and enjoy the estate until default in payment of the principal or interest as aforesaid; it was held that this operated as a lease to the mortgagee until December, 1840 (*d*). A tenant for years of a house demised it by way of mortgage to hold from thenceforth, subject to the proviso after named; and he further sold and transferred the fixtures and some chattels to the mortgagee, also subject to the proviso after named; the deed contained a proviso for reconveyance on payment of the money on a certain day, and also a proviso that, on non-payment, the mortgagee might enter upon and receive the rents, and sell the premises, and also the fixtures and chattels; it was held that the mortgagee's right to take possession did not attach until the day on which the money was to be paid, and that therefore he could not maintain an action of trespass previously (*e*). But where a person demised premises, to hold from thenceforth for a term, provided that if the lessor paid a certain sum and interest a year after, then that the demise should be void; provided also, that upon default the lessee might sell; and there was a *covenant* by the lessor for payment of principal and interest, and that at any time after default it should be lawful for the lessee to enter, and from thenceforth to hold the premises and take the rents; it was held, that the lessee might take possession immediately and before default (*f*).

CH. VI. SEC. 6.
Mortgagor and Mortgagee.

Construction
of Mortgage
Deeds.

A mortgagee in possession is not obliged to lay out money any further than to keep the estate in necessary repair; but on an action for redemption he may be made to account for all loss and damage occasioned by his gross negligence in respect of bad cultivation and non-repair (*g*). He will also be charged, not only for all rents re-

Liabilities of
a Mortgagee
in Possession.

(*b*) *Powseley v. Blackman*, Cro. Jac. 659; Com. Dig. tit. *Estates* (H. 2).

(*c*) *Doe d. Dixie v. Davies*, 7 Exch. 89.

(*d*) *Wilkinson v. Hall*, 3 Bing. N. C. 508; *Doe d. Lyster v. Goldwin*, 2 Q. B. 143; *Doe d. Roylance v. Lightfoot*, 8 M. &

W. 553; *Doe d. Parsley v. Day*, 2 Q. B. 147.

(*e*) *Wheeler v. Montefiore*, 2 Q. B. 133; but see *Doe d. Parsley v. Day*, 2 Q. B. 147.

(*f*) *Rogers v. Grazebrook*, 8 Q. B. 895.

(*g*) *Wragg v. Denham*, 2 Y. & C. 117; Fisher, ss. 901—909.

CH. VI. SEC. 6. *Mortgagor and Mortgagee.* ceived, but also for all rents which but for his wilful neglect or default he might have received (*h*). A mortgagee in possession has been held not chargeable as for wilful default in declining to defend an action of replevin brought by the owner of goods distrained on the premises by such mortgagee (*i*). If the estate lie at such a distance that the mortgagee *must* employ a bailiff to collect the rents, what he pays to the bailiff is allowed; but not where he does or may receive the rents himself. It is the settled practice of the Court not to take an account against a mortgagee in possession with annual rests, where, at the time of his entering into possession, there is an arrear of interest (*k*). A mortgagee of leaseholds may take possession, even where there is no arrear of interest due, under circumstances which may not render him liable to account with annual rests; as where he enters in order to prevent a forfeiture for non-payment of ground-rent or for non-insurance (*l*).

SECT. 7.—*Master and Servant.*

Servant occupying separate House does not become Tenant.

An agent or servant who is allowed to occupy premises belonging to his principal for the more convenient performance of his duties, acquires no *estate* therein, although he be also allowed to use the premises for carrying on therein an independent business of his own (*m*); nor does any tenancy arise in the common case of a servant occupying a cottage with less wages on that account (*n*). Where a person was employed by the Highgate Archway Company to collect toll for them, and lived in the toll-house, one shilling per week being deducted from his wages by way of rent; and the company having ceased to collect toll at the particular spot, he was dismissed from their employ, and received a notice to leave the house, which he promised to do: it was held that these circumstances did not constitute him a tenant of the company (*o*). Where a servant occupies premises of his master, without paying rent, as part remuneration for his services, in order to ascertain whether the servant is a "substantial householder" within the 43 Eliz. c. 2, s. 1, so as to be eligible to the office of overseer of the poor, the question is whether the occupation is subservient and necessary to the service; if it is, the occupation is

(*h*) Fisher, ss. 873, 894, 895; *Brandon v. Brandon*, 10 W. R. 287; *Parkinson v. Hanbury*, L. R., 2 H. L. Cas. 1; 36 L. J., Ch. 292; 15 W. R. 642.

(*i*) *Cocks v. Gray*, 1 Giff. 77.

(*k*) *Nelson v. Booth*, 3 De G. & J. 119; 27 L. J., Ch. 782.

(*l*) *Patch v. Wild*, 30 Beav. 99.

(*m*) *White v. Bayley*, 10 C. B., N. S. 227.

(*n*) *Bertie v. Beaumont*, 16 East, 33;

Re v. Stock, 2 Taunt. 339; *Mayhew v. Suttle*, 4 E. & B. 347, 357; 23 L. J., Q. B. 372; 24 Id. 54; *R. v. Shipdan*, 3 D. & R. 384; *R. v. Bardwell*, 2 B. & C. 161; *R. v. Kelstern*, 6 M. & S. 136; *R. v. Cheshunt*, 1 B. & A. 473; *R. v. Snape*, 6 A. & E. 278; *Allen v. England*, 3 F. & F. 49.

(*o*) *Hunt v. Colson*, 3 Moo. & Sc. 790; *Mayhew v. Suttle*, *supra*.

that of the master; if it is not, the occupation is that of a tenant, and the servant is a "householder" (*p*).

CH. VI. SEC. 7.
Master and
Servant.
Civil Ser-
vants.

Officers or servants of government, who are *permitted* to occupy houses belonging to government as part remuneration for their services, may be considered as occupying as tenants within the Reform Act (2 Will. 4, c. 45), s. 27, but not if they are *required* to occupy them with a view to the more efficient performance of their duties (*q*). Where a servant, on being served with an ejectment, appeared and defended the action, it was held, that he had thereby made himself personally liable as a tenant in possession (*r*). One of two partners, joint tenants of a house where their joint business is carried on, has a right to authorize a joint weekly servant to remain in the house, though the other partner has regularly given him a week's notice to leave the service (*s*).

SECT. 8.—*Vendor and Vendee.*

An occupation under an agreement for the purchase of land, if a good title can be made, may create a tenancy (*t*), which must be determined by a demand of possession or otherwise before an ejectment can be supported (*u*). Where a person was let into possession under an agreement of purchase, he paying interest on the purchase-money until completion of the purchase, which was to be in three months; and the purchase not being then completed, he continued in possession: it was held, that there was only a tenancy at will, which might be determined without a notice to quit (*x*). So where A., having agreed to buy lands of B., had paid part of the purchase-money, and was let into possession, it was held, that this was a mere tenancy at will, which might be determined by a demand of possession: after which an ejectment might be maintained (*y*), but not an action for use and occupation (*z*). Where the vendee of an estate sold by auction has been suffered to enter upon and hold the premises while the title was under investigation, and the contract has after-

Occupation
by Vendee
under Con-
tract for Sale
of Freehold.

(*p*) *Reg. v. Spurrell*, L. R., 1 Q. B. 72; 25 L. J., M. C. 71.

(*q*) *Hughes v. Chatham (Overseers)*, 5 M. & G. 54; *Dobson v. Jones*, Id. 112; *Clark v. Bury St. Edmunds*, 1 C. B., N. S. 23.

(*r*) *Doe d. James v. Stanton*, 2 B. & A. 371; 1 Chit. R. 119; *Doe d. Atkins v. Roe*, 2 Chit. R. 179; *Doe d. Cuff v. Stradling*, 2 Stark. 187; Cole Ejec. 84, 124.

(*s*) *Donaldson v. Williams*, 1 Cr. & M. 345.

(*t*) *Doe d. Newby v. Jackson*, 1 B. & C. 448; *Kirtland v. Pounsett*, 2 Taunt. 145; *Hearne v. Tomlins, Peake*, 192; *Hope v.*

Nooth, 1 B. & Ad. 498; *Doe d. Milburn v. Edgar*, 2 Bing. N. C. 498; *Winterbottom v. Ingham*, 7 Q. B. 611.

(*u*) *Right d. Lewis v. Beard*, 13 East, 210; *Doe d. Newby v. Jackson*, 1 B. & C. 448; *Doe d. Milburn v. Edgar*, 2 Bing. N. C. 498; *Doe d. Stanway v. Rock*, 4 M. & G. 30; *Doe d. Gray v. Stanton*, 1 M. & W. 700; Cole Ejec. 58.

(*x*) *Doe d. Tones v. Chamberlain*, 5 M. & W. 14; *Doe d. Lord v. Burton*, 16 Q. B. 807.

(*y*) *Doe d. Hiatt v. Miller*, 5 C. & P. 595; *Ball v. Cullimore*, 2 C., M. & R. 120.

(*z*) *In re Banks v. Rebbeck*, 2 Low. M. & P. 432.

CH. VI. SEC. 8.
Vendor and
Vendee.

wards been determined for want of title, the vendor cannot on these grounds only recover for use and occupation, although a jury find that the occupation has been beneficial (*a*). But where by the contract of sale he admits himself to be tenant from week to week to the vendor at 80*l.* per week, payable in advance or otherwise, such rent may be distrained for (*b*). And if the vendee retain possession after the contract of purchase has gone off, he will be liable for subsequent use and occupation (*c*).

Occupation
under Con-
tract for As-
signment of
Term.

An occupation under an agreement for assigning a lease, where it was agreed that the assignee should pay the lessee, until the completion of the assignment, at the rate of 100*l.* per year, was held to constitute the relation of landlord and tenant between the lessee and assignee (*d*); but where, in an agreement for the sale of leasehold premises, to be paid for by instalments, it was stipulated that, in default of payment of the instalments at specified times, the former instalments should be forfeited, and the vendor should not be compellable to convey, upon which the purchaser was let into possession, and made default; he was held to be from thenceforth a mere tenant on sufferance (*e*).

Occupation by
Vendor.

A continuance of occupation by a vendor after conveyance executed, without any agreement, will not raise an implied tenancy, nor render him liable to an action for use and occupation (*f*). But an express agreement that the purchaser shall receive "all rents and profits" from the day fixed for completion of purchase, entitles the purchaser to a fair occupation rent from the vendor until possession is given (*g*). And the same rule applies, although the delay in completion is the fault of neither party (*h*).

(*a*) *Winterbottom v. Ingham*, 7 Q. B. 611. The rents taken from sub-tenants, not recoverable under a claim for use and occupation (*Rumball v. Wright*, 1 C. & P. 589), will be recoverable as money paid to the use of the intending vendor. See also *Kirtland v. Pounsett*, 2 Taunt. 146.

(*b*) *Yeoman v. Ellis*, L. R., 2 C. P. 601; 36 L. J., C. P. 326.

(*c*) *Howard v. Shaw*, 8 M. & W. 118.

(*d*) *Saunders v. Musgrave*, 6 B. & C. 524; 2 C. & P. 294; *Anderson v. Midland R. Co.*, 3 E. & E. 614; 30 L. J., Q. B. 94. See

also *Seaton v. Booth*, 4 A. & E. 528.

(*e*) *Doe d. Moore v. Lawder*, 1 Stark. R. 308; *Doe d. Rogers v. Pullen*, 2 Bing. N. C. 749.

(*f*) *Tew v. Jones*, 13 M. & W. 12.

(*g*) *Metropolitan R. Co. v. Defries*, L. R., 2 Q. B. D. 387; 36 L. T. 494; 25 W. R. 841—C. A., affirming decision below, L. R., 2 Q. B. D. 189; 36 L. T. 150; 25 W. R. 271.

(*h*) *Sherwin v. Shakespeare*, 5 D. G., M. & G. 517; 23 L. J., Ch. 177.

CHAPTER VII.

OF SUBSTITUTION OF PARTIES TO THE CONTRACT OF TENANCY BY
ASSIGNMENTS, SUB-LEASE, BANKRUPTCY, MARRIAGE, AND DEATH.

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SECT. 1.—*Assignments generally.*

AN assignment is the transfer or conveyance of some pre-existing term or reversion, estate, right, title, or interest. The party assigning is called the assignor, and he to whom the assignment is made the assignee. The word “assigns” extends not only to the immediate assignee, but also to assignees ad infinitum (*a*). Every lessor may assign his reversion, and every lessee may assign his term, unless expressly restrained from so doing by some condition in his lease (*b*), or be a tenant at will (*c*), or on sufferance (*d*). “A contingent, an executory, and a future interest, and a possibility coupled with an interest, in any tenements or hereditaments, of any tenure, whether the object of the gift or limitation of such interest or possibility be or be not ascertained, also a right of entry, whether immediate or future, and whether vested or contingent, into or upon any tenements or hereditaments in England, of any tenure, may be disposed of by deed” (*e*). But a right of re-entry for a forfeiture cannot be so assigned (*f*).

What is an
Assignment.

Persons become assignees either by act of the party or by act of law: under the first head may be classed those who become so by an instrument of assignment; under the latter head may be stated those who have thrown upon them the interest in the premises—in

Different
Modes of
Assignment.

(*a*) *Spencer's case*, 5 Co. R. 16; *Bailey v. De Crespigny*, L. R., 4 Q. B. 180, 186.

(*b*) *Post*, Chap. XVII., Sect. 2.

(*c*) *Ante*, 211.

(*d*) *Ante*, 215.

(*e*) 8 & 9 Vict. c. 106, s. 6.

(*f*) *Hunt v. Bishop*, 8 Ex. 675; *ante*, 2.

CH. VII. s. 1. consequence of the property having been taken under writs of execution—by bankruptcy—by marriage—or by death. Each of those modes of becoming an assignee will be considered in this chapter.

Assignments generally.

Assignments must be by Deed.

Stat. Frauds, s. 3.

Assignments by act of the parties, whether of the reversion or the term, must be by deed.

The Statute of Frauds (*g*) enacts, “that no leases, estates or interests, either of freehold or terms of years, or any uncertain interest, not being copyhold or customary interest, of, in, to or out of any messuages, manors, lands, tenements or hereditaments, shall be assigned, granted or surrendered, unless it be by deed or note in writing, signed by the party so assigning, granting or surrendering the same, or their agents thereunto lawfully authorized by writing; or by act and operation of law.” By 8 & 9 Vict. c. 106, s. 3, “an assignment of a chattel interest, not being copyhold, in any tenements or hereditaments, shall be void at law unless made by deed.”

8 & 9 Vict. c. 106, s. 3.

Assignment to Self and other Person.

22 & 23 Vict. c. 35, s. 21.

By 22 & 23 Vict. c. 35, s. 21, “any person shall have power to assign personal property, now by law assignable, including chattels real, directly to himself and another person, or other persons or corporation, by the like means as he might assign the same to another.” Therefore, upon the appointment of a new trustee of leaseholds and personal estate, the continuing trustees may assign the trust property direct to themselves and the new trustees jointly, upon the trusts of the settlement; whereas previously an assignment and re-assignment were necessary to effect this object. A demise by a termor to another of the whole of the term, where it is the intention of the parties to create the relation of landlord and tenant, is, as between themselves, a lease and not an assignment (*h*). But this is an exception to the general rule (*i*).

SECT. 2.—*The Contract for Assignment.*

(a) *Generally.*

By virtue of the 4th section of the Statute of Frauds, the effect of which has been already considered (*k*), any contract to sell either a reversion or a term must be in writing.

Sale of Reversion.—Notice of Tenant's Interest.

Where a reversion is sold, the possession of a tenant is notice to a purchaser of the actual interest which a tenant may have (*l*). Where the purchaser at the date of the contract knew that the property was

(*g*) 29 Car. 2, c. 3, s. 4.
(*h*) *Pollock v. Stacy*, 9 Q. B. 1033;
Williams v. Haycraft, 1 E. & F. 1040;
Prees v. Corrie, 5 Bing. 24; *Baker v.*
Gosling, 1 Bing. N. C. 19; *In re Turner*,

11 Ir. Ch. R. 304.
(*i*) Post, Sect. 3.
(*k*) Ante, 79. And see *Dart V. & P.*
(ed. 5), A.D. 1876.
(*l*) *Daniels v. Davison*, 15 Ves. 249.

occupied by a tenant, and did not inquire as to the tenant's interest, it was held that he had notice of the lease, which it was subsequently discovered that the tenant had (*m*). In *Caballero v. Henty* (*n*), the conditions of sale of a public-house stated it was in the occupation of a tenant. A brewer, intending to use the public-house for the sale of his beer, agreed to buy it. He afterwards learnt that it was under lease to another brewer for a term of which eight years were unexpired. It was held that the purchaser was not bound to ascertain from the tenant the terms of his tenancy, and that the vendor could not enforce specific performance.

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Contract for Assignment.
Notice of Tenant's Interest.

In *Phillips v. Miller* (*o*), it was held that vendors were not bound to make good to purchasers certain sums paid by the purchasers to tenants for hay and straw according to market value (whereas by the custom of the country fodder value only was payable), in pursuance of special agreements by the vendors with the tenants not mentioned in the particulars of sale. This decision, however, proceeded principally on the ground that the agreements with the tenants were personal contracts not binding on the reversion (*p*). The vendors bona fide believed that it was unnecessary to mention the agreements in the particulars of sale.

Phillips v. Miller.

Where A., being possessed of a messuage and premises for the residue of a certain term of years, agreed with B. to relinquish possession to him and to suffer him to become tenant of the premises for the residue of the term, in consideration of B.'s paying a sum of money towards completing certain repairs of the premises, it was held that this was an agreement relating to the sale of an interest in land within the statute (*q*). A., being tenant under a parol agreement for a seven years' lease, agreed to give up the immediate possession thereof to B., in order that B. might enter thereon as tenant; in consideration whereof, and also as a compensation for certain improvements made by A., and for the value of certain articles left, B. agreed to pay A. 100%. A. accordingly relinquished and gave up possession of the premises to B., who was thereupon accepted as tenant from year to year, at a different rent from that formerly paid by A.: and B. afterwards, in part-performance of the agreement on his part, paid A. 51%. In an action to recover the balance of the 100%:—held, that the contract was within the statute, and consequently that the plaintiff was not entitled to recover (*r*); except,

Contract for Assignment of Term.

(*m*) *James v. Litchfield*, L. R., 9 Eq. 51.

(*n*) L. R., 9 Ch. 447; 43 L. J., Ch. 635; 30 L. T. 314; 22 W. R. 446.

(*o*) L. R., 10 C. P. 420; 44 L. J., C. P. 265; 32 L. T. 638, Exch. Ch., reversing decision below, L. R., 9 C. P. 201.

(*p*) See also *Roberts v. Tregaskis*, 38 L.

T. 176, where an agreement not to increase rent nor give notice to quit was held not to bind a purchaser of the landlord's interest.

(*q*) *Buttermere v. Hayes*, 5 M. & W. 456. See also *Leaf v. Tilton*, 10 M. & W. 393.

(*r*) *Kelly v. Webster*, 12 C. B. 282.

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Contract for
Assignment.

*Hodgson v.
Johnson.*

perhaps, for money found to be due on an account stated (s). So, in consideration that A., who was in the possession and occupation of premises wherein he carried on the business of a milkman, would yield up the possession and occupation of the said premises to B., and permit him thenceforth to occupy the same, and would assign over to B. all his property in the stock and plant and deliver the same to B., the latter promised to pay a certain sum:—held, that this was a contract for an interest in or concerning lands within the statute (t). In *Hodgson v. Johnson* it was agreed verbally that the plaintiff should take possession of a brickyard of which the defendant was tenant, and take the plant and bricks at a valuation, and that the defendant should pay up all rent due, and endeavour to induce the landlord to accept the plaintiff as tenant. The plaintiff took possession and gave the defendant a warrant of attorney for payment of the sum at which the bricks and plant were valued. A distress was afterwards put in upon the premises, and the plant and bricks sold for rent due from the defendant before the agreement, and the plaintiff was turned out of possession by the landlord. In an action for breach of the agreement to pay up the rent, it was held, that the contract taken in its entirety was a contract for the sale of an interest in lands within the statute, and therefore that the plaintiff could not sever and sue only upon that part which related to the payment of rent (u). A. and B. agreed orally that A. should pay 37% for the interest of B. in premises occupied by him as a slaughterhouse, and for the fixtures, B. to return 10% if A. were refused a licence to use the premises as a slaughterhouse. The premises and fixtures were transferred to A.; and B. received the 37%. Subsequently an action was brought to recover back the 10%, a licence to A. to use the premises as slaughterhouse having been refused: held, that the contract being executed as far as regarded the land, and the promise sued on relating wholly to money, the plaintiff might recover, though the contract was not in writing (v). An agreement respecting the transfer of an interest in land not in writing cannot be enforced by action to recover the consideration after the transfer has been executed, and nothing remains to be done but to pay the consideration money; but if after such transfer the defendant admits owing the stipulated price, the amount may be recovered upon an account stated (w).

Sales by
Auction.

The Statute of Frauds (29 Car. 2, c. 3), s. 4 (x), extends to sales by

(s) *Cocking v. Ward*, 1 C. B. 858; *Laycock v. Pickles*, 4 B. & S. 497; 33 L. J., Q. B. 43.

(t) *Smart v. Harding*, 15 C. B. 652.

(u) *Hodgson v. Johnson*, E., B. & E. 685; 5 Jur., N. S. 290. See, however, *Pulbrook v. Lauree*, L. R., 1 Q. B. D. 284;

and 88, ante.

(v) *Green v. Saddington*, 7 E. & B. 503.

(w) *Cocking v. Ward*, 1 C. B. 158; *Laycock v. Pickles*, 4 B. & S. 497; 33 L. J., Q. B. 43.

(x) Ante, 224.

auction (y). The day for the completion of the purchase of an interest in land inserted in a written contract cannot be waived by oral agreement, and another day substituted in its place (z). An auctioneer selling a lease is bound to state in the particulars or conditions of sale a notice given by the landlord of his intention to enter unless the premises are put in repair, although the vendee is aware of the ruinous state of the buildings, and it is alleged that the auctioneer was not apprised of the notice (a): and where leasehold premises are sold by auction, and the lease containing the usual covenant to repair is produced and read to the bidders, if any of the buildings demised and described in the lease have been pulled down before the sale, the purchaser is not bound to complete the purchase, and may recover back his deposit, although the building pulled down be not described in the particulars of sale (b). Where leasehold premises were sold by auction by the defendant to the plaintiff, under a condition that the defendant should make a good title, it was held no defence to an action for not making a good title, that the premises had been assigned by the plaintiff to the defendant by way of mortgage, and that a good title was made, except that the premises were out of repair, of which the plaintiff had full knowledge, and that the lessor had not re-entered as he was entitled to do (c). In the conditions of sale of the lease of a public-house it was described as "a free public-house," and the lease contained a covenant that the lessee and his assigns should take their beer from a particular brewer; though the lease was entirely read over by the auctioneer at the time of the sale, who said mistakenly that it was a free public-house, and that the covenant about the beer had been decided to be bad; it was ruled that a purchaser who heard the lease read over was not bound under these circumstances to complete the purchase, but was entitled to recover back the deposit (d). Where the particulars of sale of premises in Covent Garden stated, that under the lease "no offensive trade was to be carried on, and that the premises could not be let to a coffee-house keeper or working hatter," and the original lease when produced appeared to prohibit the business of a brewer, baker, sugar-baker, vintner, victualler, butcher, tripe-seller, poulterer, fishmonger, cheese-seller, fruiterer, herb-seller, coffee-house keeper, working hatter and many others, and the sale of coals, potatoes or any provisions, it was held, that there was such a material discrepancy between the particulars and the lease as to entitle a purchaser to rescind his

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Sales by Auction—*contd.*
 Particulars of Sale.

Misdescription.

(y) *Walker v. Constable*, 1 Bos. & P. 306;
Fairbrother v. Simmons, 5 B. & A. 33;
Kensworthy v. Schofield, 2 B. & C. 948.
 (z) *Stowell v. Robinson*, 3 Bing. N. C.
 928; *Moore v. Campbell*, 10 Exch. 323;
Noble v. Ward, L. R., 1 Ex. 117; 35 L. J.,

Ex. 81.

(a) *Stevens v. Adamson*, 2 Stark. 422.

(b) *Granger v. Worms*, 4 Camp. 83.

(c) *Barnett v. Wheeler*, 7 M. & W. 364;
Wilson v. Wilson, 14 C. B. 616.

(d) *Jones v. Edney*, 3 Camp. 285.

CH. VII. s. 2. contract (e). Where an original lessee of land subject to a covenant against certain obnoxious trades, with a proviso for re-entry for a breach of such covenant, granted under-leases of houses erected on the land, not containing a similar covenant and proviso, it was held, that a purchaser by auction of houses erected on part of this land, and of the improved ground-rents of the houses so under-let, might recover back his deposit-money from the auctioneer, the omission of the proviso in the under-leases not having been specified in the conditions or mentioned at the time of the sale (f). Where the particulars of sale by auction of several lots described one as subject to the same rights of way as were then enjoyed under existing leases of certain houses, one of which leases was to be seen; and a plan annexed showed one right of way to those houses over that lot, but not another, and it also showed another right of way over that lot to a second adjoining lot, and the same person bought these two lots by two biddings, but a single contract was entered into for the whole:—it was held, that he might rescind the contract as to both lots, and that it was not a case for the application of a compensation provision as to misdescription of the premises (g).

Where a public-house was sold with the victuallers' and other licences, the vendor not being at the time entitled to such licences, nor able to get them transferred to the purchaser in due time pursuant to his contract, it was held that the purchaser might rescind the contract and recover back his deposit (h).

Auctioneer
may not pay
Rent to avoid
Distress.

It may be here mentioned that an auctioneer who has sold goods has no authority to pay the landlord's rent, in order to avoid the goods being distrained (i).

(b) *Title of the Vendor.*

Common Law
Warranty of
Lessor's Title.

Prior to the Vendor and Purchaser Act, 1874, there was, in every contract for the sale of an *existing lease*, an implied undertaking by the seller (if the contrary were not expressed, as it usually was in practice) to make out the lessor's title to demise (k), and without showing such title, the seller could not maintain an action at law against the buyer for refusing to complete the purchase (l).

Warranty
dispensed
with by
V. & P. Act,
1874.

This warranty is now dispensed with by the Vendor and Purchaser Act, 1874 (37 & 38 Vict. c. 78), which by sect. 2, rule 1, enacts that "under a contract to assign a term of years, whether derived or to be derived out of a freehold or leasehold estate, the intended assign shall

(e) *Flight v. Booth*, 1 Bing. N. C. 370.
(f) *Waring v. Hoggart*, 1 Ry. & Moo. 39; but see *Hayward v. Purke*, 16 C. B. 295.

(g) *Dykes v. Blakes*, 4 Bing. N. C. 463.
(h) *Claydon v. Green*, L. R., 3 C. P. 511; 37 L. J., C. P. 226.

(i) *Sweeting*, app. v. *Turner*. resp., 41 L. J., Q. B. 58.

(k) *Hall v. Betty*, 4 M. & G. 410.

(l) *Souter v. Drake*, 5 B. & Ad. 992; *De Medina v. Norman*, 9 M. & W. 820; 2 Dowl., N. S. 239; *Laythorp v. Bryant*, 2 B. & C. 735.

not be entitled to call for the title to the freehold." It is to be observed that this rule only bars the purchaser's right to call for the title to the *freehold*, so that if an under-lease be sold, the title of any mesne landlord may still be called for; and further that the rule does not apply at all to a lease for lives (*m*).

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*Contract for
Assignment
(Title of
Vendor).*

Upon a contract for the sale of an agreement for a lease it is not an implied condition that the lessor has power to grant the lease (*n*). This rule was laid down before the Vendor and Purchaser Act, which affirms its principle, but does not expressly embody it.

Agreement
for Lease.

An agreement for the sale of *all B.'s interest* in a lease does not mean free from all under-leases by way of mortgage and other incumbrances then affecting the premises (*o*). When it was stipulated (before the Vendor and Purchaser Act) that the vendor should not be obliged to produce the lessor's title, the vendee might, notwithstanding, insist upon defects in the lessor's title, which were disclosed by the abstract delivered, or which he had discovered aliunde (*p*); but it was said to be otherwise where the purchaser has agreed to take the vendor's title "as he holds the same," without requiring the lessor's title (*q*). The Vendor and Purchaser Act appears to admit the objection of defects discovered in the lessor's title by the abstract or otherwise. If a person, who has contracted to purchase the lease of a house, subsequently discovers that it was originally leased jointly with another house, and that the lessor could enter for breach of covenants in respect of either house, he seems clearly not bound to complete the purchase (*r*).

Construction
of Contracts
of Sale.

If a contract for the purchase of a lease state that it is made "subject to the approval of the title by the purchaser's solicitor," then, in the absence of mala fides on the part of the purchaser or his solicitor, the vendor cannot enforce specific performance of the contract if the purchaser's solicitor disapprove of the title. This rule was laid down by Fry, J., in *Hudson v. Buck* (*s*), is stated in *Hussey v. Horne-Payne* (*t*) in the Court of Appeal to the same effect, and although questioned by Lord Cairns in the House of Lords (*u*) is still law.

"Title to be
approved by
Solicitor."
*Hussey v.
Horne-Payne.*

(*m*) See Dart V. & P. vol. i. p. 290.

(*n*) *Kintrea v. Preston*, 1 H. & N. 357; 25 L. J., Ex. 287.

(*o*) *Phelps v. Prothero*, 16 C. B. 370.

(*p*) *Shepherd v. Keatley*, 1 C., M. & R. 117; *Wheeler v. Wright*, 7 M. & W. 359; *Barnett v. Wheeler*, Id. 364; *Sellick v. Trevor*, 11 M. & W. 722; *Darlington v. Hamilton, Kay*, 550; *Warren v. Richardson*, 1 Younge, 1; *Harnett v. Yielding*, 2 Sch. & Lef. 549.

(*q*) *Spratt v. Jeffery*, 10 B. & C. 249; *Hayward v. Parke*, 16 C. B. 295; *Hume v. Pocock*, 14 W. R. 191; *Mills v. Tweed*, L. R., 1 C. P. 39. See *Waddell v. Wolfe*,

L. R., 9 Q. B. 515.

(*r*) *Blake v. Phim*, 3 C. B. 976; *Madeley v. Booth*, 2 De Gex & Sm. 718; *Darlington v. Hamilton, Kay*, 550; *Penniall v. Harborne*, 11 Q. B. 368.

(*s*) L. R., 7 Ch. D. 683; 47 L. J., Ch. 247; 38 L. T. 55; 26 W. R. 190.

(*t*) L. R., 8 Ch. D. 670; 47 L. J., Ch. 751; 38 L. T. 543; 26 W. R. 703—C. A.

(*u*) L. R., 4 App. Cas. 411; 48 L. J., Ch. 846; 41 L. T. 1; 27 W. R. 585. The House of Lords affirmed the judgment of the Court of Appeal, but on different grounds.

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*Contract for
Assignment
(Title of
Vendor).*

Objection on
Ground of
Forfeiture.

A purchaser of a leasehold may object to the vendor's title, on the ground that he has incurred a forfeiture by omitting for the space of a month to pay the annual premium of insurance pursuant to his covenant, although it does not appear that the lessor has taken advantage of the forfeiture (*x*). Under a contract for the purchase of the residue of an old term, a purchaser is not bound to accept a similar new lease: for the former differs in value from the latter, the residue of an old term being in certain respects more advantageous (*y*); but a purchaser cannot refuse to perform an agreement for the sale of "the unexpired term of eight years' lease and goodwill," on the ground that only seven years and seven months of the term remained (*z*).

Lessor's
Licence to
assign.

Premium for
Licence.

It is incumbent on the vendor of a lease which contains a restriction against alienation, to prove that he has obtained the lessor's consent to the assignment (*a*); and it is also incumbent on him, and not on the purchaser, to procure the lessor's licence for the assignment (*b*). If necessary, he must pay any reasonable premium and extra rent required for such consent (*c*). This was held in a case where the lessee held at a rent of 36*l.* for a term of 35 years, and the lessor refused the licence for a sub-lease for 21 years at a rent of 65*l.*, except upon payment of an increased rent of 6*l.* and a premium of 50*l.* Stuart, V.-C., decreed specific performance, and, in the event of the lessee being unable to grant a proper sub-lease, an inquiry as to damages (*e*). The failure to procure from the lessor a licence to assign, or to register previous assignments, before the day on which it is agreed to assign and give possession of leasehold premises, is no breach of the agreement (*d*).

Proof of Dis-
charge of an
Incumbrance.

A purchaser is not compellable to accept a title to premises formerly subject to an incumbrance, the discharge of which is shown only by presumption: thus where a leasehold was sold, subject to a ground rent, which was said to be apportioned out of a larger rent, but the apportionment was not evidenced by an existing deed, but only by the acceptance of a mesne landlord, and presumption; it was held that the purchaser was not bound to accept the title (*e*).

(*x*) *Wilson v. Wilson*, 14 C. B. 616.

(*y*) *Mason v. Corder*, 7 Taunt. 9.

(*z*) *Belcorth v. Hasell*, 4 Camp. 140.

(*a*) *Mason v. Corder*, 7 Taunt. 9; *Winter v. Dumergue*, 14 W. R. 699.

(*b*) *Lloyd v. Crisp*, 5 Taunt. 249; and see *Birmingham v. Sheridan*, 33 L. J., Ch. 671; 12 W. R. 658; *Forrer v. Nash*, 35 Beav. 167; 14 W. R. 8; *Wallis v. Littell*, 11 C. B., N. S. 369; 31 L. J., C.

P. 100; *Barton v. Banks*, 2 F. & F. 213; *Davis v. Nisbett*, 10 C. B., N. S. 752; 31 L. J., C. P. 6.

(*c*) *Hilton v. Tipper*, 18 L. T. 626; 16 W. R. 888.

(*d*) *Stowell v. Robinson*, 3 Bing. N. C. 928. And see *Wrighton v. Newton*, 2 C., M. & R. 124.

(*e*) *Barnwell v. Harris*, 1 Taunt. 430.

(c) *Rights and Liabilities as to Title Deeds.*

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Contract for
Assignment.

It is an established principle that whoever is entitled to the land has also a right to all the title-deeds affecting it (*f*); and he may maintain an action of detinue against any person who withholds them from him after demand made (*g*); or an action of trover (*h*); consequently the party entitled to the term is entitled to the lease. A solicitor's lien on a lease will not prevent the lessee from assigning his estate (*i*).

Right to Title
Deeds goes
with Right
to Land.

Lien on Lease.

After the expiration or determination of a lease the lessor is not entitled to possession of it as against the lessee, nor can he maintain trover for it (*k*).

Custody of
expired Lease.

(d) *Value of Leaseholds, Reversions and Annuities.*

In order to show the value of leasehold estates, and to enable those persons who intend either to purchase or sell to form their judgment, the following tables have been extracted from a very accurate and useful work (*l*) upon the subject. The first table shows the value of leases, estates or annuities for terms of years certain, in number of years' purchase of the *clear* annual rent, at the several rates of 3, 4, 5, 6, 7, 8, 9 and 10 per cent. interest, which the purchaser may thereby make of his money. The clear annual rent must in all cases be ascertained, by deducting from the gross rent of the estate, or value of the annuity, the ground rent, all taxes, and other annual charges, which would fall upon the purchaser.

Mode of
Valuation of
Property.

(*f*) *Harrington v. Price*, 3 B. & Ad. 170; *Hooper v. Ramsbottom*, 6 Taunt. 12.

(*g*) *Lightfoot v. Keane*, 1 M. & W. 745; *Roberts v. Showler*, 13 M. & W. 609; 2 D. & L. 687; *Slater v. Dangerfield*, 15 M. & W. 263; *Goode v. Burton*, 1 Exch. 189; *Newton v. Beck*, 3 H. & N. 220.

(*h*) *Harrington v. Price*, 3 B. & Ad. 173; *Hooper v. Ramsbottom*, 6 Taunt. 12; *Davies v. Vernon*, 6 Q. B. 443.

(*i*) *Odell v. Wake*, 3 Camp. 394.

(*k*) *Hall v. Ball*, 3 M. & G. 242; *El-*

worthy v. Sanford, 3 H. & C. 330; 34 L. J., Ex. 42.

(*l*) Tables for the Purchasing of Estates, &c., by William Inwood, Architect and Surveyor (1845). To arrive at as near an approximation as possible to the true value, by the use of vulgar fractions only, without decimals, the algebraical signs + and - have been used; the sign + signifying that the value is a little more than that stated, and the sign - that it is a little less.

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Table of Value
of Leaseholds,
&c.

TABLE

VALUE OF LEASES, ESTATES OR ANNUITIES,

FOR A NUMBER OF YEARS CERTAIN,

TO MAKE THE FOLLOWING RATES PER CENT. (*m*).

Years.	Years' Purch. at 3 per cent.	Years' Purch. at 4 per cent.	Years' Purch. at 5 per cent.	Years' Purch. at 6 per cent.	Years' Purch. at 7 per cent.	Years' Purch. at 8 per cent.	Years' Purch. at 9 per cent.	Years' Purch. at 10 per cent.
$\frac{1}{2}$	$\frac{1}{2}$ —	$\frac{1}{2}$ —	$\frac{1}{2}$ —	$\frac{1}{2}$ —	$\frac{1}{2}$ —	$\frac{1}{2}$ —	$\frac{1}{2}$ —	$\frac{1}{2}$ —
1	1—	1—	1—	1—	1—	1—	1—	1—
2	2—	2—	$1\frac{1}{2}+$	$1\frac{1}{2}+$	$1\frac{1}{2}+$	$1\frac{1}{2}+$	$1\frac{1}{2}+$	$1\frac{1}{2}$ —
3	$2\frac{3}{4}+$	$2\frac{3}{4}+$	$2\frac{1}{2}$ —	$2\frac{1}{2}$ —	$2\frac{1}{2}+$	$2\frac{1}{2}+$	$2\frac{1}{2}+$	$2\frac{1}{2}$ —
4	$3\frac{3}{4}$ —	$3\frac{3}{4}$ —	$3\frac{1}{2}+$	$3\frac{1}{2}$ —	$3\frac{1}{2}$ —	$3\frac{1}{2}+$	$3\frac{1}{4}$ —	$3\frac{1}{4}$ —
5	$4\frac{1}{2}+$	$4\frac{1}{2}$ —	$4\frac{1}{4}+$	$4\frac{1}{4}$ —	4+	4—	4—	$3\frac{3}{4}+$
6	$5\frac{1}{2}$ —	$5\frac{1}{2}$ —	5+	5—	$4\frac{3}{4}+$	$4\frac{1}{2}+$	$4\frac{1}{2}+$	$4\frac{1}{4}+$
7	6—	6+	$5\frac{3}{4}+$	$5\frac{1}{2}+$	$5\frac{1}{2}$ —	$5\frac{1}{2}$ —	5+	$4\frac{3}{4}+$
8	7+	$6\frac{3}{4}$ —	6—	$6\frac{1}{2}$ —	6—	$5\frac{3}{4}$ —	$5\frac{1}{2}+$	$5\frac{1}{4}+$
9	$7\frac{3}{4}+$	$7\frac{1}{2}$ —	7+	$6\frac{3}{4}+$	$6\frac{1}{2}+$	$6\frac{1}{4}$ —	6—	$5\frac{3}{4}+$
10	$8\frac{1}{2}+$	8+	$7\frac{3}{4}$ —	$7\frac{1}{4}+$	7+	$6\frac{3}{4}$ —	$6\frac{1}{2}$ —	$6\frac{1}{4}$ —
11	$9\frac{1}{4}+$	$8\frac{3}{4}+$	8—	8—	$7\frac{1}{2}$ —	$7\frac{1}{4}$ —	$6\frac{3}{4}+$	$6\frac{1}{2}$ —
12	10—	$9\frac{1}{2}$ —	$8\frac{3}{4}+$	$8\frac{1}{2}$ —	8—	$7\frac{1}{2}$ —	$7\frac{1}{4}$ —	$6\frac{3}{4}+$
13	$10\frac{3}{4}$ —	10—	$9\frac{1}{2}$ —	$8\frac{3}{4}+$	$8\frac{1}{4}$ —	8—	$7\frac{1}{2}$ —	7+
14*	$11\frac{1}{4}+$	$10\frac{3}{4}+$	10—	$9\frac{1}{4}+$	$8\frac{3}{4}$ —	$8\frac{1}{4}$ —	$7\frac{3}{4}+$	$7\frac{1}{2}+$
15	12—	11+	$10\frac{3}{4}$ —	$9\frac{3}{4}$ —	9+	$8\frac{3}{4}+$	8+	$7\frac{3}{4}+$
16	$12\frac{1}{2}+$	$11\frac{1}{4}$ —	$10\frac{3}{4}+$	10+	$9\frac{1}{2}$ —	$8\frac{3}{4}+$	$8\frac{1}{4}+$	$7\frac{3}{4}+$
17	$13\frac{1}{2}$ —	$12\frac{1}{4}$ —	$11\frac{1}{4}+$	$10\frac{3}{4}$ —	$9\frac{3}{4}+$	9+	$8\frac{3}{4}+$	8+
18	$13\frac{3}{4}+$	$12\frac{3}{4}$ —	$11\frac{1}{4}$ —	$10\frac{3}{4}+$	10+	$9\frac{1}{4}+$	$8\frac{3}{4}+$	$8\frac{1}{4}$ —
19	$14\frac{1}{4}+$	$13\frac{1}{4}$ —	12+	$11\frac{1}{4}$ —	$10\frac{1}{4}+$	$9\frac{1}{4}+$	9—	$8\frac{1}{4}+$
20	15—	$13\frac{3}{4}+$	$12\frac{1}{2}$ —	$11\frac{1}{2}$ —	$10\frac{1}{2}+$	$9\frac{3}{4}+$	$9\frac{1}{4}$ —	$8\frac{3}{4}+$
25	$17\frac{1}{2}$ —	$15\frac{1}{2}+$	14+	$12\frac{3}{4}+$	$11\frac{3}{4}$ —	$10\frac{3}{4}$ —	$9\frac{3}{4}$ —	9+
30	$19\frac{1}{2}+$	$17\frac{1}{4}+$	$15\frac{1}{2}+$	$13\frac{3}{4}+$	$12\frac{1}{2}$ —	$11\frac{1}{4}+$	$10\frac{1}{4}+$	$9\frac{1}{2}$ —
35	$21\frac{1}{2}$ —	$18\frac{3}{4}$ —	$16\frac{1}{4}+$	$14\frac{1}{2}$ —	13—	$11\frac{3}{4}$ —	$10\frac{3}{4}+$	$9\frac{3}{4}$ —
40	23+	$19\frac{3}{4}+$	$17\frac{1}{4}$ —	15+	$13\frac{1}{4}+$	12—	$10\frac{3}{4}+$	$9\frac{3}{4}+$
45	$24\frac{1}{2}+$	$20\frac{3}{4}$ —	$17\frac{3}{4}+$	$15\frac{1}{2}$ —	$13\frac{1}{2}+$	12+	11—	$9\frac{3}{4}+$
50	$25\frac{1}{4}$ —	$21\frac{3}{4}$ —	$18\frac{1}{4}+$	$15\frac{3}{4}+$	$13\frac{3}{4}+$	$12\frac{1}{4}$ —	11—	10—
60	$27\frac{3}{4}$ —	$22\frac{3}{4}+$	19—	$16\frac{1}{4}$ —	14+	$12\frac{3}{4}$ —	11+	10—
70	29+	$23\frac{1}{2}$ —	$19\frac{1}{4}+$	$16\frac{1}{2}$ —	$14\frac{1}{2}$ —	$12\frac{3}{4}$ —	11+	10—
80	$30\frac{1}{4}$ —	24—	$19\frac{3}{4}+$	$16\frac{1}{2}+$	$14\frac{1}{4}$ —	$12\frac{3}{4}$ —	11+	10—
90	31+	$24\frac{1}{4}+$	$19\frac{3}{4}+$	$16\frac{1}{2}+$	$14\frac{1}{4}+$	$12\frac{3}{4}$ —	11+	10—
100	$31\frac{1}{2}+$	$24\frac{1}{4}+$	$19\frac{3}{4}+$	$16\frac{1}{2}+$	$14\frac{1}{4}+$	$12\frac{3}{4}$ —	11+	10
Perpetual	$33\frac{1}{2}+$	25	20	$16\frac{2}{3}$ —	$14\frac{1}{3}+$	$12\frac{2}{3}$	11+	10

* EXAMPLE.—A lease or annuity for 14 years, to make 5 per cent., and to get back the principal, is worth a little less than 10 years' purchase of the clear annual rent; at 3 per cent., a little more than $11\frac{1}{4}$ years' purchase; at 8 per cent., a little less than $8\frac{1}{4}$ years' purchase; and so on.

(*m*) Inwood, Table 1.

TABLE

CH. VII, s. 2.
Table of Value
of Reversions.

THE PRESENT VALUE OF REVERSIONS

IN YEARS' PURCHASE (*n*).

The following Table shows the present value of a reversion in years' purchase of the *clear* annual rent, after a given term not exceeding 60 years, at 3, 4, 5, 6, 7, 8, 9 and 10 per cent. interest.

After these Years.	Years' Purch. at 3 per cent.	Years' Purch. at 4 per cent.	Years' Purch. at 5 per cent.	Years' Purch. at 6 per cent.	Years' Purch. at 7 per cent.	Years' Purch. at 8 per cent.	Years' Purch. at 9 per cent.	Years' Purch. at 10 per cent.
1	32½+	24+	19+	15¾—	13½+	11½+	10½—	9+
2	31½—	23+	18½—	14¾+	12½—	10¾—	9½+	8½+
3	30½+	22½—	17½+	14—	11¾+	10—	8½+	7½+
4	29½+	21½+	16½—	13½—	10¾+	9½—	7½+	6½+
5	28¾+	20½+	15¾—	12½—	10½—	8½+	7½—	6½—
6	28—	19¾+	15—	11¾—	9½+	7½+	6½—	5½—
7	27+	19—	14½—	11+	9—	7½+	6+	5½—
8	26½+	18½+	13½+	10½—	8½+	6½+	5½+	4¾—
9	25½+	17½+	13—	9¾+	7¾+	6½+	5+	4½—
10	24¾+	17—	12½+	9½+	7½+	5¾+	4¾—	3¾+
11	24+	16½—	11¾—	8¾+	6¾+	5½+	4½+	3½+
12	23½—	15¾+	11¼—	8¼+	6¼+	5—	4—	3½—
13	22¾+	15+	10½+	7¾+	6—	4½+	3½+	3—
14*	22+	14¾—	10+	7½+	5¾+	4½+	3½+	2¾—
15	21½—	14—	9¾+	7—	5¼—	4—	3+	2¾—
16	20¾+	13¾+	9½—	6¾+	4¾+	3½—	2¾+	2½—
17	20½—	12¾+	8¾—	6¼—	4¾+	3½—	2½+	2—
18	19¾+	12¼+	8¼+	5¾+	4¼—	3½—	2¼+	1¾+
19	19—	11¾+	8—	5¾+	4—	3—	2¼—	1¾—
20	18¾—	11½—	7¾+	5¼—	3¾—	2¾—	2—	1¾—
25	16—	9¾—	6—	3¾+	2¾—	1¾+	1½+	1—
30	13¾—	7¾—	4¾—	3—	2—	1½—	¾+	½+
35	11¾+	6½+	3¾—	2¼—	1½+	¾+	½+	¾+
40	10½—	5½—	2¾+	1½+	1—	¾+	¾+	¾—
45	8¾+	4½+	2¼—	1¼—	¾—	¾—	¾—	¾—
50	7¾+	3¾+	1¾—	1—	¾—	¾+	¾+	¾+
55	6¾+	3—	1¼+	¾—	¾+	¾+	¾—	¾+
60	5¾—	2¾—	1+	¾+	¾—	¾	¾	¾

* EXAMPLE.—A reversion of an estate after a 14 years' term, is worth in present money, at 5 per cent., a little more than 10 years' purchase of the clear annual rent; at 3 per cent., a little more than 22 years' purchase; at 8 per cent., a little more than 4½ years' purchase; and so on.

CH. VII. S. 2.

*Table of Value
of Lifehold,
&c. Estates.*

TABLE

OF

THE COMPARATIVE VALUE

OF

LIFEHOLD AND LEASEHOLD ESTATES (c).

The following Table will show the relative value, at 5 per cent. interest, of estates held for a term of life, or for a term of years certain.

Age.	Equal to a Leasehold Estate for a Term certain.			
	One Life.	Two joint Lives.	Longest of Two Lives.	Longest of Three Lives.
	Years.	Years.	Years.	Years.
10	29	21	43	51
20	25	17	37	46
30*	21	15	33	39
40	18	12	27	32
50	15	10	22	26
60	11	7	16	19
70	7	4	11	13

* EXAMPLE.—An estate held on a single life, aged 30, is equal in value to a leasehold estate for a term certain of 21 years, at 5 per cent.: one on two joint lives, aged 30, to a term certain of 15 years: one on the longest of two lives, aged 30, to a term certain of 33 years: and one held on the longest of three lives, aged 30, to a term certain of 39 years.

(c) Inwood, Table 28.

CH. VII. s. 3.
*Assignment of
Reversion.*SECT. 3.—*Assignment of Reversion.*

A lessor may by deed assign his reversion. At common law such an assignment would only have given the assignee a right to the rent reserved, to distrain for it, and to sue for breaches of covenants in law, but not for breaches of express covenants entered into by the lessee with the lessor (*l*). To remedy this, the statute 32 Hen. 8, c. 34, enacted that all grantees of reversions should enjoy all the advantages, benefits and remedies by entry for non-payment of rent, or for doing of waste or other forfeiture (*m*), or by action only for non-performance of conditions, covenants or agreements, contained or expressed in leases, which the lessors themselves had or enjoyed.

Right of
Assignee of
Reversion to
sue for Breach
of Covenant.

32 Hen. 8,
c. 34.

This statute does not apply where the demise is not by deed (*n*). If the demise be otherwise than by deed, the lessor, notwithstanding assignment of the reversion, retains his rights of action (*o*).

Lease must
be by Deed.

To enable the assignee of a reversioner to sue on the covenants in a lease, he must be seised of the same reversion to which the covenants were originally annexed; therefore, where there was a lease for years, under which the tenant entered, but which was never executed by the lessor, who died and devised the property, it was held, that the devisee could not sue as assignee of the reversion for breaches of covenants in the lease (*p*). A lease was made by A. and B. his wife, who were seised of an undivided moiety in right of the wife, and also by C., who was seised of the other undivided moiety, and it contained a covenant by the lessee, with A. and C. only, to repair; semble, that this was not a covenant running with the land on which the assignee of the reversion could sue (*q*). The assignee of a rent reserved by deed (without being an assignee of the reversion, if any), may maintain an action for the rent which becomes due after the assignment (*r*).

Reversion
must be the
same.

The surrenderee of a copyhold reversion may bring covenant against the lessee within the equity of the statute 32 Hen. 8, c. 34; for it is a remedial law, and no prejudice can arise to the lord, notwithstanding the lessee had assigned the term before the surrender (*s*). If a mortgagor and mortgagee of a term make an under-lease in which

Surrenderee
of Copyhold,
Mortgagor,
&c.

(*l*) *Martyn v. Williams*, 1 H. & N. 817, 826; 26 L. J., Ex. 117.

(*m*) *Bennett v. Herring*, 3 C. B., N. S. 370.

(*n*) *Standen v. Christmas*, 10 Q. B. 135; *Elliott v. Johnson*, L. R., 2 Q. B. 120; 36 L. J., Q. B. 41; 8 B. & S. 38.

(*o*) *Bickford v. Parson*, 5 C. B. 920.

(*p*) *Cardwell v. Lucas*, 2 M. & W. 111; *Cooch v. Goodman*, 2 Q. B. 580.

(*q*) *Wootton v. Steffenoni*, 12 M. & W. 129; *Thompson v. Hakerill*, 19 C. B., N. S. 717; 35 L. J., C. P. 18.

(*r*) *Williams v. Hayward*, 1 E. & E. 1040; 28 L. J., Q. B. 374; *Allen v. Bryan*, 5 B. & C. 512; *Robins v. Cox*, 1 Lev. 22; *Newcombe v. Harvey*, Carth. 161.

(*s*) *Glorer v. Cope*, 1 Salk. 185; 4 Mod. 81; *Whitton v. Peacock*, 3 Myl. & R. 325.

CH. VII. s. 3. the covenants for the rent and repairs are only with the mortgagor and his assigns, the assignee of the mortgagee cannot maintain an action for the breach of these covenants, because they are collateral to his grantor's interest in the land, and therefore do not run with it; but the mortgagor himself may, the covenants being in gross (t). Where a mortgagor made a lease for a term, reciting the mortgage, and the lessee covenanted to pay a certain sum annually in part of the interest on the mortgage at a certain place, it was held a covenant in gross, not running with the land (u). An action will lie by the assignee of a reversion for years against an under-lessee on a covenant to repair (x); upon such a covenant, tenants in common may sue a lessee of a house, who, after the demise, but before the breach alleged, became a co-tenant of the plaintiffs in the same house (y). The assignee of a lease, which is good only by estoppel, may maintain an action on the covenants (z). Where a person, who was in fact tenant from year to year (as he held under a void lease for years), underlet by deed for a term, and the under-lessee again underlet by deed for a less term: it was held, that this under-lessee had a reversion on which his assignee could maintain an action of covenant (a). After assigning over a lease, the assignor having no reversion cannot sue the assignee except on express covenants contained in the assignment (b).

Breaches
before
Assignment.

The assignee of a reversion has no right of action for arrears of rent due (c), or for breaches of a covenant to repair committed before the assignment of the reversion (d); notwithstanding such assignment the reversioner may sue for previous breaches (c). Where a mortgagor of a term of years made an under-lease by indenture, it seems that this, though at first a lease by estoppel, is convertible into a lease in interest by a re-conveyance by the mortgagees, so as to give a right of action to the assignees of the lessee on the covenants in the under-lease (f).

Notice to Tenant before
Re-entry.
Scallock v. Harston.
4 Ann. c. 16.

The assignee of a reversion may re-enter for breach of covenants, other than the covenant to pay rent, without giving notice to the tenant that the reversion has been assigned to him (g). As regards

(t) *Webb v. Russell*, 3 T. R. 393; *Stokes v. Russell*, Id. 679; *Russell v. Stokes* (in error), 1 H. Blac. 562.

(u) *Pargeter v. Harris*, 7 Q. B. 708; *Saunders v. Merryweather*, 3 H. & C. 902; 35 L. J., Ex. 115.

(x) Bac. Abr. tit. *Covenant* (E. 6), n. (h); *Orley v. James*, 13 M. & W. 209.

(y) *Kates v. Cole*, 2 Brod. & B. 660; *Twynam v. Pickard*, 2 B. & A. 105; *Badeley v. Figurn*, 4 E. & B. 71; *Norval v. Pascoe*, 34 L. J., Ch. 82.

(z) *Cuthbertson v. Irving*, 4 H. & N. 742; 6 Id. 135.

(a) *Orley v. James*, 13 M. & W. 209.

(b) *Hicks v. Downing*, 1 Id. Raym. 99; 1 Salk. 13.

(c) *Flight v. Bentley*, 7 Sim. 149.

(d) *Hunt v. Remnant*, 9 Ex. 636; *Johnson v. St. Peter's, Hereford*, 4 A. & E. 520; *Martyn v. Williams*, 1 H. & N. 817; 26 L. J., Ex. 117.

(e) *West v. Teude*, Cro. Car. 187; *Hicks v. Downing*, 1 Id. Raym. 99; 1 Salk. 13.

(f) *Webb v. Austin*, 7 M. & G. 701.

(g) *Scallock v. Harston*, L. R., 1 C. P. D. 106; 45 L. J., C. P. 125; 34 L. T. 130; 24 W. R. 431.

rent, it is expressly provided by 4 Ann. c. 16, s. 10, that the tenant is not to be prejudiced without notice. CH. VII. s. 3.
*Assignment of
Reversion.*

The grantee of a reversion, therefore, may take advantage of all covenants *which run with the land* (*h*). The remedy is mutual, for the same statute gives the lessee a right of action against the grantee of the reversion (*i*). The statute does not extend to mere collateral covenants (*k*); but it includes devisees (*l*).

An assignee of the reversion of part of the demised premises could always, under the statute 32 Hen. 8, c. 34, take advantage of the covenants respecting that part (*m*), and so might an assignee of part of the reversion. Assignee of
Reversion of
Part.

But it was held that the assignee of the reversion of part could not take advantage of a condition broken, though an assignee of part of the reversion in the whole property might (*n*). It has since been enacted by 22 & 23 Vict. c. 35, s. 3, "where the reversion upon a lease is severed, and the rent or other reservation is legally apportioned, the assignee of each part of the reversion shall, in respect of the apportioned rent or other reservation allotted or belonging to him, have and be entitled to the benefit of all conditions or powers of re-entry for nonpayment of the original rent or other reservation, in like manner as if such conditions or powers had been reserved to him as incident to his part of the reversion in respect of the apportioned rent or other reservation allotted or belonging to him." Assignee of
Part of Re-
version.
*Wright v.
Burroughs.*
22 & 23 Vict.
c. 35, s. 3.

Where a lease of an undivided part of certain mines contained a recital of an agreement between the lessee, the lessor, and the owners of the other two-thirds, for pulling down an old mill, and building another of larger dimensions, and the lease contained a covenant to keep such new mill in repair, and so leave it at the end of the term, but did not contain a covenant to build, it was held that the assignee of the lessor of the one-third might sue in respect of his interest (*o*).

An assignment of the reversion must be by deed (*p*). A. let a house to B., as tenant from year to year, and afterwards granted a lease by deed to C. of the house for twenty-one years: this was held to transfer the reversion to C., and to disentitle A. to recover from B. any rent which accrued during C.'s lease (*q*). A conveyance in How Assign-
ments of the
Reversion
may be made.

(*h*) *Spencer's case*, 1 Sm. L. C. 60, ante, 148.

(*i*) *Jourdain v. Wilson*, 4 B. & A. 266.

(*k*) *Webb v. Russell*, 3 T. R. 393.

(*l*) *Machell v. Duntton*, 2 Leon. 33.

(*m*) *Twynam v. Pickard*, 2 B. & A. 105; *Simpson v. Clayton*, 4 B. N. C. 758; *Badeley v. Vigurs*, 4 E. & B. 71; *Attos v. Hemmings*, 2 Bulst. 281; *Wright v. Burroughs*, *infra*; *Rawlings v. Morgan*, 34 L. J., C. P. 185. (In this case the plaintiff was entitled to only one-fifth of the re-

version.)

(*n*) *Wright v. Burroughs*, 3 C. B. 685; 4 D. & L. 438.

(*o*) *Easterby v. Sampson*, 6 Bing. 644; 4 M. & P. 601 (Exch. Ch.).

(*p*) *Beely v. Perry*, 3 Lev. 155; *Brawley v. Wade*, McClel. 664.

(*q*) *Harmer v. Bean*, 3 C. & K. 307; *Burrows v. Gradin*, 1 D. & L. 213; post, Sect. 5; but see *Edwards v. Wickwar*, L. R., 1 Eq. 403.

CH. VII. s. 3. fee, whether absolutely or by way of mortgage, will pass a term which has been carved out of it, and afterwards re-assigned to the grantor, subject to a sublease (r).

Effect of
Mortgage of
Reversion.
Moss v. Gallimore.

Mortgages subsequent to a lease operate as grants of the reversion, and carry with them, as incidental to such reversion, a right to the rent and the benefit of the landlord's remedies for the recovery (s). The mortgagee, therefore, may enforce the payment of the rent from the lessee either by distress or action; and the lessee will be exonerated by such payment from any demand on the part of the mortgagor or those claiming under him; even though actual compulsion on the part of the mortgagee has not been resorted to, but the lessee has paid the rent voluntarily (t). Payment of rent to the mortgagor without notice of the mortgage is valid (u), but payment of rent in advance is not within this rule, so as to discharge a tenant who had notice of the mortgage before the rent was due, for a payment of rent in advance is merely a loan by the tenant to the landlord (x). A payment, however, is a payment of rent when the rent falls due, and becomes irrecoverable by the mortgagee so far as it is made in respect of rent due before the notice (y). It is not necessary that the notice should be in terms; it is sufficient that the mortgage should be brought to the mind of the tenant (z).

Payment of
Rent.
Cook v. Guerra.

SECT. 4.—Assignment of Term.

(a) Absolutely.

What
amounts to an
Assignment.

An assignment must be *by deed* (a), and must pass the legal estate of the assignor; for a transfer of a mere equitable interest will not make a man liable as an assignee. An agreement to take an assignment of a lease, followed by possession on the part of the equitable assignee, is not sufficient to give the lessor any right to sue the equitable assignee in equity on the covenants in the lease (b). The delivery and depositing of a lease as a security for money, without any written assignment, passes no interest at law, although it may create a right which may be enforced in equity (c); but the transfer may be complete, although the assignee has never in fact got possession of the deed of assignment, by reason of a claim of lien on the part of the assignor's attorney for the expense of preparing it (d).

(r) *Burton v. Barclay*, 7 Bing. 745.
(s) *Ante*, 47.
(t) *Moss v. Gallimore*, 1 Doug. 279; 1 Smith L. C. 629 (7th ed.).
(u) 4 Ann. c. 16, s. 10.
(x) *De Nicolls v. Saunders*, L. R., 5 C. P. 58; 39 L. J., C. P. 297; 22 L. T. 661; 18 W. R. 1106.
(y) *Cook v. Guerra*, L. R., 7 C. P. 132;

41 L. J., C. P. 89; 26 L. T. 97; 20 W. R. 367.
(z) *Id.*
(a) 8 & 9 Vict. c. 106, s. 3; *ante*, 224.
(b) *Cox v. Bishop*, 8 De G., M. & G. 815; 26 L. J., Ch. 389.
(c) *Doe d. Maslin v. Roe*, 5 Esp. 105; *Williams v. Evans*, 23 Beav. 239.
(d) *Odell v. Wake*, 3 Camp. 394.

An assignment, as contradistinguished from a sublease, signifies a parting with *the whole term*; and when the whole term or more than the whole term is made over by the lessee, although in the deed by which that is done the rent and a power of re-entry for nonpayment are reserved to himself, and not to the original lessor, yet the instrument amounts to an assignment, and not a sublease (e); and in such case, the person to whom it is made over may sue the original lessor or his assignees of the reversion, or be sued by them as assignee of the term, on the respective covenants in the original lease, which run with the land, even though new covenants are introduced into the assignment (f). It is necessary that the person sought to be charged as an assignee claim and be in possession through the same estate as the person whom he succeeds; for if he come in by an elder title, he is not an assignee (g). In an action by the lessor against a person as assignee of the term, to whom the lessee demised for a longer term than he himself had, and at a higher rent; it was held to operate in law as an assignment, and that it might be so described in pleading (h). An assignee of a term, who has granted a sublease for the whole term, has in effect assigned over, and has been held not liable to the lessor or his assignee of the reversion for the subsequent rent or subsequent breaches of covenant (i). Where the lessee of two farms had agreed in writing (k) with another that the latter should have them during the lease, remaining tenant to the lessee during that period, and the sub-tenant accordingly took possession and paid a year's rent to the lessee, who afterwards distrained for rent, it was held that the agreement amounted to an absolute assignment of all the lessee's interest, and that he (having no reversion) was not enabled to distrain (l). But it by no means follows that an action for use and occupation, or of debt for rent, or of covenant, could not have been maintained. A parting with the whole term by verbal agreement has been held to create the relation of landlord and tenant, although there was no reversion (m). So a termor who had sub-let by indenture for a term of years longer than his own, the sub-lessee covenanting to pay him rent, has been held entitled to sue the sub-lessee for such

Cir. VII. s. 4.
Assignment of
Term.

Distinction
between As-
signment and
Sub-lease.

Beardman v.
Wilson.

(e) *Hicks v. Downing*, 1 Ld. Raym. 99; *Palmer v. Edwards*, 1 Doug. 187; *Thorn v. Woolcombe*, 3 B. & Ad. 595; *Preece v. Corrie*, 5 Bing. 24; *Parmenter v. Webber*, 8 Taunt. 593; *Wollaston v. Hakevill*, 3 M. & G. 297; *Pascoe v. Pascoe*, 3 Bing. N. C. 898; *Langford v. Selmes*, 3 Kay & J. 220; *Beardman v. Wilson*, L. R., 4 C. P. 57; 17 W. R. 54.

(f) *Palmer v. Edwards*, 1 Doug. 187, n.

(g) *Roach v. Wadham*, 6 East, 289.

(h) *Wollaston v. Hakevill*, 3 M. & G. 297.

(i) *Beardman v. Wilson*, L. R., 4 C. P. 57; 17 W. R. 54.

(k) Before the 8 & 9 Vict. c. 106, s. 3; ante, 118.

(l) *Parmenter v. Webber*, 8 Taunt. 593; — v. *Cooper*, 2 Wils. 375; *Preece v. Corrie*, 5 Bing. 24; *Pascoe v. Pascoe*, 3 Bing. N. C. 898; *Langford v. Selmes*, 3 K. & J. 220; *Cole Ejec.* 223.

(m) *Preece v. Corrie* and *Pascoe v. Pascoe*, supra.

CH. VII. s. 4. rent (*n*). Where a termor demised to another for the whole of his term at a weekly rent, it being the intention of the parties to create the relation of landlord and tenant:—held, that such demise was not to be deemed an assignment against the intention of the parties; and that an action for use and occupation might be brought by the termor in respect of the whole term, although the lessee had given a week's notice to quit before the expiration of the term, and had quitted accordingly (*o*). A tenant from year to year who underlets for a long term, does not thereby assign all his estate, which may possibly continue longer than the term expressed to be granted by the sublease (*p*). An assignee of a term who underlets for his whole term, in effect assigns over, and is not liable to the lessor for subsequent rent or subsequent breaches of covenant (*q*).

Operative
Words in
Assignments.

An assignment is usually made by the word “assign,” but sometimes “grant, assign, and set over” are used; no particular words are necessary, provided the intention of the parties be sufficiently expressed (*r*). Where a lessee for life granted all his estate and interest to A. and his executors: it was held not to amount to an assignment, because a grant to a man and his executors could not convey an estate for life, being a freehold (*s*). An agreement to assign on payment of a sum by instalments, the assignee in the meantime to perform the covenants in the lease and keep the assignor harmless, and the assignor to re-enter on non-payment of any instalment, is merely an agreement for an assignment and not an assignment (*t*). Where a lessee agreed to execute an effectual assignment of two leases of premises, “as he held the same for terms of twenty-eight years,” and the assignee agreed to accept a proper assignment accordingly, without requiring the lessor's title, it was held that he was bound to take an assignment of two consecutive leases, though the second was void, being executed under a power which had not been pursued (*u*).

Assignment
for Benefit of
Creditors.

White v. Hunt.

In *White v. Hunt* (*x*) a debtor assigned to a trustee for the benefit of his creditors “all his goods and chattels, personal estate, substance and effects whatsoever, and all his right, title, property, benefit, claim and demand whatever therein.” It was held that these words passed a term, and rendered the trustee liable as assignee for rent.

Usual Cove-
nants in As-
signments.

The proper and usual covenants on the part of the assignor of a term are, that the lease is in full force: that all the rent, covenants and conditions have been paid, performed and observed to that time:

(*n*) *Baker v. Gostling*, 1 Bing. N. C. 19; *Williams v. Hayward*, 1 E. & E. 1040; *In re Turner*, 11 Ir. Ch. R. 304.

(*o*) *Pollock v. Stacy*, 9 Q. B. 1033.

(*p*) *Oxley v. James*, 13 M. & W. 209.

(*q*) *Beardman v. Wilson*, supra (*i*).

(*r*) See Forms of Assignments, post, Appendix B., Sects. 27, 28.

(*s*) *Earl of Derby v. Taylor*, 1 East, 502.

(*t*) *Hartshorne v. Watson*, 6 B. N. C. 477.

(*u*) *Spratt v. Jeffery*, 10 B. & C. 249; and see *Tweed v. Mills*, L. R., 1 C. P. 39.

(*x*) L. R., 6 Ex. 32; 40 L. J., Ex. 23; 23 L. T. 559; overruling *Carter v. Warne*, M. & M. 479.

that notwithstanding any such act or thing as aforesaid he has power to assign: and for quiet enjoyment by the assignee during the remainder of the term, without interruption by the assignor or any person claiming under him: free from incumbrances by him: and for further assurance. The proper covenants on the part of the assignee are, that he will pay the rent and perform the covenants in the lease, and save harmless the assignor from any breach thereof by him or his assigns (*y*). On an agreement to assign a lease, and to indemnify the lessee from the rent, the assignee entered before any legal assignment was made, some goods of the lessee being left on the premises; it was held that the assignee was liable on his indemnity, those goods having been taken as a distress for rent, and that it was immaterial whether the goods were left with the leave of the assignee (*z*).

CH. VII. s. 4.
Assignment of Term.

Usual Covenants in Assignments—*contd.*

A lessee continues liable upon express covenants in the lease, notwithstanding any assignment; therefore an action of covenant will lie against a lessee for years, or his executors, on an express covenant, notwithstanding he has assigned his term, and the lessor has accepted rent from the assignee (*a*). The lessor may at the same time sue the lessee upon his express covenant, and the assignee upon the privity of estate; but he can have execution against one only. An eviction out of part of the land will only amount to a discharge of an assignee pro tanto (*b*).

Liability of Lessee, notwithstanding Assignment.

An assignee of a term is not bound by the personal covenants of the lessee. But he is bound to perform all the covenants which “run with the land,” and that without being named by the special word “assigns” (*c*). He is also liable to his immediate assignor upon any express covenants by him in the deed of assignment (*d*). But he is not liable to the lessee for rent which the lessee has been called upon to pay after the assignee has assigned over (*e*); and there is no implied contract by an assignee entering upon an invalid assignment and quitting without notice, that he will indemnify the lessee against the rent for any period after he has ceased to occupy (*f*).

On what Covenants the Assignee is liable.

There is, however, an implied promise on the part of each successive assignee to indemnify the original lessee against breaches of covenant committed by each assignee during the continuance of his own estate,

Remote Assignee.
Moule v. Garrett.

(*y*) *Staines v. Morris*, 1 V. & B. 10; *Walveridge v. Steward* (in error), 1 Cr. & M. 644; 3 Moo. & Sc. 561; *Harris v. Goodwyn*, 2 M. & Gr. 405; 9 Dowl. 409; *Burnett v. Lynch*, 5 B. & C. 589. See forms, Appendix B., Sects. 27, 28.

(*z*) *Groom v. Bluck*, 2 M. & G. 567.

(*a*) *Barnard v. Goddall*, Cro. Jac. 309; *Thursby v. Plant*, 1 Wms. Saund. 240.

(*b*) *Stevenson v. Lambard*, 2 East, 575;

Campbell v. Lewis, 3 B. & A. 392.

(*c*) As to what covenants “run with the land,” see ante, 148.

(*d*) *Harris v. Goodwyn*, 9 Dowl. 409; *Burnett v. Lynch*, 5 B. & C. 589.

(*e*) *Walveridge v. Steward*, 1 C. R. & M. 644.

(*f*) *Crouch v. Tregoning*, L. R., 7 Ex. 88; 41 L. J., Ex. 97; 26 L. T. 286; 20 W. R. 536.

CH. VII. s. 4. and this promise is implied although such assignee may have cove-
Assignment of nanted to indemnify his immediate assignor against all subsequent
Term. breaches (g).

In an action by the assignor claiming indemnity from the assignee for breaches of covenant in the lease, the court will merely direct payment on account of breaches already committed, and will not make a general declaration of the assignor's right to indemnity (h).

When the
 Assignee's
 Liability
 commences.

An assignee of a term may be sued on the covenants which run with the land, although he has not taken actual possession (i); so the assignee of an assignee is liable, although he has not taken actual possession, for breaches of covenant happening after the assignment to him (j) and before any assignment over by him (k): so a mortgagee *by assignment* of the term, though not in possession, is liable to perform the covenants in the lease which run with the land (l). To avoid this, mortgages of leaseholds are generally made by way of under-lease (m). Where a lessee covenanted for himself and his assigns to pull down certain old houses and build others within seven years, but did not perform the covenant, and after the end of seven years assigned, an action of covenant was held not to lie against the assignee because the breach was complete before the assignment, and the liability of the assignee depends solely upon the privity of estate; had the covenant, however, been broken after the assignment, as if the lessee had assigned before the seven years expired, the assignee would have been liable (n). And he would have been liable to an ejectment for the forfeiture committed prior to the assignment to him, unless such forfeiture had been waived (o).

Assignee may
 assign over to
 Man of Straw.
Onslow v.
Corrie.

An assignee being liable to the original lessor or his assigns only in respect of privity of estate, may get rid of such liability by an assignment over (p) except as to previous breaches; with respect to which he will continue liable both at law (q) and in equity (r). Such an assignment may be made even to a beggar or to a married

(g) *Moule v. Garrett*, L. R., 5 Ex. 182; 41 L. J., Ex. 62 (Exch. Ch.); 26 L. T. 367; 20 W. R. 416.

(h) *Lloyd v. Dimmack*, L. R., 7 Ch. D. 398; 47 L. J., Ch. 398; 38 L. T. 173; 26 W. R. 458.

(i) *Walker v. Reeves*, 2 Doug. 461, n.; 3 Id. 19.

(j) *Taylor v. Shum*, 1 Bos. & P. 21.

(k) *Beardman v. Wilson*, L. R., 4 C. P. 57; 17 W. R. 54.

(l) *Stone v. Evans*, Peake, Ad. Ca. 94; *Burton v. Barclay*, 7 Bing. 746; *Williams v. Bosanquet*, 1 Brod. & B. 238; overruling *Eaton v. Jaques*, 2 Doug. 455.

(m) Post, 244.

(n) *Churchwardens of St. Saviour's, Southwark v. Smith*, 1 W. Blac. 351; 3

Burr. 1272; *Grescott v. Green*, 1 Salk. 199; *Brittin v. Vaux*, Lutw. 109; *Hawkins v. Sherman*, 3 C. & P. 459.

(o) *Bennett v. Herring*, 3 C. B., N. S. 370.

(p) *Valiant v. Dodonede*, 2 Atk. 546; *Pitcher v. Tovey*, 12 Mod. 23; *Le Keux v. Nash*, 2 Str. 1222; *Walker v. Reeves*, 2 Doug. 461, n.; 3 Id. 19; *Taylor v. Shum*, 1 Bos. & P. 21; Co. Lit. 3 a, 356 b; *Boulton v. Canon*, Frcem. 336; *Chancellor v. Poole*, 2 Doug. 764; *Beardman v. Wilson*, L. R., 4 C. P. 57; 17 W. R. 54.

(q) *Harvey v. King*, 2 C. M. & R. 18; *Pitcher v. Tovey*, 1 Salk. 81.

(r) *Philpot v. Hoare*, 2 Atk. 219; *Amb. 480*; *Treade v. Coke*, 1 Vern. 165; 2 Eq. Ca. 47; *Onslow v. Corrie*, 2 Madd. 330.

woman (s), but the assignee will continue liable upon any express covenant entered into by him in the assignment to himself (t). CH. VII. s. 4.
Assignment of
Term.

The assignee of a term, declared against as such, has been held not to be liable for rent accruing after he had assigned over, though it was stated that the lessor was a party executing the assignment, and agreed thereby that the term, which was determinable at his option, should be absolute (u). But if the breach had been continuing, it would have been otherwise: as if there had been a covenant to repair within a certain time after notice, and the repairs were not done according to such notice, though the premises were out of repair before the assignment (v). In *Wolveridge v. Steward* the lessee assigned to A. his interest in demised premises by indenture, executed by both parties, "subject to the payment of the rent and performance of the covenants and agreements reserved and contained in the original lease." A. took possession and occupied the premises under this assignment, and before the expiration of the term assigned to a third person. After the assignment over the lessee was called upon by the lessor to pay rent which the assignee had suffered to be in arrear; it was held, that the lessee could not maintain an action of covenant against A. in respect of such breach, the words "subject to the payment of rent, &c.," being words of qualification and not words of contract (x).

An assignee of part of the land cannot be charged, in an action of debt, with the whole rent, but only for a proportionate part thereof (y). But an assignee of part is liable to a distress for rent due for the whole of the demised premises (y), and to an action on every covenant running with the land and affecting the part assigned, inasmuch as an assignee cannot discharge himself of all his liability to the covenants running with the land, which are in their nature divisible (z).

Assignees of a term may sue the reversioner, or his assigns, for breaches of covenant running with the land which are committed by him or them after the assignment (a); an assignee of a lease by estoppel is no exception to the rule (b). But an assignee cannot maintain an action upon a breach of covenant before the assignment to him (c), nor for the breach of any covenant which does not, by

Assignee of
Part liable for
Part of Rent
in Action, but
to Distress
for Whole.

Rights of
Assignees of
a Term.

(s) *Valiant v. Dodomede*, 2 Atk. 446; *Le Kenz v. Nash*, 2 Stra. 1221; *Taylor v. Shum*, 1 Bos. & P. 21; *Onslow v. Corrie*, 2 Madd. 330.

(t) *Wolveridge v. Steward*, 1 Cr. & M. 644.

(u) *Chancellor v. Poole*, 2 Doug. 764.

(v) Com. Dig. tit. *Covenant* (B.).

(x) *Wolveridge v. Steward* (in error), 1 Cr. & M. 644; 3 Moo. & Sc. 561.

(y) *Curtis v. Spitty*, 1 Bing. N. C. 756; *Merceron v. Dowson*, 5 B. & C. 479; *Hare v. Cator*, Cowp. 766; *Holford v. Hatch*, 1

Doug. 183.

(z) *Congham v. King*, Cro. Car. 221; *Gamon v. Vernon*, 2 Lev. 231; *Stevenson v. Lambard*, 2 East, 576; *Trynam v. Pickard*, 2 B. & A. 105; *Dadeley v. Vigurs*, 4 E. & B. 71.

(a) Bac. Abr. tit. *Covenant* (E. 5).

(b) *Cuthbertson v. Irving*, 4 H. & N. 742; 6 Id. 135; 28 L. J., Ex. 306; 29 Id. 485.

(c) *Lewis v. Ridge*, Cro. Eliz. 863; *Martyn v. Williams*, 1 H. & N. 817; 26 L. J., Ex. 117.

CH. VII. s. 4. touching or concerning the demised premises, run with the land or the reversion (*d*).
Assignment of Term.

(b) *By Way of Mortgage.*

Mortgagee's Liability. A mortgagee of a leasehold estate *by assignment* is liable, so long as he has the legal estate, to perform the covenants which are obligatory on any ordinary assignee, whether he be in possession or not (*e*): he may assign it without being in actual possession (*f*). A mortgagee may avoid the liability of an assignee by taking a sub-lease instead of an assignment, and this is frequently done. If he become assignee, equity will not afford him any relief, though he may offer to forego his charge and lose his money (*g*). A trustee to whom a lease is assigned to secure an annuity to a third person is strictly an assignee (*h*). A power given to a trustee in a mortgage deed to sell if the mortgagee requests it, does not necessarily imply a right to enter on the premises (*i*).

Equitable Assignments by Deposit. Every assignment of a lease is void at law unless made by deed (*k*). Where a lease is deposited by way of equitable mortgage as a security for money advanced (*l*), it is clear that the deposittee has no legal title (*m*); and it would seem to be the better opinion, that the lessor has no remedy in equity against the deposittee, upon the covenants in the lease (*n*), even although the deposittee be in possession (*o*). It has been held, too, in a case where the deposittee not only entered, but also paid rent in arrear, and was accepted by the lessor as owner of the lease, the lessor had no equity to compel the deposittee to take a legal assignment of the lease (*p*).

SECT. 5.—*Sub-lease.*

Sub-lease for whole Term is an Assignment. A sub-lease is a demise by a lessee (or his assignee) for a less term than he himself has. A demise for the whole term, if it be by deed, amounts to an assignment (*q*). A fortiori, a lease by deed for a period beyond the term will operate as an assignment. But there are many cases in which a sub-lease by parol for the whole term has

(*d*) See *Spencer's case*, 1 Smith L. C. 60; and Chap. V., Sect. 8 (*b*), ante, 148.

(*e*) *Stone v. Evans*, Peake, Ad. Ca. 94; 7 East, 341; *Williams v. Bosanquet*, 1 Brod. & B. 238; *Westerell v. Dale*, 7 T. R. 312; *Burton v. Barclay*, 7 Bing. 745.

(*f*) *Smarle v. Williams*, 3 Lev. 388; 8 & 9 Vict. c. 106, s. 5.

(*g*) *Anon.*, Freem. Ch. 253; *Casberd v. Att.-Gen.*, 6 Price, 411; *Sparkes v. Smith*, 2 Vern. 275.

(*h*) *Gretton v. Diggles*, 4 Taunt. 766.

(*i*) *Watson v. Waltham*, 2 A. & E. 485.

(*k*) 8 & 9 Vict. c. 106, s. 3.

(*l*) See *Williams v. Evans*, 23 Beav.

239; *Matthews v. Goodday*, 31 L. J., Ch. 282; *Butlin v. Dunne*, 12 Ir. Ch. R. 67.

(*m*) *Doe d. Maslin v. Roe*, 5 Esp. 105.

(*n*) *Moore v. Choat*, 8 Sim. 608 (overruling *Flight v. Bentley*, 7 Sim. 149).

(*o*) *Cox v. Bishop*, 8 De G., M. & G. 815; 26 L. J., Ch. 389.

(*p*) *Moore v. Greg*, 2 De G. & S. 334. But see *Lucas v. Comerford*, 1 Ves. jun. 235; *Close v. Wilberforce*, 1 Beav. 112.

(*q*) *Hicks v. Downing*, 1 Ld. Raym. 99; *Holliston v. Hakewill*, 3 M. & G. 297; *Beardman v. Wilson*, L. R., 4 C. P. 57; 38 L. J., C. P. 91; 19 L. T. 282; 17 W. R. 54.

been allowed to operate as such, so as to give the underlessor a right to an action for rent (*r*), but not a right to distrain (*s*). CIV. VII. s. 5.
Sub-lease.

A sub-lease for years made by a lessee for years, to commence immediately on his death, is good, if he die during his own term; therefore a man possessed of a term for twenty years may grant the lands for nineteen years to commence after his death, and it will be good for so many of the twenty years as shall be unexpired at the time of his death. Where a lessee has power to renew his term upon giving six months' notice of his intention before its expiration, and upon his preparing a fresh lease, &c., he cannot, though he gave notice of such his intention, demise the premises to another party beyond the expiration of the first term, unless he prepare such fresh lease and get it executed, or at least endeavour so to do (*t*). What Sub-
leases are
good.

A contract to sell a lease is not satisfied by the conveyance of a sub-lease (*u*), for the sub-lease might become void if the covenants and conditions in the original lease were not duly performed (*r*). But on the purchase of a sub-lease it is not a valid objection to the title that the sub-lease may become forfeited by the non-performance of the covenants in the original lease (*y*). It is the duty of a person contracting for a sub-lease to ascertain the contents of the original lease (*z*). So, also, a purchaser of leasehold property is bound to inform himself of the contents of the lease and cannot avoid specific performance on the ground that it contains an unusual covenant (not to exercise certain trades, &c.), which was not mentioned in the particulars of sale, or at the sale (*a*). A sub-lease should always contain an express covenant by the sub-lessee, to observe and perform all the covenants and conditions in the original lease, except those which he is specially exempted from performing (*b*). Sales of Sub-
leases.

A sub-lessee is not affected by the voluntary surrender of the lease by his mesne landlord to the superior landlord; nor, if he has knowledge of it, is he bound in any way to treat it as a notice to quit (*c*). Sub-lessee
not affected
by Surrender
of mesne
Landlord.

(*r*) *Poulteney v. Holmes*, 1 Str. 405; *Smith v. Mapleback*, 1 T. R. 445; *Pollock v. Stacy*, 9 Q. B. 1033; *Williams v. Hayward*, 1 E. & E. 1040; *Baker v. Gosling*, 1 Bing. N. C. 19; *In re Turner*, 11 Ir. Ch. R. 304.

(*s*) *Preece v. Corrie*, 5 Bing. 24; *Pascoe v. Pascoe*, 3 Bing. N. C. 898.

(*t*) *Mackay v. Mackreth*, 4 Doug. 213.

(*u*) *Madeley v. Booth*, 2 De G. & Sm. 718; *Darlington v. Hamilton*, Kay, 650; *Blake v. Phinn*, 3 C. B. 976; *Henderson v. Hudson*, 15 W. R. 860; *Sheard v.*

Venable, 36 L. J., Ch. 922; 15 W. R. 1166; *Duddell v. Simpson*, L. R., 2 Ch. Ap. 102.

(*x*) *Doc d. Muston v. Gladwin*, 6 Q. B. 953; *Logan v. Hall*, 4 C. B. 598, 613, 621.

(*y*) *Hayford v. Criddle*, 22 Beav. 477.

(*z*) *Cosser v. Collinge*, 3 Myl. & K. 283.

(*a*) *Grosvenor v. Green*, 28 L. J., Ch. 173; 5 Jur., N. S. 117.

(*b*) See Form, Appendix A, Sect. 14.

(*c*) *Mellor v. Watkins*, L. R., 9 Q. B. 400; 23 W. R. 55.

CH. VII. s. 6.

Attornment.

Statutes
relating to
Attornment.

Substitution
of Notice for
Attornment.
4 Ann. c. 16,
ss. 9, 10.

Attornments
to Strangers
void.

11 Geo. 2,
c. 19, s. 11.

Assignee may
sue or distrain
without
Attornment.

SECT. 6.—Attornment.

After the statute *Quia emptores* (*d*), by which subinfeudation was prohibited, it became necessary when the reversioner or remainderman after an estate for years, for life or in tail, granted his reversion or remainder, that the particular tenant should attorn to the grantee (*e*). This necessity of attornment was in some degree diminished by the Statute of Uses (*f*), whereby the possession was immediately executed to the use: and by the Statute of Wills (*g*), by which the legal estate was immediately vested in the devisee.

Attornments, however, are now rendered unnecessary in nearly every case by the 4 Ann. c. 16, s. 9, which enacts, that all grants and conveyances of manors, lands, rents, reversions, &c., shall be good without the attornment of the tenants (*h*); but by sect. 10, notice must be given of the grant to the tenant, before which he shall not be prejudiced by payment of any rent to the grantor, or by breach of the condition for non-payment (*i*).

By 11 Geo. 2, c. 19, s. 11, attornments made by tenants to strangers claiming title to the estate of their landlords shall be null and void, and their landlords' possession not affected thereby, unless made "pursuant to and in consequence of some judgment at law, or decree or order of a court of equity; or made with the privity and consent of the landlord or landlords, lessor or lessors; or to any mortgagee after the mortgage is become forfeited."

An assignee of the reversion, whether by way of mortgage or otherwise, if he has given due notice under 4 Ann. c. 16, s. 9, may sue or distrain for the rent (*k*). It makes no difference that the previous tenancy was only from year to year (*l*). But a prior mortgagee is not an assignee of the reversion, and therefore cannot distrain or sue for the rent until after the mortgagor's tenant has attorned to him, and so created a new tenancy as between them (*m*). After an attornment the mortgagee may distrain for the arrears of rent thereby admitted to be due (*n*). Such attornment may be made "after the mortgage is become forfeited" without the assent of the mortgagor (*o*).

(*d*) 18 Edw. 1, st. 1.

(*e*) Shep. Touch. chap. xiii.

(*f*) 27 Hen. 8, c. 10; *Rivis v. Watson*, 5 M. & W. 255.

(*g*) 34 & 35 Hen. 8, c. 5, repealed and re-enacted by 1 Vict. c. 26.

(*h*) This appears to have been overlooked in *Edwards v. Wickwar*, L. R., 1 Eq. 403.

(*i*) *Cook v. Moylan*, 1 Exch. 67; 5 D. & L. 101; *Cole Ejec.* 229, 473.

(*k*) *Lumley v. Hodgson*, 16 East, 99; *Rivis v. Watson*, 5 M. & W. 255; *Lloyd v. Davies*, 2 Exch. 103.

(*l*) *Burrouces v. Gradin*, 1 D. & L. 213;

Harmer v. Bean, 3 C. & K. 307.

(*m*) *Evans v. Elliott*, 9 A. & E. 342; *Partington v. Woodcock*, 6 A. & E. 690; *Rogers v. Humphreys*, 4 A. & E. 313. See Forms of Attornment, Appendix C., Nos. 16 and 16 (a).

(*n*) *Gladman v. Plumer*, 15 L. J., Q. B. 79; 10 Jur. 109.

(*o*) *Moss v. Gallimore*, 1 Smith L. C. 629 (7th ed.); *Doe d. Higginbotham v. Barton*, 11 A. & E. 314; *Doe d. Mayor, &c. of Poole v. Whitt*, 15 M. & W. 571; *Hickman v. Machin*, 4 H. & N. 720; but see *Alchorne v. Gomme*, 2 Bing. 54, 59, 61; *Delaney v. Fox*, 2 C. B., N. S. 768.

An instrument in writing professing to be a mere attornment, but which is in fact an agreement to create a fresh tenancy on new terms, requires a stamp as a lease or as an agreement for a lease (*p*). But a mere memorandum of attornment, not creating any new tenancy, or fresh terms, but merely substituting one landlord for another, does not require a stamp either as a lease or as an agreement (*q*). An instrument in these terms: "I hereby certify that I remain in the house No. 3, Swinton Street, belonging to W. G., on sufferance only, and agree to give him possession at any time he may require:" was held not to amount to an agreement for a tenancy so as to require a stamp (*r*).

CH. VII. s. 6.
Attornment.
No Stamp on
mere Attorn-
ments.

An attornment generally estops the party making it from denying the title of the person to whom the attornment is made (*s*). Thus where an attornment was made to the claimants in an ejectment, who derived their title under a will, the tenant was held to be estopped from contending in a subsequent action that upon the true construction of the will the claimants had no title (*t*), although on a previous occasion it had been decided that the tenant might show the attornment to have been made by mistake and under suspicious circumstances, and that it had not been acted on for seven years, and a conveyance to himself made by the real owner (*u*). A. and B., tenants in common, having agreed to divide their property, and that *Blackacre* should belong to A.; the occupier of *Blackacre*, who after this agreement had paid his whole rent to A., cannot in an ejectment brought against him by A. object that the partition deed between A. and B. is not executed (*x*). Where a tenant had attorned and paid rent to a devisee of the landlord, and no fraud or misrepresentation had been practised towards him, it was held, that he could not afterwards dispute the devisee's title by evidence showing that the testator was incompetent to make a will (*y*). Attornment by tenant to heir upon threat of eviction is tantamount to entry by the heir, and prevents the tenant from afterwards disputing his title (*z*). So, where a tenant of glebe land has attorned and paid rent to the subsequent incumbent, he will not be permitted to dispute his title by evidence of a simoniacal presentation of the incumbent (*a*). Sometimes, however, a tenant who has attorned will be allowed to prove that such attornment was procured by fraud, covin or misrepresenta-

Effect of At-
tornment as
an Estoppel.

(*p*) *Cornish v. Searall*, 8 B. & C. 471;
Doe d. Frankis v. Frankis, 11 A. & E.
792; *Eagleton v. Gutteridge*, 11 M. & W.
465; 2 Dowl., N. S. 1053.

(*q*) *Doe d. Linsey v. Edwards*, 5 A. & E.
95, 102; *Doe d. Wright v. Smith*, 8 A. &
E. 255.

(*r*) *Barry v. Goodman*, 2 M. & W. 768.

(*s*) *Cole Ejec.* 218, 219, 230.

(*t*) *Gravenor v. Woodhouse*, 2 Bing. 71.

(*u*) *Gravenor v. Woodhouse*, 1 Bing. 38.

(*x*) *Doe d. Pritchett v. Mitchell*, 1 Brod.
& B. 11; 3 Moo. 219; and see *Arden v.*
Sullivan, 14 Q. B. 832.

(*y*) *Doe d. Marlow v. Wiggins*, 4 Q. B.
367.

(*z*) *Hill v. Saunders*, 4 B. & C. 529.

(*a*) *Cooke v. Loxley*, 5 T. R. 4.

CH. VII. s. 6.
Attornment.

tion, or that it was made by mistake and in ignorance of material facts, and that the person to whom the attornment was made really had no title (*b*). Thus where A., being tenant to B. who died, afterwards attorned to C. as heir of B., in ignorance that C.'s title as heir was disputed: hold, that A. was not thereby estopped from showing that C. really had no title to the property, and that the attornment to him was a mistake (*c*). Where a person, having possession of land under a good title, became tenant and paid rent to a stranger, it was held, that he was not estopped, after such tenancy had determined and before he had given up possession, from setting up his own prior title in an ejectment by his lessor (*d*). But it is to be observed that in all such cases the onus of proof as to the title, &c., is shifted and thrown upon the person who attorned, and he must (amongst other things) *disprove* the title of the person to whom such attornment was made, which is sometimes impracticable or very difficult.

What
amounts to an
Attornment.

Payment of rent by a tenant to his landlord, after the title of the latter had expired, and after the tenant had received notice of an adverse claim, does not amount to an acknowledgment of title in the landlord, or to a virtual attornment; unless at the time of such payment the tenant heard the precise nature of the adverse claim, or how the landlord's title had expired (*e*). Where A. was tenant of premises under a lease granted by B., and a sequestration issued out of the Court of Chancery against the latter; and A. then signed the following instrument: "I hereby attorn and become the tenant to C. and D., two of the sequestrators named in the writ of sequestration issued in the said suit in Chancery, and to hold the same for such time and upon such conditions as may be subsequently agreed upon:" it was held, that this was an agreement to become tenant, and operated as an attornment; and also that as A. had not received possession from C. and D. he was not estopped by the attornment from disputing their title to the premises (*f*). But an instrument whereby the tenant merely puts one person in the place of another as his landlord, and continues to hold under the same terms and conditions as before, is a mere attornment and not an agreement, and is evidence of ownership at the time it was executed against future occupiers, though they do not claim through the person who signed it (*g*). If an attornment be relied on to defeat the Statute of Limitations it must be made before

(*b*) *Rogers v. Pitcher*, 6 Taunt. 202; *Cornish v. Searall*, 8 B. & C. 471; *Doe d. Plevin v. Brown*, 7 A. & E. 447; *Brook v. Biggs*, 2 Bing. N. C. 572; *Hughes v. Hughes*, 15 M. & W. 703.

(*c*) *Gregory v. Doidge*, 3 Bing. 474.

(*d*) *Accidental Death Insurance Co. v. Mackenzie*, 9 W. R. 713.

(*e*) *Fenner v. Duploe*, 2 Bing. 10; *Eng-*

land v. Slade, 4 T. R. 682; *Gregory v. Doidge*, 3 Bing. 474; *Claridge v. Mackenzie*, 4 M. & G. 143.

(*f*) *Cornish v. Searall*, 8 B. & C. 471; but see *Hall v. Butler*, 10 A. & E. 204.

(*g*) *Doe d. Linsey v. Edwards*, 5 A. & E. 95; *Doe d. Wright v. Smith*, 8 A. & E. 255; *Cole Ejec.* 229.

action brought (*h*), and the defendant may contend that the party making such attornment did so without any intention to admit the party's right or title, and in ignorance that it would have that effect (*i*).

CH. VII. s. 6.
Attornment.

SECT. 7.—Writs of Execution.

(a) *Fieri Facias*.

When the sheriff under a writ of fieri facias seizes a lease (actually or constructively) and sells the term, he must make an assignment of it by deed. If he merely puts the execution creditor in possession, that will not pass the term and the debtor may recover in ejectment (*k*). Seizure by a sheriff of a lease of a debtor's dwelling-house does not vest the term in the sheriff, but it remains in the debtor, even though sold by public auction, until after the sheriff executes an assignment to the purchaser (*l*). If the sheriff sells the term before the writ is returnable, but does not execute the assignment to the vendee till a subsequent period, the assignment is valid (*m*). Any such assignment may be made by the under-sheriff in the name and under the seal of office of the sheriff (*n*). Where a sheriff takes a lease and fixtures in execution, he must sell the fixtures separately, if he cannot find a purchaser for the whole (*o*). Where an outgoing tenant has agreed to assign the remainder of his term, the sheriff, before an actual assignment made, may sell the term under a fi. fa. against the tenant, and put upon it the value agreed to be given by the incoming tenant (*p*).

Sheriff's Duty
on executing
a Fi. fa.

Before the Judicature Act, an equitable reversionary interest in a term could not be seized and sold under a fi. fa. (*q*), but it would seem that it might have been reached in a court of equity (*r*), and that the effect of the Judicature Act is to render such an interest liable to execution generally.

Equitable re-
versionary
Interest.

When the sheriff seizes and sells a term under a fi. fa., he does not usually put the purchaser into actual possession of the property,

Possession
under Fi. fa.

(*h*) *Doe d. Mee v. Leatherhead*, 4 A. & E. 784.

(*i*) *Doe d. Linsey v. Edwards*, 5 A. & E. 95, 106; *Kearny v. Genner*, cited Cole Ejec. 231.

(*k*) *Doe d. Hughes v. Jones*, 9 M. & W. 372; 1 Dowl. N. S. 352; Cole Ejec. 569.

(*l*) *Playfair v. Musgrove*, 14 M. & W. 239; 3 D. & L. 72.

(*m*) *Doe d. Stevens v. Donaton*, 1 B. & A. 230.

(*n*) *Doe d. James v. Brawn*, 5 B. & A. 243; cited 8 Q. B. 1042.

(*o*) *Barnard v. Leigh*, 1 Stark. R. 43.

(*p*) *Sparrow v. Earl of Bristol*, 1 Marsh. 10.

(*q*) *Scott v. Scholey*, 8 East, 467; *Metcalfe v. Scholey*, 2 Bos. & P., N. R. 461; *Burden v. Kennedy*, 3 Atk. 739; *Martindale v. Booth*, 3 B. & Ad. 498; *The Mayor, &c. of Poole v. Whitt*, 15 M. & W. 571.

(*r*) *Gore v. Bowser*, 3 Sm. & Giff. 1; 24 L. J., Ch. 316, 440; *Partridge v. Foster*, 10 Jur., N. S. 741; 12 W. R. 1127; but see *Thornton v. Finch*, 4 Giff. 505; *Godfrey v. Tucker*, 33 L. J., Ch. 559.

CH. VII. s. 7.
Writs of Exe-
cution (Fieri
Facias).

especially if there be an under-tenant (*s*): but the purchaser is left to obtain actual possession by ejectment (*t*), or to recover the rent from any under-tenant by distress or action in the usual manner (*u*). The purchaser becomes liable to the rent and covenants in the lease in like manner as any other assignee of the term (*x*). But the lessee continues liable on his covenants in the lease to pay rent and to repair, &c., notwithstanding the term has been taken from him under the execution (*y*), in like manner as he would have done had he executed an assignment of the term to a purchaser, in which case he would have probably had the usual covenant of indemnity from such rent and covenants.

(b) *Elegit*.

Writ of
Elegit.

Under a writ of *elegit* the sheriff may “make and deliver execution unto the party in that behalf suing of *all* such lands, tenements, tithes, rents and hereditaments, including lands and hereditaments of copyhold and customary tenure, as the person against whom execution is so sued, or any person in trust for him, shall have been seised or possessed of at the time of entering up the said judgment (*z*), or at any time afterwards, or over which such person shall at the time of entering up such judgment, or at any time afterwards, have any disposing power which he might, without the assent of any other person, exercise for his own benefit”(*a*).

The same land cannot be extended under two or more *elegits*, nor can the sheriff be entitled to poundage under more than one of such writs (*b*). But if two or more *elegits* be delivered to the sheriff, he should execute and give priority to that which was first delivered to him, and return to the other that he has not delivered the land to the plaintiff by a reasonable price and extent, the same having been already extended and delivered to A. B. under a writ of *elegit* dated, &c., which had previously been delivered to him to be executed according to law.

The sheriff does not usually deliver actual possession of the property to the execution creditor: but it seems that he may lawfully do so where the debtor himself is in occupation (*c*). Tenants of the debtor cannot be turned out of possession under an *elegit* (*d*). The writ and

(*s*) *Taylor v. Cole*, 3 T. R. 295; 1 Smith L. C. 115 (6th ed.); *Rumball v. Murray*, 3 T. R. 298; *Miller v. Farnell*, 2 Marsh. 78.

(*t*) *Cole Ejec.* 569.

(*u*) *Lloyd v. Davies*, 2 Exch. 103; *Mayor, &c. of Poole v. Whitt*, 15 M. & W. 571.

(*x*) 1 Doug. 184.

(*y*) *Auriol v. Mills*, 4 T. R. 98; 1 Smith L. C. 782 (6th ed.).

(*z*) The estates and interests of subse-

quent bona fide purchasers and mortgagees will not be affected, unless the judgment, &c. be duly registered. See post, 251.

(*a*) 1 & 2 Vict. c. 110, s. 11; *Cole Ejec.* 564. See form of Writ, Jud. Act, 1875, Appendix F. to Schedule.

(*b*) *Carter v. Hughes*, 2 H. & N. 714.

(*c*) *Rogers v. Pitcher*, 6 Taunt. 206; *Chatfield v. Parker*, 8 B. & C. 643.

(*d*) *Taylor v. Cole*, 3 T. R. 295.

inquisition thereon, when returned and filed, operate only as an assignment of the reversion; and therefore the judgment creditor cannot maintain ejectment against the tenants in possession until after their respective terms have expired or been duly determined by notice to quit or otherwise (e). But he may, like any other assignee of the reversion, sue or distrain for the rent which becomes due after the filing of the writ and the return thereto, and that without any previous attornment by the tenant (f), provided the writ and inquisition be valid, but not otherwise (g). He is not entitled to any rent which became due before the inquisition, although after the delivery of the writ to the sheriff (h). He may give a tenant such notice to quit as the debtor himself might have given, and afterwards maintain ejectment (i). If the tenancy commenced after the judgment was entered up and duly registered, an ejectment may be maintained against such tenant without previous notice to quit (k). So if the debtor himself is in actual possession (l).

CH. VII. s. 7.
Writs of Execution (Elegit).

When the debt and costs have been satisfied, and that appears upon an account taken by the master, the court will order possession of the land to be restored to the defendant (m).

Judgments, &c. will not affect lands situate in Middlesex or Yorkshire, as against bonâ fide purchasers and mortgagees, until a memorial thereof is registered pursuant to the statutes in that behalf (n). In those and also in other counties, judgments, &c. must be registered with the senior master of the Common Pleas, and execution thereon actually executed and registered, otherwise they will not prejudice subsequent bonâ fide purchasers and mortgagees, with or without notice of the judgment (o). In the counties palatine of Lancaster and Durham, judgments, &c. must be registered with the proper officers of the courts there (p), and execution thereon actually executed and registered.

Registration
of Judgments,
&c.

By 23 & 24 Vict. c. 38, s. 1, "no judgment, statute or recognizance to be entered up after the passing of this act (q) shall affect any land (of whatever tenure) as to a bonâ fide purchaser for valuable consideration, or a mortgagee (whether such purchaser or mortgagee have

23 & 24 Vict.
c. 38, s. 1.
Writ of Execution must
be issued and
registered;

(e) *Doe d. Da Costa v. Wharton*, 8 T. R. 2; *Cole Ejec.* 566.

(f) *Lloyd v. Davies*, 2 Exch. 103; *Ramsbottom v. Buckhurst*, 2 M. & S. 565.

(g) *Arnold v. Ridge*, 13 C. B. 745; *Cole Ejec.* 566.

(h) *Sharp v. Key*, 8 M. & W. 379; 9 Dowl. 770.

(i) *Cole Ejec.* 566.

(k) *Doe d. Putland v. Hilder*, 2 B. & A. 782; *Doe d. Evans v. Owen*, 2 C. & J. 71; but see 27 & 28 Vict. c. 112, s. 1, post, 252.

(l) *Doe d. Parr v. Roe*, 1 Q. B. 700; *Doe d. Roberts v. Parry*, 13 M. & W. 368;

2 D. & L. 430; *Cole Ejec.* 566.

(m) *Price v. Farney*, 3 B. & C. 733; *Hughes v. Lumley*, 4 B. & B. 274.

(n) *Benham v. Keane*, 31 L. J., Ch. 129; 8 Jur., N. S. 604.

(o) 1 & 2 Vict. c. 110, s. 19; 2 & 3 Vict. c. 11; 3 & 4 Vict. c. 82; 18 & 19 Vict. c. 15; 22 & 23 Vict. c. 35, s. 22; 23 & 24 Vict. c. 38, supra; 27 & 28 Vict. c. 112, post, 252.

(p) 18 & 19 Vict. c. 15.

(q) 23rd July, 1860. If entered up after 29th July, 1864, see 27 & 28 Vict. c. 112, s. 1, post, 252.

CH. VII. s. 7.
Writs of Execution (Elegit).

and also executed within 3 Months after such Registration.

notice or not of any such judgment, statute or recognizance), unless a writ or other due process of execution of such judgment, statute or recognizance shall have been issued and registered as hereinafter is mentioned before the execution of the conveyance or mortgage to him, and the payment of the purchase or mortgage money by him : provided always, that no judgment, statute or recognizance to be entered up after the passing of this act (g), nor any writ of execution or other process thereon, shall affect any land, of whatever tenure, as to a bonâ fide purchaser or mortgagee, although execution or other process shall have issued thereon and have been duly registered, unless such execution or other process shall be executed and put in force within three calendar months from the time when it was registered.”

27 & 28 Vict. c. 112.

Judgment not to affect Land till delivered in Execution.

By 27 & 28 Vict. c. 112, s. 1, “no judgment, statute or recognizance to be entered up after the passing of this act (v) shall effect any land (of whatever tenure) until such land shall have been actually delivered in execution by virtue of a writ of elegit or other lawful authority, in pursuance of such judgment, statute or recognizance.” And by sect. 3, the writ itself must be registered pursuant to 23 & 24 Vict. c. 38 ; after which a summary remedy is given by petition to the Chancery Division of the High Court for a sale of the debtor’s interest in the land (s). Under this act judgments entered up after 29th July, 1864, take priority not according to their dates, but according to the time when an execution is delivered to the sheriff to be executed (t).

SECT. 8.—*Bankruptcy.*

By the Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), all pre-existing bankruptcy acts were repealed. Many of the earlier acts (u) contained certain special provisions in reference to the case of a bankrupt tenant, and the Act of 1869 also contains special provisions for the same case, the material difference between the former acts and the Act of 1869 being, that, under the former acts, a lease involving obligations which might exceed in value the benefits to be derived from it did not vest in the bankrupt’s assignees until they did some act manifesting their acceptance, whereas, under the Act of 1869, all leases whatever, together with the rest of the bankrupt’s property, vest in the trustees until they do some act manifesting their disclaimer (v).

(g) 23rd July, 1860. If entered up after 29th July, 1864, see 27 & 28 Vict. c. 112, s. 1, post.

(r) 29th July, 1864.

(s) Sects. 4, 5, 6 ; see now, also, Jud. Act, 1873, s. 34.

(t) *Guest v. Cowbridge R. Co.*, L. R.,

6 Eq. 619.

(u) See, for instance, 49 Geo. 3, c. 121, s. 19 ; 6 Geo. 4, c. 16, s. 75 ; 12 & 13 Vict. c. 106, s. 146 ; 24 & 25 Vict. c. 134, s. 131.

(v) See *Williams on Bankruptcy*, 2nd ed. p. 140 ; *Wilson v. Wallani*, 42 L. T. 375.

The act having provided for the vesting of all the bankrupt's property in trustees, the case of a bankrupt tenant is dealt with by sects. 23, 24, 34, 35. CH. VII. s. 8.
Bankruptcy.

The first of these sections provides for "disclaimer" in writing by the trustees of a bankrupt tenant as follows:—"When any property of the bankrupt acquired by the trustee under this act consists of land of any tenure burdened with onerous covenants, of unmarketable shares in companies, of unprofitable contracts, or of any other property that is unsaleable, or not readily saleable, by reason of its binding the possessor thereof to the performance of any onerous act, or to the payment of any sum of money, the trustee, notwithstanding he has endeavoured to sell, or has taken possession of such property, or exercised any act of ownership in relation thereto, may, by writing under his hand (x), disclaim such property; and upon the execution of such disclaimer, the property disclaimed shall, if the same is a contract, be deemed to be determined from the date of the order of adjudication, and if the same is a lease be deemed to have been surrendered on the same date, and if the same be shares in any company be deemed to be forfeited from that date, and if any other species of property it shall revert to the person entitled on the determination of the estate or interest of the bankrupt; but if there shall be no person in existence so entitled then in no case shall any estate or interest therein remain in the bankrupt. Any person interested in any disclaimed property may apply to the court, and the court may, upon such application, order possession of the disclaimed property to be delivered up to him, or make such other order as to the possession thereof as may be just."

Power to Trustees in Bankruptcy to disclaim Lease.

"Any person injured by the operation of this section shall be deemed a creditor of the bankrupt to the extent of such injury, and may accordingly prove the same as a debt under the bankruptcy."

By sect. 24, "the trustee shall not be entitled to disclaim any property in pursuance of this act in cases where an application in writing has been made to him by any person interested in such property requiring such trustee to decide whether he will disclaim or not, and the trustee has for a period of not less than twenty-eight days after the receipt of such application, or such further time as may be allowed by the court, declined or neglected to give notice whether he disclaims the same or not."

Limitation of Time for Disclaimer.

By Rule 28 of the Bankruptcy Rules of 1871 (made under section 78 of the act), "where any property of a bankrupt acquired by a trustee under 'The Bankruptcy Act, 1869' shall consist of a leasehold interest (y), the trustee shall not execute a disclaimer of

No Disclaimer without leave of Court.
Rule 28.

(x) A writing under the hand of the trustee's solicitor is not sufficient. *Wilson v. Wallani*, 42 L. T. 375, per Stephen, J.

(y) These words do not include a lease of chattels, which therefore may be disclaimed without leave. *Sheffield Waggon Co. v. Stratton*, 48 L. J., Q. B. 35.

CH. VII. s. 8. *Bankruptcy.* the same without the leave of the court being first obtained for that purpose ; and upon any application to the court for such leave, notice of the desire of the trustee to disclaim such interest shall be given to such person or persons as the court shall direct, and such order shall be made thereon as the court shall think fit" (z).

Effect of Rule 28. It is to be observed that this rule is to some extent inconsistent with the statute. To that extent it is ultra vires and void ; and it was expressly held in *Reed v. Harvey* (a) that a disclaimer in accordance with the statute is operative, although leave to disclaim may not have been obtained in accordance with the rule. It had previously been held, upon applications for leave, that the court would exercise a discretion (b); and in exercising such discretion, would look to any conduct on the part of the lessor amounting to a waiver of his right to have a disclaimer in twenty-eight days (c).

Extension of Time. When a trustee has received a notice calling upon him to say whether he will disclaim or not, if he requires a time beyond the twenty-eight days given by section 24 to decide what course he will take, he must, as a rule, apply for extension of time before the twenty-eight days have expired (d), though special circumstances may occur which will satisfy the court that they ought to accede to the application though made after the expiration of the twenty-eight days (e).

Disclaimer of expired Lease. In one case the Court of Appeal gave leave to disclaim an expired lease, "so far as the formal leave of the court was required for that purpose" (f).

Power of Trustees to assign over to Pauper ; *Onslow v. Corrie.* It was held in *Onslow v. Corrie* (g), under an early Bankruptcy Act (49 Geo. 3, c. 121, s. 19), that the assignees of a bankrupt, having elected to take to the lease, like any other assigns, might assign over to a pauper ; and there is nothing in the Bankruptcy Act of 1869 to avoid the effect of that decision, although such an assignment over seems contrary to the spirit of the 23rd and 24th sections, and to produce an unjust state of the law. The principle of *Ex parte Sneezum*, however, in which it was held, in the case of a continuing contract for works, that, although the trustee is bound to declare his option by sect. 24, yet if he does not disclaim the contract but goes on with it, he may afterwards throw it up and leave the other party to

(z) There is no appeal after the disclaimer has been once executed. *Dutton, Ex parte, Woods, In re*, L. R., 3 Ch. D. 459; 45 L. J., Bank. 141.

(a) 42 L. T. 512, per Lush and Manisty, JJ.

(b) *Re Wilson*, L. R., 13 Eq. 186.

(c) *Ex parte Moore, Re Stokoe*, L. R., 2 Ch. D. 802. In this case a letter from the lessor's solicitor, written the day before the twenty-eight days expired, and requesting a reply "at earliest convenience"

was held to amount to a waiver. As to effect of *posting* application, and proof of delivery, see *Reed v. Harvey*, 42 L. T. 511.

(d) *Ex parte Lovering, Re Jones*, L. R., 9 Ch. 586; 43 L. J., Bank. 94.

(e) *Banner v. Johnson*, L. R., 5 H. L. 157; 40 L. J., Ch. 730.

(f) *Paterson, Ex parte, Throckmorton, In re*, L. R., 11 Ch. D. 908.

(g) 2 Mad. 330; see too *Wilkins v. Fry*, 1 Mer. 265.

the contract no remedy but to prove for damages (*h*)—is not applicable to the case of a lease (*i*). This was decided by the Court of Appeal in *Ex parte Dressler, Re Solomon* (*j*), in which it was expressly held that trustees who take actual possession of leasehold property of the bankruptcy, and do not disclaim, when called upon in the exact manner pointed out by the statute, i. e., by writing, &c., become personally liable for rent. “They are liable,” observed James, L. J., “as assignees of the estate to pay the rent, and, as between themselves and the landlord, they are personally liable, though they are entitled to an indemnity out of the debtor’s assets. And no injustice will be done to them, for they ought to have retained out of the assets a sum sufficient to answer the rent.” “A trustee,” said Brett, L. J., “ought to make up his mind speedily whether he will disclaim a lease or not.”

CH. VII. s. 8.
Bankruptcy.

*Ex parte
Dressler.*

It will be observed that in this case the trustee was called upon to say whether he would disclaim or not. In cases where he is not so called upon, his personal liability for rent, if he take possession, is theoretically the same, that is, it continues till the end of the lease (*k*); but there is the great practical difference that he may terminate the liability at his pleasure; for, apart from section 24, he may execute the disclaimer at any time (*l*). And if *Onslow v. Corrie* be law (and it does not appear to have been questioned), the trustees of a bankrupt tenant may, going beyond the partial relief against creditors recognized in *Ex parte Sneezum*, relieve the estate of all liability whatsoever to the landlord. Upon the authorities, it seems that the disclaimer sections not only protect, but even improve the bankrupt’s estate—allowing the trustees to keep the landlord in uncertainty, at little chance of loss to the estate, and some chance of great gain.

When the original lessee has assigned his lease, and the assignee has become bankrupt, in such a case the lessor may sue the original lessee for rent payable under a covenant, at least so far as it was due before disclaimer, though after adjudication. This was decided in *Smyth v. North* (*l*), in which case Barons Martin and Pigott (Baron Bramwell, however, dissenting) were further of opinion, that even for rent due after the disclaimer by the assignee’s trustee, the original lessee remained liable; and that sect. 23 did not apply to cases in which the lease had been assigned and the assignee had become bankrupt; and it should be noticed that a similar decision was come to on the 19th section of the 49 Geo. 3, c. 121 (*m*).

Power of
Lessor to sue
Lessee on
Bankruptcy
of Assignee.
*Smyth v.
North.*

(*h*) *Ex parte Davis, Re Sneezum*, L. R., 3 Ch. D. 463.

Stephen, J.

(*i*) *Ex parte Dressler, Re Solomon*, *infra*.

(*k*) See per Brett, L. J., in *Ex parte Dressler*, *ubi supra*.

(*j*) L. R., 9 Ch. D. 262; 48 L. J., Bank. 20; 39 L. T. 377; 27 W. R. 144; *Wilson v. Wallani*, 42 L. T. 375, per

(*l*) L. R., 7 Ex. 242; 41 L. J., Ex. 103; 20 W. R. 683.

(*m*) *Taylor v. Young*, 3 B. & Ald. 521.

CH. VII. s. 8
Bankruptcy.

At common law the voluntary surrender of a lease does not affect the rights of a sub-tenant (*p*); but it is doubtful how far this principle would be applied to an enforced surrender, under the 23rd section of the Bankruptcy Act.

Rights of
Sub-tenant.
Taylor v.
Gillott.

In *Taylor v. Gillott* (*q*), the lessee of a house agreed to sub-let a part of it, at less rent than he paid himself, and on terms materially different from those of his own lease. The agreement stipulated for a premium, which the intending sub-lessee paid, and then entered into possession. The lessee afterwards became bankrupt, and the trustee disclaimed. The lessor brought an action of ejectment against the intending sub-lessee, who sought to restrain this action by a bill in equity. But Hall, V.-C., dismissed the bill, principally on the ground of the difference between the covenants in the lease and those stipulated for in the agreement for the sub-lease. This decision might have been more favourable for the sub-tenant (1) if a lease had been actually granted; (2) if the agreement had stipulated for the insertion of the covenants of the head-lease; or (3) if the whole matter had been brought before the Court of Bankruptcy under Rule 28 of the Rules of 1871 before cited (*q*).

Mortgage of
Lease.

It is perhaps doubtful how far the court will allow a disclaimer when the debtor has mortgaged his leasehold interest; but any application by the mortgagee must be made before the disclaimer is executed, after which the lessor's title is complete (*r*).

Proof against
Estate of
Bankrupt.

When a lease has been disclaimed by the trustee, the lessor will be allowed to prove against the estate of his bankrupt lessee for the difference between the value of the rental he would, by the lease, have received from the lessee and the rent he can obtain on a fresh letting of the property (*s*). But on the disclaimer, in the sixth year of the term, of a twenty-one years lease, determinable at the end of the first seven or fourteen years at the option of the lessee, the lessor may prove only for a diminution in value up to the end of the seventh year of the term—in addition of course to proofs for rent due before

(*p*) *Mellor v. Watkins*, 9 Q. B. 400; and see post, Chap. VIII., Sect 3 (*c*).

(*q*) See the question discussed in Williams on Bankruptcy, 2nd ed. p. 142. The present bankruptcy law seems inadequate to meet its difficulties, which require a more detailed treatment than they have met with in the 23rd and 24th sections of the Bankruptcy Act, 1869, even though supplemented by No. 28 of the General Rules of 1871. It seems to be equitable that the sub-tenant should have the option of taking to the head-lease (see Williams on Bankruptcy, p. 142); and, looking to *Reed v. Harrey* (p. 254,

anto), to be also necessary that the provisions of Rule 28 of the Rules of 1871 should be incorporated in the statute itself, with such amendments as might seem desirable. Bankruptcy Amendment Bills have been repeatedly brought forward of late years, but as often dropped. See an extract from the Bill of 1877, in the last edition of this work, p. 254.

(*r*) *Ex parte Woods*, *Re Ditton*, L. R., 3 Ch. D. 459.

(*s*) *Ex parte Llynvi Coal and Iron Co.*, *Re Hill*, L. R., 7 Ch. 28; 41 L. J., Bank. 5; 25 L. T. 609; 20 W. R. 105.

disclaimer, and to amounts owing in respect of breach of covenant to repair, &c. (t). CH. VII. s. 8.
Bankruptcy.

When a trustee in bankruptcy disclaims, he cannot afterwards enforce any covenant of the landlord to purchase any buildings, fixtures, or improvements, &c. at the end of the term which is so prematurely surrendered and determined (u). Effect of Dis-
claimer on
Covenant of
Lessor.

Nor can the trustee, after disclaimer, even although he be still in possession, remove the tenant's fixtures,—the effect of the disclaimer is to give the landlord an absolute title to the fixtures, as from the date of the order of adjudication (x). Even if he sever and sell the fixtures, and *subsequently* disclaim, the landlord is entitled to the proceeds of the sale (y)—the effect of the disclaimer is to place the trustee in the position of never having had any estate in the leasehold property (y). Fixtures.

By sect. 34, "the landlord, or other person to whom any rent is due from the bankrupt, may at any time, either before or after the commencement of the bankruptcy, distrain upon the goods or effects of the bankrupt for the rent due to him from the bankrupt, with this limitation, that, if such distress for rent be levied after the commencement of the bankruptcy (z), it shall be available only for one year's rent, accrued due prior to the date of the order of adjudication; but the landlord or other person to whom the rent may be due from the bankrupt may prove under the bankruptcy for the overplus due for which the distress may not have been available."

A landlord cannot enforce payment in full by the trustee in bankruptcy of any rent which became due before the bankruptcy, otherwise than by a distress for the arrears not exceeding one year's rent (a), though he may distrain for all *subsequent* rent (b).

A landlord may, however, distrain for rent payable in advance under a covenant in the lease, and due after the bankruptcy and while the trustee remains in possession of the property (c); and this will, it seems, apply to all claims of rent due after the bankruptcy and before disclaimer. An attempt was in one case made to prevent a landlord from acting on his right of distress under sect. 34, and to commit

Power for
Landlord to
distrain for
Rent.

(t) *Blake, Ex parte, McEvan, In re*, L. R., 11 Ch. D. 572; 40 L. T. 869; 27 W. R. 901.

(u) *Kearsey v. Carstairs*, 2 B. & Adol. 716; *Fairburn v. Eastwood*, 6 M. & W. 679.

(x) *Stephen, Ex parte, Lavies, In re*, L. R., 7 Ch. D. 127; 47 L. J., Bank. 22; 37 L. T. 613; 26 W. R. 136—C. A.

(y) *Brook, Ex parte, Roberts, In re*, L. R., 10 Ch. D. 100; 48 L. J., Bank.

22; 39 L. T. 458; 27 W. R. 255.

(z) As to when this is, see sect. 11.

(a) *Gethin v. Wilks*, 2 Dowl. 189.

(b) *Briggs v. Sowry*, 8 M. & W. 729; *Newton v. Scott*, 9 M. & W. 434; 10 Id. 471; *Phillips v. Shervill*, 6 Q. B. 944; *Bagge, app., Mawby, resp.*, 8 Exch. 611; *Brocklehurst v. Lawe*, 7 E. & B. 176; 26 L. J., B. Q. 107.

(c) *Ex parte Hale, Re Binns*, L. R., 1 Ch. D. 285; 45 L. J., Bk. 21.

CH. VII. s. 8. Bankruptcy. him for contempt in distraining without leave of the court. An order of committal was made by a county court judge, but unhesitatingly discharged by the chief judge, who declined to interfere with the landlord's statutory right (*d*).

Proof for Rent as if it grew due from Day to Day. By sect. 35, "when any rent or other payment falls due at stated periods, and the order of adjudication is made at any time other than one of such periods, the person entitled to such rent or payment may prove for a proportionate part thereof, up to the day of the adjudication, as if such rent or payment grew due from day to day."

Proviso for Re-entry on Bankruptcy of Lessee. A lease, or agreement for a lease, may lawfully be made subject to a condition or proviso for re-entry in the event of the lessee, his executors, administrators or assigns, becoming bankrupt (*e*); but such proviso is not a "usual" covenant in an agreement for a lease (*f*). A term may also be so limited as to cease on the lessee becoming bankrupt, or ceasing to occupy for his own benefit (*g*); and acceptance of rent by the lessor from the trustee in bankruptcy of a bankrupt tenant will not amount to a waiver of any forfeiture, but create a new contract with the trustee binding them by the covenants in the lease (*h*). In such cases the lessor may lawfully enter on the bankruptcy of the lessee, or even of his executor (*i*), but not after the lessor has accepted *subsequent* rent with full knowledge of the bankruptcy, and thereby waived the forfeiture (*k*).

Trustees may Assign without Licence. When a lessee becomes bankrupt, and the term passes to the trustees in bankruptcy, they may assign it to a purchaser without the landlord's licence, and that notwithstanding a covenant by the lessee for himself and his assigns not to assign or underlet without such licence (*l*). Where a lease contained a proviso for re-entry on assignment without licence, and the lessee having executed a general assignment of all his property for the benefit of his creditors, was afterwards made bankrupt; it was held, that the assignees in bankruptcy were entitled to the lease, and that it was not forfeited by the general assignment, because that was an act of bankruptcy and consequently void as against them (*m*).

Trust Estates remain in the Bankrupt. Property held by the bankrupt upon trust for any other person remains vested in him (*n*). But any beneficial interest which the bank-

(*d*) *Ex parte Till, Re Mayhew*, L. R., 16 Eq. 97; 42 L. J., Bk. 84; 21 W. R. 574.

(*e*) *Roe d. Hunter v. Galliers*, 2 T. R. 133. As to what is "duly" made a bankrupt, under a proviso for re-entry, see *Doe d. Lloyd v. Ingleby*, 15 M. & W. 465.

(*f*) See the cases ante, 114.

(*g*) *Doe d. Lockwood v. Clarke*, 8 East, 185.

(*h*) *Dyke v. Taylor*, 2 Giff. 566; 30 L. J., Ch. 281.

(*i*) *Doe d. Bridgman v. David*, 1 C., M.

& R. 405; *Doe d. Williams v. Davies*, 6 C. & P. 614.

(*k*) *Doe d. Gatehouse v. Rees*, 4 Bing. N. C. 384.

(*l*) *Doe d. Goodbehere v. Bevan*, 3 M. & S. 353; *Doe d. Cheere v. Smith*, 5 Taunt. 795; 1 Marsh. 359; *Philpot v. Hoare*, 2 Atk. 219.

(*m*) *Doe d. Lloyd v. Powell*, 5 B. & C. 308.

(*n*) Bankruptcy Act, 1869 (32 & 33 Vict. c. 71), s. 15, subs. 1.

rupt has will pass to the trustees in bankruptcy, ex. gr.: a term of years or right of entry vested in husband and wife, in right of the wife, will upon the husband's bankruptcy pass to the trustees (o). Even a reversionary term which *may* fall into possession during the coverture, and which is not vested in a trustee for the wife's separate use, will pass to the trustees in bankruptcy (p). If a man before his bankruptcy deposit a lease as a security for money, but no mortgage or assignment of it is made, it has been held that the trustees in bankruptcy might recover the property by ejectment, for the mere deposit conferred no legal title (q). But this was in an action at law, and the equitable right of the mortgagee will now always prevail (r); and, indeed, in the Bankruptcy Courts the title of the equitable mortgagee would always have prevailed (s). And even under the old law it did not follow that they could recover the deed (t). A steam-engine, erected for the purpose of working a colliery, to be used by the lessee during his term, but to be held as the property of the landlord subject to such use, will not, it has been decided, pass to the trustees on the bankruptcy of the tenant (u). So, too, fixtures, while attached to the freehold, constitute part of the freehold, are not within the reputed ownership clause of the Bankruptcy Act, and do not pass to the trustees on the bankruptcy of the tenant (x).

CH. VII. s. 8.
Bankruptcy.

Otherwise,
where he has
any beneficial
interest.

Machinery
and Fixtures
annexed to
the Freehold.

A surety in a bond conditioned for the performance of covenants by the lessee is not discharged from his liability to the lessor by the bankruptcy of the lessee, as the liability is incapable of valuation (y).

Surety's Lia-
bility.

Where there is a joint demise to two, both are tenants; and it would seem that evidence is inadmissible to show that it was intended that one should be the sole tenant, and the other merely a surety (z).

(o) *Mitchell v. Hughes*, 6 Bing. 689.

(p) *Doe d. Shaw v. Steward*, 1 A. & E. 300.

(q) *Doe d. Maslin v. Roe*, 5 Esp. 105.

(r) *Judicature Act*, 1873, s. 24.

(s) See *Ex parte Cowell, Re Inwood*, 17 L. J., Bk. 16; *Ex parte Broadwood*, 1 M., D. & D. 631.

(t) *Wood v. Grimwood*, 5 Man. & R. 551; see too *Barton v. Gainer*, 3 H. & N. 387.

(u) *Coombs v. Beaumont*, 5 B. & Ad. 72; *Ex parte Scarth*, 1 M., D. & D. 240.

(x) *Boydell v. M'Michael*, 1 C., M. & R. 177; *Ex parte Reynal*, 2 M., D. & D. 443; *Ex parte Cowell*, 17 L. J., Bank. 16; 12 Jur. 411; *Walsley v. Milne*, 7 C. B., N. S. 115; 29 L. J., C. P. 97; *Fletcher v. Manning*, 1 C. & K. 350; *Ex parte Newbury*, 10 L. T. 661. See also *Ex parte King*, 1 M., D. & D. 119.

(y) *Young v. Taylor*, 3 B. & A. 521; 8 Taunt. 315; *Tuck v. Fyson*, 6 Bing. 321.

(z) *Rex v. Great Wakering*, 3 N. & M. 47; *Lee v. Nixon*, Id. 441.

CH. VII. s. 9.

*Marriage (of
Female Lessor).*SECT. 9.—*Marriage.*(a) *Of Female Lessor (q).*

Interest of
Husband in
Wife's Free-
holds.

A husband takes a freehold interest during the coverture in such of his wife's freeholds of inheritance as are not put into settlement before the marriage, and he may dispose of such freehold interest by deed without her concurrence (*r*). If he become bankrupt, such freehold interest will pass to his trustees (*s*), and it may be extended under an elegit against him (*t*). If he have issue by his wife born alive, who might by possibility have inherited, he will become tenant by the curtesy for his life of her freeholds of inheritance (including estates tail) (*u*). But such title is only initiate during her life, and will not merge any term of years to which he may be entitled in his own right (*x*). Unless he becomes tenant by the curtesy he cannot distrain or sue for rent of the wife's freeholds which accrues after her death under a demise made by his wife and himself, or by him on her behalf (*y*). If, however, the lease was made by him in his own name only, the tenant would be thereby estopped from denying his title to the subsequent rent during the continuance of the tenancy (*y*).

Arrears of
Rent and
Breaches of
Covenant
before the
Marriage.

Arrears of rent and other debts due to a female lessor before her marriage, and breaches of covenant, trespasses, &c., before then committed, are *choses in action*, which can only be sued for by the husband and wife jointly, and not by the husband alone (*z*); nor by the wife alone (*a*), not even after the husband has deserted her and gone to reside abroad (*b*); or whilst they are living apart pursuant to a deed of separation (*c*). Even where the husband is an alien enemy the wife cannot sue alone (*d*). If the husband become bankrupt, his trustees may sue for the wife's choses in action, jointly with her, but not without her (*e*). If the husband die without reducing into possession any of his wife's choses in action, they will survive to her (*f*). So if he assign them for value, whether absolutely or by way of mortgage, or under the Bankrupt Acts, his assignee must

(q) And see ante, p. 58.

(r) Co. Lit. 351 a; Bac. Abr. tit. *Baron and Feme* (C. 1); *Robertson v. Norris*, 11 Q. B. 916.

(s) *Michell v. Hughes*, 6 Bing. 689, 695.

(t) 2 Wms. Saund. 69 c, note (1).

(u) Co. Lit. 29 a—30 b; 1 Steph. Com. 273 (6th ed.); Burton, Comp. ss. 348—355; but see *Doe d. Neville v. Rivers*, 7 T. R. 276.

(v) *Jones v. Davies*, 5 H. & N. 766; 29 L. J., Ex. 378; 31 Id. 116.

(y) *Hill v. Saunders*, 2 Bing. 112; *S. C.* (in error), 4 B. & C. 529; *Howe v. Scarrott*, and *Sharp v. Scarrott*, 4 H. & N. 723; 28 L. J., Ex. 326.

(z) *Hardy v. Robinson*, 1 Keb. 440; *Tirell v. Bennet*, 2 Keb. 89; *Noy*, 70; *Milner v. Milnes*, 3 T. R. 631; *Rumsey v. George*, 1 M. & S. 180; Bac. Abr. tit. *Baron and Feme* (K.); *Roper*, H. & W. 214 (2nd ed.); 1 Chit. Pl. 33 (7th ed.).

(a) *Caudell v. Shaw*, 4 T. R. 361.

(b) *Boggett v. Frier*, 11 East, 301.

(c) *Marshall v. Rutton*, 8 T. R. 545.

(d) *De Wahl v. Braune*, 1 H. & N. 178; *Stretton v. Busmach*, 1 Bing. N. C. 139.

(e) *Sherrington v. Yates* (in error), 12 M. & W. 855; 1 D. & L. 1032.

(f) *Richards v. Richards*, 2 B. & Ad. 447; *Gaters v. Madeley*, 6 M. & W. 423; *Guyard v. Sutton*, 3 C. B. 153; *Scarpennelli v. Atcheson*, 7 Q. B. 864.

reduce them into possession during his lifetime, otherwise they will survive to the wife (*a*). If she die first, the husband may recover them as her administrator (after obtaining proper letters of administration), but not otherwise (*b*). The administrator of a husband who survived his wife, and died without taking out letters of administration of her effects, cannot recover her choses in action: for that purpose administration must be taken out to the wife (*c*). Where the husband has survived his wife and died intestate without administering to her estate, his next of kin must constitute themselves his legal representatives before they can have any claim to administer to the wife's estate (*d*).

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Marriage (of
Female Lessor).

For rent or any other cause of action which accrues during the coverture in respect of the wife's land, or upon contracts made with her, the husband may either sue alone (*e*), or he may sue jointly with his wife (*f*). If the wife survive, she will be entitled to the arrears of rent which accrued during the coverture (*g*). But if the husband demise the wife's land by deed or by parol in his own name only, the wife cannot join with him in an action to recover the rent, or for double rent or double value for holding over (*h*). A husband, when sued in replevin, may avow in his own name for rent due in right of his wife after the marriage (*i*), or he may avow in the names of himself and wife in her right; and such avowry will be proved by an attornment to them, not saying in her right (*k*); or it may be disproved by evidence of a receipt for rent given by the husband alone (*l*). Husband and wife may distrain for a rent-charge devised to the wife for life, without the intervention of trustees, and may jointly avow such distress in right of the wife (*m*).

Rent and
other Causes
of Action
which accrue
during the
Coverture.

If a feme sole makes a lease at will, or is lessee at will, and afterwards marries, the marriage is no determination of her will, so as to make the lease void: nor can she herself, without the consent of her husband, determine the lease in either case (*n*). Where the husband

LESSOR at
Will.

(*a*) *Betts v. Kimpton*, 2 B. & Ad. 273; *Howard v. Oakes*, 3 Exch. 136; 6 D. & L. 230; *Mitford v. Mitford*, 9 Ves. 87; *Hutchins v. Smith*, 9 Sim. 137; *Elwin v. Williams*, 13 Sim. 309; *Johnson v. Johnson*, 1 Jac. & W. 472; *Ashby v. Ashby*, 1 Coll. C. C. 553; *Michelmore v. Mudge*, 2 Giff. 183; 29 L. J., Ch. 609; *Fitzgerald v. Fitzgerald*, 8 C. B. 592; Bac. Abr. tit. *Baron and Feme* (C. 3).

(*b*) *Hart v. Stephens*, 6 Q. B. 937; *Day v. Pargrave*, 2 M. & S. 397, note (*b*).

(*c*) *Betts v. Kimpton*, 2 B. & Ad. 273; *Howard v. Oakes*, 3 Exch. 136; 6 D. & L. 230.

(*d*) *In re Goods of Crause*, 1 Sw. & Tr. 146.

(*e*) *Howell v. Maine*, 3 Lev. 403; *Bret v. Cumberland*, Cro. Jac. 399; 3 Bulst. 164; 1 Roll. R. 359; *Burrough v. Moss*, 10 B.

& C. 558; *Offley v. Clay*, 2 M. & G. 172; Bac. Abr. tit. *Baron and Feme* (K.).

(*f*) *Hashford v. Buckingham*, Cro. Jac. 205; *Alberry v. Walby*, 1 Stra. 229; *Philliskirk v. Pluckwell*, 2 M. & S. 393; *Alderman v. Nute*, 4 M. & W. 704.

(*g*) Com. Dig. tit. *Baron and Feme* (F. 1).

(*h*) *Haucourt v. Wyman*, 3 Exch. 817.

(*i*) *Wise v. Bellent*, Cro. Jac. 442; *Bodles v. Pnoc*, Id. 282; *Osborne v. Watleden*, 1 Mod. 273; *Pullen v. Palmer*, 3 Salk. 207.

(*k*) *Gravenor v. Woodhouse*, 2 Bing. 71, 74.

(*l*) *Parry v. Hundle*, 2 Taunt. 180.

(*m*) *Wynne v. Wynne*, 2 M. & G. 8; 9 Dowl. 901.

(*n*) Bac. Abr. tit. *Baron and Feme* (E.).

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Marriage (of
 Female Lessor).

and wife made a lease for years by indenture of the wife's lands, reserving rent, and, the lessee having entered, the husband before any day of payment died; upon which the wife took a second husband, and he at the day accepted the rent and died: it was held, that the wife could not avoid the lease; for that by her second marriage she had transferred the power of avoiding it to her husband, and his acceptance of the rent had bound her, as her own before such marriage would have done; for he, by the marriage, succeeded into the power and place of his wife, and what she might have done, either as to affirming or avoiding the lease before marriage, the husband might do after the marriage (o). As the wife's acceptance of rent will make good and unavoidable leases for years made by her and her husband at common law, or by her husband solely, if they be by indenture or deed-poll, so, if the wife die before her husband, the same election and power of affirming or avoiding such leases descends to her issue or heir; for such leases are good till those who succeed to the estate defeat and avoid them by their disagreement thereto (o). Where a reversion, expectant on a term of years, is conveyed to a husband and wife, the husband alone may have an action for breach of covenant to repair (o); but if lands be conveyed to husband and wife with a covenant for further assurance, she must be joined with him in an action for the breach of such last-mentioned covenant (p).

(h) *Of Female Lessee.*

Effect of
 Marriage on
 the Leaschold
 Interest of
 the Wife

Marriage is a gift in law to the husband of all the wife's chattels real (not put into settlement),—as a term for years in right of his wife: so of estates by statute-merchant, statute-staple, elegit, &c.; and of these he alone may dispose, or forfeit, or they may be extended for his debts (q). If he sublet any of them in his own name only, the rent will belong to his executors or administrators, and not to the wife as survivor (r). He may even dispose of them by deed to take effect on his death to the exclusion of the wife (s). The reason is, that he has power to dispose of the whole, and therefore of any part; but if he make no disposition of them in his lifetime, they survive to his wife, and therefore he cannot devise them (t): for the husband is only possessed of a term in her right, and the term or legal interest continues in her. If the husband dispose of part of his wife's term, the part undisposed of will survive to her (u). If the wife survive,

(o) Bac. Abr. tit. *Leases* (C.).

(p) *Middlemore v. Goodale*, Cro. Car. 505; Bac. Abr. tit. *Baron and Feme* (K.).

(q) Bac. Abr. tit. *Baron and Feme* (C. 2), (I.).

(r) Com. Dig. tit. *Baron and Feme* (E. 2); Co. Lit. 46 b, 351 a; 1 Roll. 343,

l. 15; *Blaxton v. Heath*, Poph. 145.

(s) *Herbin v. Chard*, Poph. 96; *Grute v. Locroft*, Cro. Eliz. 287.

(t) Plowden, 418 b; Com. Dig. tit. *Baron and Feme* (E. 2); Bac. Abr. tit. *Baron and Feme* (C. 2).

(u) *Sym's case*, Cro. Eliz. 33.

she may maintain an action for all chattels real which the husband had in her right and did not dispose of in his lifetime (*x*). So absolute is the power of the husband over the chattels real and personal of his wife, that he may dispose of them as he thinks proper; and no act or concurrence of hers is necessary: so, if a man marry a woman who has a term of years settled in trust for her, the husband may dispose of such equitable term (*y*): but where a term is assigned to trustees for a married woman, with the privity and consent of her husband, he cannot intermeddle with or dispose of it. If lands are demised to a man and his wife, and the husband alone makes an underlease, he alone may sue a third person for an injury to the reversion (*z*). If a husband covenant or agree to grant an underlease of the wife's term of years, such agreement is a good disposition in equity of the term, and will bind the wife in case of the husband's death without granting the lease (*a*). But a husband cannot assign his wife's reversionary interest in leaseholds, if that interest was of such a nature that it could not possibly vest in the wife in possession during the coverture (*b*). The husband and wife should be sued jointly for use and occupation by the wife, partly before and partly after the marriage (*c*). If the husband survive the wife, he takes her terms subject to all equities affecting them (*d*), and he may be compelled to account for rents received by him after the death of his wife, who was only a tenant for her own life (*e*). If the husband or wife be evicted of a term which he has in right of his wife, and the husband brings an ejectment in his own name, and has judgment to recover; these circumstances amount to a disposition of the term, and vest it in the husband (*f*).

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Marriage (of
Female Lessee).

SECT. 10.—*Death.*(a) *Heirs or Devisees.*

By 1 Vict. c. 26, a man may devise all real and personal estate which he is entitled to, either at law or in equity, at the time of his death (*g*). Where a term is specifically bequeathed, it will, notwithstanding, in the first instance vest in the executor by virtue of his

Bequest of
Leaseholds—
Assent of
Executors.

(*x*) Co. Lit. 46 b; Com. Dig. tit. *Baron and Feme* (E. 2); Bac. Abr. tit. *Baron and Feme* (C. 2).

(*y*) Roll. Abr. 343; Lane, 54, 55; Prec. Ch. 418; *Turnor's case*, 1 Vern. 7, 18; *Factor v. Samynne*, 2 Vern. 270; *Bates v. Dandy*, 2 Atk. 207; *Incedon v. Northcote*, 3 Atk. 435.

(*z*) *Wallis v. Harrison*, 5 M. & W. 142; 7 Dowl. 395.

(*a*) *Stead v. Creagh*, 9 Mod. 43; *Druce v.*

Denison, 6 Ves. 385; Bac. Abr. tit. *Baron and Feme* (C. 2).

(*b*) *Day v. Duberly*, 5 H. L. Cas. 388.

(*c*) See *Richardson v. Hall*, 1 Brod. & B. 50.

(*d*) *Moody v. Matthews*, 7 Ves. 174.

(*e*) *Cuton v. Coles*, L. R., 1 Eq. 581.

(*f*) Bac. Abr. tit. *Baron and Feme* (C. 2).

(*g*) See Jarman on Wills (3rd ed.); Wms. Exors. (7th ed.).

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Death (*Heirs*
or *Devisees*).

office; and the legatee cannot enter until he has the assent of the executor to the bequest (*h*). Indeed, even where a term is bequeathed to an executor for his own use, it does not vest in him as legatee until he as executor assents to it (*i*). An executor may before obtaining probate assent to a bequest (*k*); but not an administrator before obtaining letters of administration (*l*). The assent of any one of several executors is sufficient (*m*). The assent of an executor to a bequest is not matter of law, but a question of fact for the jury (*n*). An assent once given cannot be afterwards retracted (*o*). Executors should never assent to a bequest until they have very clearly ascertained that there is sufficient property to pay all the testator's debts and liabilities. An executor who has assented unconditionally to a specific bequest of the testator's leaseholds is not entitled, in a Court of Equity, to require an indemnity out of the testator's general estate in respect of his covenants contained in the leases (*p*).

Actions for
Breaches of
Covenant be-
fore or after
Lessor's
Death.

Where the covenant of a lessee, whether it runs with the land or not, has been broken in the lessor's lifetime, and whilst the lessor continued to be the reversioner, his executors or administrators are the only persons entitled to sue upon it: and so, also, with respect to covenants which do not run with the land or with the reversion. The administratrix of a surviving trustee of freehold or leasehold property may sue for arrears of rent which became due in his lifetime (*q*). Where a covenant of the lessee, which runs with the land, has been broken *after* the death of the lessor, the right of action is vested in the person then legally entitled to the reversion (*r*).

Who entitled
to Rent, &c.
before Birth
of Posthu-
mous Child.

A qualified heir is entitled to the rents and profits of realty which accrue between the death of the ancestor and the birth of the ancestor's posthumous and only child, whether such rents be actually received before such birth or not (*s*).

Actions
against
Legatees and
Heirs.

The legatee of a term is an assignee thereof (after the executor has assented to the bequest), and as such is liable for subsequent breaches of covenants which run with the land (*t*); but a legatee of an equity of redemption in a term cannot be charged as an assignee (*u*). If there be a breach of the lessor's covenants in his lifetime, his heir is

(*h*) *Doe d. Maherley v. Maherley*, 6 C. & P. 126; 2 Wms. Exors. 1372 (7th ed.).

(*i*) *Young v. Holmes*, 1 Str. 70; *Doe d. Hayes v. Sturges*, 7 Taunt. 217; Shep. Touch. 454; 2 Wms. Exors. 1380 (7th ed.).

(*k*) *Fenton v. Clegg*, 9 Exch. 680; *Johnson v. Warwick*, 17 C. B. 516; 25 L. J., C. P. 102.

(*l*) *Morgan v. Thomas*, 8 Exch. 302.

(*m*) 2 Wms. Exors. 948, 1378 (7th ed.).

(*n*) *Mason v. Farnell*, 12 M. & W. 674; 1 D. & L. 576.

(*o*) *Doe d. Id. Saye and Sele v. Guy*, 3 East, 120; *Foley v. Barnell*, 4 Bro. P. C. 34.

(*p*) *Shadbolt v. Woodfall*, 2 Coll. 30; *Hickling v. Bowyer*, 3 Mac. & G. 635, 646; 2 Wms. Exors. 1348, 1378 (7th ed.).

(*q*) *Dollen v. Batt*, 4 C. B., N. S. 760; 27 L. J., C. P. 281.

(*r*) Com. Dig. tit. *Covenant* (B. 3).

(*s*) *Richards v. Richards*, 1 Johns. 754; 29 L. J., Ch. 836.

(*t*) *Holford v. Hatch*, 1 Doug. 184.

(*u*) *Mayor of Carlisle v. Blamire*, 8 East, 487.

liable if named, if the covenant be real, in respect of his assets by descent; and he may be sued as an assignee of the reversion (x).

CH. VII. s. 10.
Death (Heirs
or Devisees).

(b) *Executors and Administrators.*

Executors and administrators are entitled, by virtue of their office, to all the chattels real and personal of the deceased, notwithstanding a specific bequest of any of them to another person. A legatee of leaseholds has no complete title until one or more of the executors has assented to the bequest (y). If a lease for years of land be granted to a man and his heirs, or to him and the heirs of his body, or to him and his successors, and he die, his executor or administrator, and not his heir, takes the term (z). If a rent be granted or reserved out of land to a person in fee-simple, fee-tail, for life or years, the arrears due at his death go to his executor or administrator (a); and a rent-charge *pur autre vie* goes to the executors or administrators of the grantee, though they are not mentioned in the grant (b).

What goes to
Executors
and Admin-
istrators
generally.

The right of an executor to the personal estate and effects of his testator (including chattels real and choses in action) is derived from the will, of which the probate is merely evidence (c). He is legally possessed from the time of the testator's death, and before obtaining probate (d). Where leaseholds are mortgaged, probate duty is payable in respect thereof only on the value beyond the mortgage (e). The validity of letters of administration cannot be disputed on the ground that there is a will, without first getting them recalled by the Court of Probate (f). The right and power of an administrator is derived wholly from the letters of administration (g). He cannot bind the testator's estate by assenting to any application or disposal thereof, before obtaining letters of administration; which do not relate back (h). An executor *de son tort*, to whom administration is subsequently granted, may repudiate an agreement made by him, to surrender a term of years vested in the intestate (i).

Effect of
Probate.

Letters of Ad-
ministration.

If a testator die possessed of a term of years, it will vest in his executor, who cannot waive it although it be worth nothing; for he must renounce the executorship in toto, or not at all (k). If he assign

Executor
taking Pro-
bate, cannot
renounce
Term.

(x) *Derisley v. Custance*, 4 T. R. 75.

(y) *Ante*, 264, n. (h).

(z) *Lit. s.* 740; 10 Co. R. 87; *Shep. Touch.* 469; 1 Wms. Exors. 673 (7th ed.).

(a) 1 Wms. Exors. 820 (7th ed.); *Dollen v. Batt*, 4 C. B., N. S. 760; 27 L. J., C. P. 281.

(b) 1 Vict. c. 26, s. 6; *Bearpark v. Hutchinson*, 7 Bing. 178; *Reynolds v. Wright*, 25 Beav. 100; 27 L. J., Ch. 392; 2 De Gex, F. & J. 590.

(c) *Hensloe's case*, 9 Co. R. 38 a; 1 Wms. Exors. 293 (7th ed.); *Pemberton v. Chapman*, 7 E. & B. 218; 26 L. J., Q. B. 120.

(d) *Smith v. Miles*, 1 T. R. 480; *Roe d. Bendall v. Summerset*, 2 W. Blac. 692; 5 Burr. 2608.

(e) 31 & 32 Vict. c. 124, ss. 7, 8.

(f) *Prosser v. Wagner*, 1 C. B., N. S. 289; 26 L. J., C. P. 81.

(g) *Shep. Touch.* 474; 1 Wms. Exors. 404 (7th ed.).

(h) *Morgan v. Thomas*, 8 Exch. 302.

(i) *Des d. Hornby v. Glenn*, 1 A. & F. 49.

(k) *Hellier v. Casbard*, 1 Sid. 266; 1 Lev. 127; *Rubery v. Stevens*, 4 B. & Ad. 244.

CH. VII. s. 10. it, or assent to a specific bequest of it, he may thereby be guilty of a devastavit to the extent of its real value. Terms of years belonging to a testator or intestate vest in his executor or administrator without any entry (*l*). In the case of a tenancy from year to year as long as both parties please, if the tenant die, his personal representative has the same interest in the land as he had (*m*). Any one of several executors, without the concurrence of the others, has power to assign the whole of the testator's term and interest in all or any of his leasehold property (*n*); but not after either of them has assented to a bequest of such property to a legatee (*o*).

Actions by
Executors.

An action for rent, which became due in the lifetime of the lessor, may be brought by his executor or administrator. So he may sue the lessee for breach of a covenant not to fell, stub up, lop or top timber trees, excepted out of the demise, the breach having been committed in the lifetime of the lessor (*p*). So the executor of a tenant for life may sue for breach of a covenant to repair, committed by the lessee in the lifetime of the testator (*q*). By 3 & 4 Will. 4, c. 42, s. 2, executors and administrators may bring actions for injuries to the real estate of the deceased committed within six months before his death.

Distresses.

As to distresses by executors or administrators, see post (*r*).

Liability of
Personal Re-
presentatives.

An executor or administrator may be charged as such for arrears of rent due from the deceased, so far as he has assets (*s*), but by the operation of 32 & 33 Vict. c. 46, the lessor is not entitled to any priority over other creditors (*t*). So also is an executor de son tort, and that merely on proof that the term vested in him as such (*u*). For subsequent rent he may be charged either as executor (or administrator) during the term (*x*), or personally as an assignee of the term, even where he has not entered to take possession of the demised premises (*y*). But the husband of an executrix or administratrix, who has never entered, ought not to be sued alone as assignee of the term (*z*).

Liability of
Executor *De*
son tort.

An executor de son tort is liable as assignee upon the covenants of

(*l*) *Holliston v. Hakerwill*, 3 M. & G. 297; *Atkins v. Humphrey*, 2 C. B. 654; 3 D. & L. 612; but see *Kearsley v. Osley*, 2 H. & C. 896.

(*m*) *Doe d. Shore v. Porter*, 3 T. R. 13; *James v. Dean*, 11 Ves. 391; *Mackay v. Mackreth*, 4 Doug. 213; *Rex v. Great Glenn*, 5 B. & Ad. 188; *Thompson v. Thompson*, 9 Price, 464.

(*n*) *Hawkins v. Williams*, 10 W. R. 692, Q. B.

(*o*) *Cole Ejec.* 529, 530.

(*p*) *Raymond v. Fitch*, 2 C., M. & R. 588. See 1 Wms. Exors. 806 (7th ed.).

(*q*) *Ricketts v. Weaver*, 12 M. & W. 718;

Noble v. Cass, 2 Sim. 343.

(*r*) Chap. XI. Sect. 3 (d).

(*s*) 2 Wms. Exors. 1752 (7th ed.).

(*t*) *Shirreff v. Hastings*, L. R., 6 Ch. D. 610; 25 W. R. 842.

(*u*) *Faull v. Simpson*, 9 Q. B. 365.

(*x*) *Coghil v. Frealove*, 3 Mod. 325; *Pitcher v. Torry*, 4 Mod. 71; 1 Wms. Saund. 241 b, note (5); 2 Wms. Exors. 1752 (7th ed.).

(*y*) *Holliston v. Hakerwill*, 3 M. & G. 297; *Nation v. Tozer*, 1 C., M. & R. 172; *Green v. Ld. Listowel*, 2 Ir. L. R. 384; *Ackland v. Pring*, 2 M. & G. 937; *Lyddall v. Dunlop*, 1 Wils. 4, 5; 1 Wms. Saund. 1, note (1); but see *Kearsley v. Osley*, 2 H. & C. 896.

(*z*) *Kearsley v. Osley*, 2 H. & C. 896.

a lease, and the executor of an executor de son tort may himself become executor de son tort in respect of the estate of the original estate. Where the father was executor de son tort with regard to a lease, and the son upon his death acted as agent to the mother till her death, and then continued in possession of the lease for the benefit of himself and the other children, it was held that he became assignee of the lease, and liable upon the covenants therein (*a*).

CH. VII. s. 10.
Death (Executors and Administrators).

An executor or administrator may discharge himself from personal liability as assignee of the term by an assignment over, even to a pauper (*b*); and if, not having a sufficiency of assets, he do not so assign, after first offering to surrender he cannot throw the resulting loss upon beneficiaries (*c*).

Executor may assign over to Pauper.

The proper course to be pursued is that pointed out in 22 & 23 Vict. c. 35, s. 27 (*d*). In cases to which that act does not apply, or where it is not pursued, an executor or administrator sued as an assignee of the term, and who has not assigned over, may plead—except as to £—— (being the full actual value of the demised premises during the period in respect of which the rent is claimed, and which should be paid into court, or the claim for it be otherwise answered (*e*))—that the term did not vest in him by assignment otherwise than as executor or administrator, and that he has not at any time since the death of the lessee received or derived, nor could he during any part of that time receive or derive, any profit from the said demised premises, except sums amounting to the sum excepted, and that the said demised premises have not since the death of the lessee yielded any profit whatever, except to the amount excepted; and that the defendant had not at the commencement of the action, nor has since had, nor has any goods or chattels which were of the lessee at the time of his death in the hands of the defendant as executor (or administrator) as aforesaid to be administered (*f*).

Executor not personally liable for Rent.

But the defence that the premises are worth nothing does not seem to be available in an action for non-repair, or for other breaches of covenant running with the land (not being for non-payment of rent) (*g*). And it would seem that the absence of assets is equally unavailable as a defence (*h*). The preponderance of authority seems to be in favour

Whether Executor personally liable for Breach of Covenant to repair.

Tremeere v. Morison.

(*a*) *Williams v. Heales*, L. R., 9 C. P. 177; 43 L. J., C. P. 80; 30 L. T. 20; 22 W. R. 317.

(*b*) *Pitcher v. Torrey*, 4 Mod. 71; *Taylor v. Shum*, 1 B. & P. 21; *Wilson v. Wigg*, 10 East, 315.

(*c*) *Rowley v. Adams*, 4 Myl. & Cr. 531.

(*d*) Post, 269.

(*e*) *Patten v. Reid*, 6 L. T. 281, Q. B.

(*f*) *Billinghurst v. Spearman*, 1 Salk. 297; *Buckley v. Porter*, 1 Salk. 317; *Rubery v. Stevens*, 4 B. & Ad. 241; *Wollaston v. Hakewill*, 3 M. & G. 207;

Hopwood v. Whaley, 6 C. B. 741; 6 D. & L. 342.

(*g*) *Tremeere v. Morison*, 1 Bing. N. C. 89; *Sleap v. Newman*, 12 C. B., N. S. 116; *Hornidge v. Wilson*, 11 A. & E. 645; *Tilley v. Norris*, 1 Ld. Ray. 553; but see per Bayley, B., in *Reid v. Lord Tenterden*, 4 Tyr. 111.

(*h*) *Tremeere v. Morison*, ubi supra; *Wollaston v. Hakewill*, 3 M. & G. 320, where, however, it is said that the executor is not liable without entry.

CH. VII. s. 10. of this rule, though it may work extreme injustice in particular cases *Death (Executors and Administrators).* (as, for instance, where a house is burnt down); and the danger foreseen by Tindal C. J., in *Tremere v. Morison* (*i*), viz., that the landlord would have no redress though the property went on deteriorating, can rarely arise in practice, as almost all leases have a proviso for re-entry in case of breach of covenants.

If issue be taken on the value of the premises the question will be whether they were of any annual value (*k*), or of any value beyond the sum excepted out of the defence and paid into court or otherwise pleaded to. In estimating such value the jury must calculate according to the actual annual value of the premises, supposing them to be kept in proper repair according to the covenants in the lease, and without deducting any loss occasioned by the insolvency of an under-tenant, or the non-payment of the rent by him (*l*).

Continuing
Liability of
Executors.

An executor or administrator cannot be sued as assignee of the term where the testator or intestate has assigned it: nor for causes of action which accrue after the executor or administrator has himself assigned it over: but (except so far as protected by 22 & 23 Vict. c. 35, s. 27) he will continue liable as executor or administrator in respect of any other assets, notwithstanding any such assignment (*m*). The term vests in the executor or administrator as assignee thereof without any entry by him (*n*).

Only Profits
are Assets.

When an executor takes leasehold property nothing is assets but the profits above the rent: as, if the land be worth 10*l.* per annum, and 5*l.* is reserved, in that case nothing is assets but the 5*l.* above the rent (*o*). The profits of the land may be inadequate to the rent: in a variety of cases they may be easily supposed insufficient for a given period, although the lease may on the whole be beneficial; as, for instance, where rent is claimed for the occupation of premises from Michaelmas to Lady-day, where almost the whole profit is taken in the summer (*p*): so the profits for a series of years may be less than the amount of the rent, although the lease for the whole term may be of no small value,—as in the case of a lease of woods, which are fellable only once in eight or nine years, and the felling has been very recent (*q*). In these and the like instances, the executor is personally liable only to the extent of the profits; and for such pro-

(*i*) The law upon the subject of 'the liability of the executor of a lessee is well summarized in the notes to *Jean and Chaper of Bristol v. Guyse*, 1 Wms. Saund. 124 (ed. 1871); see, too, *Jevens v. Hartridge*, Id. 1.

(*k*) *Rubery v. Stevens*, 4 B. & Ad. 241.

(*l*) *Hornidge v. Wilson*, 11 A. & E. 645; *Rubery v. Stevens*, *supra*; *Reid v. Ld. Tenterden*, 4 Tyr. 111.

(*m*) *Hellier v. Casbard*, 1 Lev. 127; 1 Sid. 266; *Coghil v. Frecklove*, 3 Mod. 325;

Wilson v. Wigg, 10 East, 315; *Howse v. Webster*, Yelv. 103; 2 Wms. Exors. 1751 (7th ed.).

(*n*) *Wollaston v. Hakevill*, 3 M. & G. 297; *Atkins v. Humphreys*, 2 C. B. 654; 3 D. & L. 612; but see *Kearseley v. Oakley*, 2 H. & C. 896.

(*o*) *Hargrave's case*, 5 Co. R. 31 b, cited 4 B. & Ad. 245.

(*p*) 2 Wms. Exors. 1622 (6th ed.).

(*q*) *Ibid.*

portion of the rent as shall exceed the profits, he is chargeable merely in the capacity of executor, or, in other words, as far only as he has assets, provided he pleads the whole matter specially and accurately (r). The profits of the land are to be applied by the executor, in the first place, to the discharge of the rent, and if that fund prove insufficient, the residue of the rent is payable out of the general assets, and stands on the same footing with other debts by specialty; and this whether the rent be reserved by lease in writing or by parol. A lease belonging to an intestate, on which another has a lien, is assets in the hands of the administrator, who has power to redeem it as well as to dispose of the legal estate (s). So an equity of redemption in a sum of money charged on real estate is a legal asset because the money is recoverable by the executor *virtute officii* (t).

CH. VII. s. 10.
Death (Executors and Administrators).

In *Fry v. Fry* a lessee was bound to insure. The insurance expired on the 25th March. He died on 27th March, without having paid the premium. The house was burnt down on the 26th May, his executors (who did not prove till the 17th June) not having paid the premium. It was held, that they were not personally liable for not having kept up the assurance (u).

Insurance

An administrator of a lessor has been held obliged to contribute as owner towards the rebuilding of a party-wall under the old Building Act, though not otherwise owner than as administrator, and though he had no assets to meet the expenses (x).

Party-Walls.

The hardship of the common law upon executors has been somewhat modified by the statute 22 & 23 Vict. c. 35, which enables an executor, *having sufficient assets* and taking advantage of the act, to rid himself completely of his personal liability under any lease or agreement for a lease. By section 27 of this act, "where an executor or administrator, liable as such to the rents, covenants or agreements contained in any lease or agreement for a lease, granted or assigned to the testator or intestate, whose estate is being administered, shall have satisfied all such liabilities under the said lease or agreement for a lease as may have accrued due and been claimed up to the time of the assignment hereafter mentioned, and shall have set apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum covenanted or agreed by the lessee to be laid out on the property demised, or agreed to be demised, although the period for laying out the same may not have arrived, and shall have assigned the lease, or agreement for a lease, to a purchaser

How Executor may get rid of Personal Liability.
22 & 23 Vict. c. 35, s. 27.

(r) *Buckley v. Park*, 1 Salk. 317; *Billinghurst v. Spearman*, 1 Salk. 297; *Rubery v. Stevens*, 4 B. & Ad. 241; *Hornidge v. Wilson*, 11 A. & E. 645; *Hopwood v. Whaley*, 6 C. B. 744; 6 D. & L. 348; *Collins v. Crouch*, 13 Q. B. 542; Bullen & L. Pl. 583, 584 (3rd ed.).

(s) *Vincent v. Sharp*, 2 Stark. R. 507.
(t) *Cook v. Gregson*, 3 Drew. 547; 25 L. J., Ch. 706.
(u) *Fry v. Fry*, 27 Beav. 146; 28 L. J., Ch. 593.
(x) *Thacker v. Wilson*, 3 A. & E. 142.

CH. VII. s. 10.
*Death (Execu-
 tors and Ad-
 ministrators).*

Right of
 Lessor to fol-
 low Assets.

thereof, he shall be at liberty to distribute the residuary personal estate of the deceased to and amongst the parties entitled thereto respectively, without appropriating any part, or any further part (as the case may be), of the personal estate of the deceased to meet any future liability under the said lease, or agreement for a lease; and the executor or administrator so distributing the residuary estate shall not, after having signed the said lease or agreement for a lease, and having, where necessary, set apart such sufficient fund as aforesaid, be personally liable in respect of any subsequent claim under the said lease or agreement for a lease." The section goes on to provide, that "nothing herein contained shall prejudice the right of the lessor, or those claiming under him, to follow the assets of the deceased into the hands of the person or persons to or amongst whom the said assets may have been distributed." Leases made before the act are within this section (z), and so are leases assigned to the testator or intestate (a), but a lease assigned to a residuary legatee is not (z). It is not clear whether an executor should set apart a fund to meet a contingent liability under a lease, which he knows of, but as to which no notice has been given him, or claim made; perhaps he may do so for his own indemnity, but the landlord has no right to bring an action to compel him to do so (b).

By sect. 28, the executor has the like power of getting rid of personal liability under conveyances on chief rent or rent-charges, and agreements for such conveyances.

By sect. 29, executors or administrators may advertise for creditors and others to send in their claims against the estate of the testator or intestate, and at the expiration of the time named in the advertisements for sending in such claims, are at liberty to distribute the assets of the testator or intestate amongst the parties entitled thereto.

By sect. 30, executors or administrators may, by petition or summons, obtain the opinion of a judge of the Chancery division "on any question respecting the management or administration of the trust property or the assets of any testator or intestate," and may act on such opinion with perfect safety, except in case of fraud or wilful concealment. Questions of construction affecting capital of considerable amount will not be decided upon a petition under this section (c). Executors bringing facts plainly before the court and distributing the assets under its direction are absolutely protected against any future claim; and the only remedy of a creditor on covenant or otherwise is against the legatees (d). A lessor is not entitled, in respect of

(z) *Dodson v. Sammiell*, 1 Drew. & Sm. 575; 30 L. J., Ch. 799; *Smith v. Smith*, 1 Drew. & Sm. 384.

(a) *In re Green*, 2 De Gex, F. & J. 121.

(b) *King v. Walcott*, 9 Hare, 692.

(c) *In re Burnett*, 10 Jur., N. S. 1098, Wood, V.-C.; *In re Evans*, 30 Beav. 232.

(d) *Bennett v. Lytton*, in *re Sanford*, 2 Johns. & H. 155; *Smith v. Smith*, 1 Drew. & Sm. 384.

a breach of covenant in a lease, to follow the assets of a deceased lessee, which had been placed in settlement upon the marriage of the lessee's daughter, there being no imputation as to the honesty with which the assets have been dealt with (e). CH. VII s. 10.
Death (Executors and Administrators).

Where leaseholds are sold under an order of the court in an administration action, and the purchase-money is paid into court, the order is a sufficient indemnity to the executors (f).

Actions for use and occupation by and against executors and administrators will be treated of hereafter (g). Where there was a lease by deed, and on the death of the lessee her son applied to the lessor to become tenant on the same terms as the lessee, and was accepted; it was held, in an action for use and occupation against the son, to whom, jointly with another, letters of administration had been granted to the estate of his mother after the commencement of the action, that it was a question for the jury whether the defendant occupied as assignee of the lease or upon a fresh taking (h). Use and Occupation.

Formerly an executor or administrator could not be charged in any case for any personal wrong done by the deceased, and therefore no action could be brought against him for any such cause; as for cutting down trees, or for suffering his cattle to eat up the plaintiff's grass; but by 3 & 4 Will. 4, c. 4, s. 2, such actions may be brought against executors within six months after administration commenced in respect of wrongs committed by the deceased within six months before his death. Wrongs to Property committed by the Testator or Intestate.

(e) *Dilkes v. Broadmead*, 2 Giff. 113; 29 L. J., Ch. 310; 30 Id. 268.

(f) *Waller v. Barrett*, 24 Beav. 413; 27 L. J., Ch. 211; *Williams v. Headland*, 34 L. J., Ch. 20. It was otherwise before the passing of 22 & 23 Vict. c. 35. See

Garratt v. Lanerfeld, 2 Jur., N. S. 177; *Brewer v. Pocock*, 23 Beav. 310.

(g) Chap. XIV.

(h) *Drury Lane Theatre v. Chapman*, 1 C. & K. 14.

CHAPTER VIII.

DETERMINATION OF THE TENANCY.

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SECT. 1.—*The Modes of Termination.*

In what ways a Lease may be determined. A LEASE for years may be determined in various ways, viz.:—1. By effluxion of time, on the expiration of the term granted. 2. By the happening of some event upon which the term is limited conditionally. 3. By a surrender. 4. By merger. 5. By forfeiture and re-entry or ejectment pursuant to some proviso or condition in the lease, for breach of covenant, &c. 6. By a notice to quit, where the tenancy is from year to year, or for other like period (greater or less) determinable by notice. 7. By a notice to determine the term at the end of the first seven or fourteen years thereof, or at some other specified period, pursuant to a power in the lease. 8. By a disclaimer of the reversioner's title, where the tenancy is only from year to year, or other less period, and not for a term of years. 9. By death of the party on whose life the lease depends, as in the case of a lease for lives.

By Effluxion of Time. When the term of years granted by a lease expires by effluxion of time, the lessee or his assigns ought thereupon to quit possession (a).

(a) For the consequences of "Holding Over," see Chap. XIV., post.

SECT. 2.—*When the Term is limited conditionally.*

Sometimes the term itself is limited conditionally, ex. gr. for forty years if the lessee, or some other person or persons therein named shall so long live. In such case the term will determine at the end of the forty years, or on the death of the person or persons named, which shall first happen (*b*). Where a certain term of years is granted provided the lessee shall so long continue to occupy the premises personally, it will cease whenever he parts with the possession, even by compulsion of law, as by his becoming bankrupt (*c*). It was held in an old case that a lease for twenty-one years, if the lessee continue so long in the service of the lessor, was not determined by the death of the lessor (*d*); and in another old case, that if a lease of a house was made to a widow for forty years, *sub conditione quod si tamdiu rixerit sola et inhabitaverit*, the term passed to her executor upon her death unmarried within the term (*e*): but these rulings seem hardly to be correct, the first because the contract of service terminates with the death of the master, and the second because the meaning of the parties appears to have been that the lease should be for the life of the widow.

CIT. VIII. s. 2.
When Term is limited conditionally.

Conditional Limitations and Conditions.

Where the testator appointed the defendant to be his agent, "to live rent free in my house as long as he continued agent, that is, as long as he does the business honestly and to the satisfaction of the trustees," it was held that the direction of the testator was only a recommendation to the trustees to continue the defendant as agent, and that they might eject him from the house, unless the defendant could prove the dismissal to be malicious (*f*).

Devise of House Rent free, during good Behaviour.

Upon the breach of any *condition* the lessor or his assigns may re-enter or maintain an ejectment, without any express proviso for re-entry (*g*). A proviso in a lease with no penalty annexed is a condition; but if a penalty is annexed it is a covenant (*h*).

Re-entry on Breach of Condition.

SECT. 3.—*Surrender.*

(a) *Surrender by express Terms.*

A surrender is the yielding up an estate for life or years to him who has the immediate estate in reversion or remainder, wherein the estate for life or years may merge, by mutual agreement (*i*). The

What is a Surrender.

(*b*) Cole Ejec. 402; *Hughes and Crowther's case*, 13 Co. R. 66; *Brudnell's case*, 5 Co. R. 9.

(*c*) *Doe d. Lockwood v. Clarke*, 8 East, 185.

(*d*) *Wrenford v. Gyles*, Cro. Eliz. 643; Noy, 70.

(*e*) *Hardy v. Seyer*, Cro. Eliz. 414.

(*f*) *Belaney v. Kelly*, 24 L. T. 738.

(*g*) *Harrington v. Wise*, Cro. Eliz. 486, cited 8 B. & C. 316; *Earl of Pembroke v. Sir H. Berkeley*, Cro. Eliz. 384, 560; *Knight v. Mory*, Id. 60; see post, Sect. 5, "Forfeiture."

(*h*) *Simpson v. Titterell*, Cro. Eliz. 242.

(*i*) 1 Inst. 337 (*b*); *Smith L. & T.* 303 (2nd ed.).

CH. VIII. s. 3. party making the surrender is called the surrenderor, and the party to whom it is made the surrenderee. It differs from a release in this respect, that the release operates by the greater estate descending upon the less; whereas a surrender is the falling of a less estate into a greater (*k*). The proper operative words of a surrender are "surrender and yield up" (*l*). If a lessee reserve to himself any interest in or part of the estate, it is no surrender (*m*); nor does a surrender, it seems, operate as such unless accepted by the reversioner (*n*).

Every Surrender must be in Writing, and a Surrender of more than 3 Years' Term must be by Deed.

Every surrender, by the act of the parties, must be in writing, and every surrender of a term of more than three years must be by deed. This is the effect of the third section of the Statute of Frauds, and of the third section of 8 & 9 Vict. c. 109, the later enactment providing that if a deed be necessary for the creation of the term, a deed is requisite to its surrender (*o*).

Stat. Frauds, s. 3.

By the Statute of Frauds (29 Car. 2, c. 3), s. 3, "no leases, estates or interests, either of freehold or of term of years, or any uncertain interest not being copyhold or customary interest, of, in, to or out of any messuages, manors, lands, tenements or hereditaments, shall be assigned, granted or surrendered, unless it be by deed or note in writing, signed by the party so assigning, granting or surrendering the same, or their agents thereunto lawfully authorized by writing, or by act and operation of law." By 8 & 9 Vict. c. 106, s. 3, "a surrender in writing of an interest in any tenements or hereditaments, not being a copyhold interest, and not being an interest which might by law have been created without writing (*p*), made after the 1st day of October, 1845, shall be void at law unless made by deed."

8 & 9 Vict. c. 106.

No Surrender by mere Cancellation.

It has been held that a lease cannot be surrendered by mere cancellation (*q*); and it has been held also, where a lease appeared to have had the names of the parties torn off, that there was neither a surrender by operation of law, nor *prima facie* evidence of a surrender by deed or note in writing (*r*).

Roe v. Archbishop of York.

Conditional surrender.

A lessee may surrender upon condition, and if the condition be broken, the particular estate is revested (*s*); therefore, if a lessee for years surrender his whole term to the original lessor upon condition, he may, upon non-performance of the condition, re-enter and revive the term (*t*).

(*k*) *Smith v. Mapleback*, 1 T. R. 441; *Williams v. Sawyer*, 3 B. & B. 70.

(*l*) *Smith L. & T.* 304 (2nd ed.). See *Forms of Surrenders*, post, Appendix B, Sects. 30, 31, 32, 33.

(*m*) *Com. Dig. tit. Surrender* (H.); *Bac. Abr. tit. Leases* (S. 3); *Co. Lit.* 337.

(*n*) *Coles v. Evanson*, 19 C. B., N. S. 382.

(*o*) See *McGarth v. Shannon*, 17 Ir. R., C. L. 128.

(*p*) *I. e.* "by sect. 1 of the Statute of Frauds, a lease not exceeding three years

from the making thereof, whereupon the rent reserved unto the landlord shall amount unto two-thirds parts at least of the full improved value."

(*q*) *Roe v. Archbishop of York*, 6 East, 86; *Id. Ward v. Lumley*, 5 H. & N. 87, 656; 29 L. J., Ex. 322.

(*r*) *Doe d. Courtail v. Thomas*, 9 B. & C. 288.

(*s*) *Co. Lit.* 218 b.

(*t*) *Lloyd v. Langford*, 2 Mod. 176; *Bac. Abr. tit. Leases* (S. 3).

The lessee cannot before entry merge the term by a surrender, because till entry there is no term and no reversion wherein the possession may be merged; but if the lessee enter and assign, the assignee may before entry surrender his term to the lessor (*u*). But it is not necessary that the surrenderor of a lease, to begin at a future day, should be in possession in order to make a surrender before the period of commencement: thus, if a lease be to commence at Michaelmas next, and the lessee take a new lease under seal before Michaelmas, it is a surrender in law of the first lease (*x*). As to surrender of leases in futuro or future interests, there is this distinction to be observed, that a lessee for years of a term to begin at a day to come cannot surrender it by an actual surrender before the day of the term begin, but he may by a surrender in law (*y*). Whenever a deed purporting to be a surrender cannot operate as such, it will probably take effect as an assignment or as a release of the right to the term, *ut res magis valeat quam pereat*.

CH. VIII. s. 3.
Surrender (by express Terms).

At what Time a Surrender may be made.

In order to make a good surrender of lands by deed, and to make them pass by such a surrender, these things are requisite:—1. That the surrenderor be a person able to surrender, and that he have an estate in possession of the thing surrendered at the time of the surrender made. 2. That the surrender be to him who has the next immediate estate in remainder or reversion, and that there be no intervening estate coming between. 3. That there be a privity of estate between the surrenderor and surrenderee. 4. That the surrenderee have a higher and greater estate in the thing surrendered than the surrenderor hath, so that the estate of the surrenderor may be drowned therein. 5. That he have the estate in his own right, and not in the right of another. 6. That he be sole seised of this estate in remainder or reversion, and not in joint-tenancy (*z*). 7. That apt, or at events sufficient, operative words be used (*a*). Those commonly employed are “surrender, grant and yield up,” or “assign and surrender.” But no particular words are essential (*b*). Where a deed is not required by 8 & 9 Vict. c. 106, s. 3 (*c*), any instrument in writing, duly signed, and expressing an immediate purpose of giving up the estate on the part of the tenant, if accepted by the landlord, will be sufficient (*d*). But such acceptance would seem to be necessary (*e*).

Requisites of a good Surrender.

A written instrument in this form:—“We do hereby renounce and

Particular instances of Surrenders.

(*u*) Bac. Abr. tit. *Leases* (S. 2).

(*x*) Shep. Touch. 302.

(*y*) Id. 304; *Ive v. Sams*, Cro. Eliz. 521; *Hutchins v. Martin*, Cro. Eliz. 605.

(*z*) Shep. Touch. 303; 2 Blac. Com. 336; but see contra, Shep. Touch. 308.

(*a*) Post, note (*d*).

(*b*) See usual Forms of Surrenders, post,

Appendix B., Scots. 30—33.

(*c*) Ante, 274.

(*d*) *Farmer v. Rogers*, 2 Wils. 26; *Smith v. Mapleback*, 1 T. R. 441; *Weddall v. Capes*, 1 M. & W. 50; *Harrison v. Blackburn*, 17 C. B., N. S. 679, 680.

(*e*) Per Byles, J., in *Colles v. Evanson*, 19 C. B., N. S. 382.

CH. VIII. s. 3. disclaim, and also surrender and yield up all right, &c.," a tenancy Surrender (by from year to year being in existence, has been held a surrender and express Terms). not a disclaimer (*f*). A written request by the tenant to his landlord to re-let the premises to some other person may, *when acted on*, amount to a surrender by act and operation of law (*g*). A written notice given by the tenant of his intention to quit at a time when he believed his tenancy to expire, but which is afterwards discovered not to be the time, does not operate as a surrender (*h*).

(b) *Surrender by Act and Operation of Law.*

Surrender by
Acceptance of
a new Lease.

Surrenders by "act and operation of law," or implied surrenders, are excepted in the Statute of Frauds (*i*), and are not affected by the 8 & 9 Vict. c. 106, s. 3, which only applies to surrenders made in writing (*k*). Of this sort are surrenders created by the acceptance of a new lease from the reversioner either to begin presently, or at any time during the continuance of the first lease; for the acceptance of a valid new lease implies a surrender of the existing lease (*l*), and operates as a surrender thereof by act and operation of law (*m*), but not if the second lease be void or voidable (*n*), or if there be a mere agreement for a future lease, and not an actual demise (*o*). The reason why such acceptance of a new lease operates as a surrender of the first is, because the lessee, by accepting the new lease, has been party to an act, the validity of which he is afterwards estopped from disputing, and which would not be valid if the first lease continued to exist, for he would be estopped from saying that the lessor had not power to make the new lease; and as the lessor could not grant the new lease until the first lease was surrendered, the acceptance of the new lease is of itself a surrender of the first (*p*).

What is a
sufficient new
Lease.

If a lessee for twenty years take a lease for ten years to begin at Michaelmas next, there is no doubt but that the term of twenty years is surrendered or determined immediately; for by the lessee's acceptance of the new lease, he admits that the lessor is in a situation to demise to him, notwithstanding the existence of the other lease; and, indeed, by such acceptance the lessor has power to make a new lease during the former (*q*). But where a lessee for twenty-one years took

(*f*) *Doc d. Wyatt v. Slagg*, 5 Bing. N.C. 564.

(*g*) *Nickolls v. Atherstone*, 10 Q. B. 944.

(*h*) *Lyon v. Reed*, 13 M. & W. 285; *Doc d. Murrell v. Milward*, 3 M. & W. 328; *Beasell v. Landberg*, 7 Q. B. 638.

(*i*) Ante, 274; Shep. Touch. 300; Com. Dig. tit. *Surrender* (L. 1); Perk. c. 9.

(*k*) Ante, 274.

(*l*) *Davison d. Bromley v. Stanley*, 4 Burr. 2210; Com. Dig. tit. *Surrender* (I.).

(*m*) Roll. Abr. tit. *Surrender*; *Crowley v. Fitty*, 7 Exch. 319; 21 L. J., Ex. 136;

Furnivall v. Grove, 8 C. B., N. S. 496; 30 L. J., C. P. 3.

(*n*) Post, 278.

(*o*) *John v. Jenkins*, 1 Cr. & M. 227; *Foquet v. Moor*, 7 Exch. 870; *Cannan v. Hartley*, 9 C. B. 634, 648; *Badeley v. Vigors*, 4 E. & B. 71; 23 L. J., Q. B. 377.

(*p*) *Lyon v. Reed*, 13 M. & W. 285; *Beasell v. Landberg*, 7 Q. B. 638.

(*q*) *Ive v. Sams*, Cro. Eliz. 521; *Hutchins v. Martin*, Id. 604; Bac. Abr. *Leases* (S. 2); 2 Smith L. C. 713 (6th ed.).

a lease of the same lands for forty years, to begin immediately after the death of J. S., it was held that this was not any present surrender of the first term, because J. S. might wholly outlive that term, and then there would be no union to work a surrender: and it was considered that in the meantime, the chances being equal, whether he would survive it or not, the first term should not be hurt till that contingency happened; but that if J. S. died within the first term, then what remained of it was surrendered and gone by the taking place of the second (*r*). Where the lessee for years of a house accepts a grant of the custody of the same house, it is a surrender; for the custody of a thing which was let before, is another interest in the same thing leased, and cannot stand with the first lease (*s*): and if the first lease be of the land itself, and the second lease of the vesture of the same land, it is a surrender of the first lease: so it is if a lessee accept a grant of common, or rent out of the same land, to commence at a certain day within the term (*t*). If the king (or queen regnant) make a demise for years, the acceptance of a new lease is no surrender of the first lease (*u*): so if a lessee accept a grant of a thing consistent with the lease of the land, it is no surrender; as if the lessee of a manor accept the grant of a bailiwick, or the stewardship of the same manor; or if he accept the office of park-keeper of the same park for his life, it is no surrender, for the subsequent grant is merely collateral, and not of the thing itself (*x*); but where a lessee for years of an advowson was presented to the advowson by the lessor it was adjudged to be a surrender of his term (*y*).

CH. VIII. s. 3.
Surrender (by
Operation of
Law).

A recital in a second lease, that it was granted in consideration (amongst other things) of the surrender of a prior lease of the same premises, is not a surrender by deed or note in writing of such prior lease, as it does not purport to be of itself a surrender or yielding up of the interest (*z*). A mere agreement for a new lease is not sufficient to create an implied surrender of the previous one (*a*); so an agreement between the lessor and a stranger, that the lessee shall have a new lease, is no surrender (*b*): and if a lessee accept a new lease in trust for another it is no surrender (*c*). But it seems that if a lessee re-demise to the lessor, for his whole term, reserving a rent, that amounts to a surrender (*d*). A notice to quit at a future day cannot operate as a surrender (*e*), but a written request by the tenant to

What does
not create a
Surrender.

(*r*) Bac. Abr. tit. *Leases* (S. 3).

(*s*) *Gybson v. Searls*, Cro. Jac. 177.

(*t*) Com. Dig. tit. *Surrender* (I. 1); *Mellows v. May*, Cro. Eliz. 874.

(*u*) *Brook v. Goring*, Cro. Car. 197.

(*x*) *Gis v. Rider*, 1 Sid. 75; *Gybson v. Searls*, Cro. Jac. 176, 184; *Earl of Arundel v. Lord Gray*, 2 Dyer, 200 b; *Woodward v. Aston*, 1 Ventr. 296.

(*y*) *Gybson v. Searls*, Cro. Jac. 84, 176.

(*z*) *Roe d. Earl of Berkeley v. Archbp. of York*, 6 East, 86; *Doe d. Earl of Egremont v. Courtenay*, 11 Q. B. 702.

(*a*) Ante, 276 (o).

(*b*) *Forris v. Allen*, Cro. Eliz. 173.

(*c*) Com. Dig. tit. *Surrender* (H.) (L. 1).

(*d*) *Lloyd v. Langford*, 2 Mod. 175; *Smith v. Mapleback*, 1 T. R. 441.

(*e*) *Doe d. Murrell v. Milward*, 3 M. & W. 328; *Bessell v. Landsberg*, 7 Q. B. 638.

CH. VIII. s. 3. his landlord to relet the premises to some other person may, when acted on, amount to a surrender by act and operation of law (*f*).
Surrender (by Operation of Law).

Effect of an invalid new Lease.

No *implied* surrender by the grant of a new lease will take effect, if the new lease be absolutely void (*g*): and if the new lease do not pass an interest according to the contract and intention of the parties, an acceptance of it is not an implied surrender of the old lease (*h*). The acceptance of a voidable lease which is afterwards made void contrary to the intention of the parties, but which has operated to pass some part of the term contracted for, is not a surrender of a valid former lease inconsistent therewith: therefore where a tenant for life, with a power of leasing, made a lease of part of some land, which was not a good execution of the power, in consideration of the surrender of two prior leases of the whole of the land, and in order to effectuate an agreement entered into between the lessee and another person for the sale of the remaining part of the land, which the lease recited that it was intended to lease to the vendee by indenture of even date, and which was done; it was held, after the death of the tenant for life, that this new lease as to the premises thereby demised did not operate as a surrender of the two prior leases (*i*). So where a tenant for life, with power of leasing, granted a lease in “consideration of the surrender up” of a former lease, “which surrender is hereby made and accepted,” it was held, that the new lease not being a good execution of the power, and therefore voidable by the remainderman, did not operate as a surrender of the prior lease (*k*). Where a voidable bishop’s lease, which had been granted in consideration of a surrender by deed executed a few days before of a prior lease, was avoided by the successor; it was held, that the first lease was not revived by such avoidance (*l*).

Effect of a new Lease of Part only.

If a lessee for years accept a new lease by indenture of part of the lands, it is a surrender for that part only, and not for the whole (*m*); and though a contract for years cannot be so divided, as to be avoided for part of the years and to subsist for the residue, either by act of the party or act in law; yet the land itself may be divided, and the tenant may surrender one or two acres, either expressly or by act of law, and the lease for the residue will stand good and

(*f*) *Nickells v. Atherstone*, 10 Q. B. 944.

(*g*) *Zouch d. Abbott v. Parsons*, 3 Burr. 1807; *Wilson v. Sewell*, 4 Burr. 1980; 1 W. Blac. 617; *Roe d. Earl of Berkeley v. Archbp. of York*, 6 East, 86; *Davison d. Bromley v. Stanley*, 4 Burr. 2210; *Doe d. Earl of Egremont v. Courtenay*, 11 Q. B. 702; *Smith L. & T.* 307 (2nd ed.); 3 Prest. Conv. 164, 165.

(*h*) Com. Dig. tit. *Estates* (G. 13).

(*i*) *Doe d. Biddulph v. Poole*, 11 Q. B. 713; *Roe d. Earl of Berkeley v. Archbp. of York*, 6 East, 86; 2 *Smith L. C.* 713 (6th ed.); *Smith L. & T.* 308 (2nd ed.).

(*k*) *Doe d. Earl of Egremont v. Courtenay*, 11 Q. B. 702; overruling *Doe d. Earl of Egremont v. Forwood*, 3 Q. B. 627.

(*l*) *Doe d. Murray v. Bridges*, 1 B. & Ad. 847.

(*m*) *Earl of Carnarvon v. Villebois*, 13 M. & W. 342; *Morrison v. Chadwick*, 7 C. B. 266; 6 D. & L. 567.

untouched (*n*). If there be two lessees for life, or years, and one of them take a new lease for years, it is a surrender of his moiety (*o*). CH. VIII. s. 3.
Surrender (by
Operation of
Law).

The term "surrender by operation of law" is properly applied to cases where the owner of a particular estate has been party to some act having some other object than that of a surrender, but which object cannot be effected whilst the particular estate continues, and the validity of which act he is by law estopped from disputing (*p*). Such surrender is the act of the law, and takes place independently of, and even in spite of, the intention of the parties (*q*). It is presumed to have preceded the act to which the tenant is party (*r*). The acts in pais, which bind parties by way of estoppel, are acts of notoriety, not less formal and solemn than the execution of a deed, as, for instance, livery, entry, acceptance of an estate, and the like (*s*).

By Estoppel.
Lyon v. Reed.

A tenancy from year to year cannot be determined unless there be either a legal notice to quit or a surrender (*t*): and therefore a tenancy from year to year, created by parol, is not determined by a parol licence from the landlord to the tenant to quit in the middle of a quarter, and the tenant's quitting the premises accordingly (*u*); but where upon a tenancy from year to year, determinable at a quarter's notice, the lessor licensed the tenant to quit in the middle of a quarter, and the tenant accordingly quitted, and the lessor accepted possession; it was held to be a surrender by operation of law, destroying the right to rent for the whole or any part of the current quarter (*x*).

By Consent
and Accept-
ance of Pos-
session.

An agreement by landlord and tenant that the term shall be put an end to, acted upon by the tenant's quitting the premises, and the landlord by some unequivocal act taking possession, amounts to a surrender by operation of law (*y*). Where, therefore, a tenant left the key at the counting-house of the landlord, and the latter, though he at first refused to accept it, afterwards put up a board to let the premises, and used the key to show them, and painted out the tenant's name from the front, this was held sufficient evidence of a surrender by operation of law (*z*). In *Reeve v. Bird*, the tenant of a house, three cottages, and a stable and yard, let at an entire rent for a term, before the expiration of it, assigned all the premises, the house and cottages being in the possession of subtenants; the landlord accepted a sum of money as rent up to the day of the assignment, which was in the middle of a

By mutual
Agreement.
Phené v.
Popplewell.

(*n*) Bac. Abr. tit. *Leases* (S. 3). See *Jones v. Bridgman*, 39 L. T. 500.

(*o*) Shep. Touch. 302.

(*p*) *Lyon v. Reed*, 13 M. & W. 285; *Bessell v. Landsberg*, 7 Q. B. 638; Com. Dig. tit. *Surrender* (I.).

(*q*) *Lyon v. Reed*, 13 M. & W. 285.

(*r*) 9 C. B. 634, note.

(*s*) *Id.*; *Nicholls v. Atherstone*, 10 Q. B. 944.

(*t*) *Doe d. Read v. Ridout*, 5 Taunt. 519.

(*u*) *Mollett v. Brayne*, 2 Camp. 103; *Thompson v. Wilson*, 2 Stark. R. 379.

(*x*) *Grimman v. Legge*, 8 B. & C. 324; *Brown v. Burtinshaw*, 7 D. & R. 603; *Furnivall v. Grove*, 8 C. B., N. S. 496; 30 L. J., C. P. 3; Bac. Abr. tit. *Leases* (S. 2).

(*y*) *Phené v. Popplewell*, 12 C. B., N. S. 334; 31 L. J., C. P. 235.

(*z*) *Id.*

CH. VIII. s. 3.
Surrender (by
Operation of
Law).

quarter; the assignee took possession of the stable and yard only; the occupiers of the cottages having left them after the assignment, and before the expiration of the term, the landlord relet them; the tenant paid no rent after the assignment, but the landlord received rent from the subtenants, and before the expiration of the term he advertised the whole of the premises to be let or sold; it was held that this was a surrender by operation of law of all the premises (*a*). But where a tenant from year to year by a Lady-day holding, orally agreed with his landlord's agent to quit at the ensuing Lady-day, which was within half a year; and the premises were relet by auction, at which the tenant attended and bid, but the new tenant was not let into possession; it was held that the tenancy was not determined, there not having been a surrender by operation of law (*b*).

Acceptance of
Key.

If the landlord of a house in the middle of a quarter accept the key from his tenant under a parol agreement that upon his then giving up the possession the rent shall cease, and he never afterwards occupy the premises, he cannot recover in an action for the use and occupation of the house for the time subsequent to his accepting the key (*c*). But where A. was tenant to B. of rooms for a term of years, and upon the bankruptcy of B., A. sent the key of the rooms to the office of the official assignee, where it was left with a clerk, who was told that it was the key of the rooms which A. had occupied; and A. immediately quitted possession, but no further communication took place: this was held not to amount to a surrender by act and operation of law (*d*). Where two persons demised a house by lease in writing, one of whom, after signing the lease, never further interfered, and the other, before the first quarter's rent became due, accepted the key from the tenant's wife; it was held, that there was a sufficient surrender by the tenant which bound both the lessors, the wife of the tenant acting as his agent, and the lessor, who accepted the key, as the agent of the other (*e*).

But the mere fact that the landlord has received the key, and attempted unsuccessfully to relet the premises, does not estop him from alleging that the tenancy still subsists; and if, afterwards, before the expiration of the term, the landlord relet, the surrender by operation of law takes effect from such reletting, and does not relate back to the receipt of the key. So it was held by the Court of Appeal in *Oastler v. Henderson* (*f*).

Letting to
another
Person, &c.

Where a lessee quitted in the middle of his term apartments which he had taken for a year, and the lessor let them to another

(*a*) *Reeve v. Bird*, 1 C., M. & R. 31.
(*b*) *Doe d. Hudleston v. Johnstone*, 1 M'Cl. & Y. 141; *Johnstone v. Hudleston*, 4 B. & C. 922; *Doe d. Murrell v. Milward*, 3 M. & W. 328.
(*c*) *Whitehead v. Clifford*, 5 Taunt. 518;

Furnivall v. Grove, 8 C. B., N. S. 406; 30 L. J., C. P. 3.
(*d*) *Cannan v. Hartley*, 9 C. B. 634.
(*e*) *Dodd v. Acklom*, 6 M. & G. 672.
(*f*) L. R., 2 Q. B. D. 575; 46 L. J., Q. B. 607; 37 L. T. 22.

person, so that the lessee could not have come back if he had chosen; *CH. VIII. s. 3.* it was held that, by so doing, the lessor dispensed with the necessity of a written surrender (*g*). Where the owner of a ferry demised it for a year, but after a few weeks the lessee finding it unprofitable, agreed instead to become servant to the owner, and received daily wages for attending to the ferry for him, it was held to be a surrender by act and operation of law (*h*). Where a tenant from year to year agreed to buy the freehold of the land, it was held, that the agreement, not being absolute, but conditional on a good title being found, did not operate as a surrender of the tenancy by operation of law (*i*).

*Surrender (by
Operation of
Law).*

The effect of a surrender by operation of law has been extended to cases in which a third person has, with the consent of both landlord and tenant, taken possession of the demised premises and been treated by the landlord as his tenant (*j*).

*Acceptance of
another Ten-
nant in lieu.
Thomas v.
Cook.*

A tenancy from year to year cannot be surrendered by the mere agreement of the landlord to accept a third person in the place of his tenant, unless such agreement be in writing, or the third person actually take possession (*k*): but an oral agreement between a landlord and tenant from year to year, that another tenant shall be substituted in his place, who is accordingly substituted, and thereupon takes possession, is a sufficient surrender to determine the former tenancy (*l*). Where a landlord grants a new lease to a stranger with the assent of the tenant under an existing lease, and the latter gives up his own possession, that is a surrender by operation of law (*m*), and there is a similar surrender if where A. being tenant from year to year sublet to B., and the original landlord, with the assent of A., accept B. as his tenant (*n*). Where two persons being tenants from year to year of two closes under different lessors agreed verbally to exchange them, which they did, and then the arrangement was mentioned to a person who was steward of both the lessors, and who expressed his assent to it, it was held that this was evidence of new demises, and of a surrender by operation of law of the previous in-

(*g*) *Walls v. Atcheson*, 3 Bing. 462.

(*h*) *Peter v. Kendal*, 6 B. & C. 703.

(*i*) *Doe d. Gray v. Stanion*, 1 M. & W. 696; *Tarte v. Darby*, 15 M. & W. 601.

(*j*) *Thomas v. Cook*, 2 B. & Ad. 119. See *Smith L. & T.* 308, where this and similar cases are ably discussed, and it is remarked that the whole doctrine is an encroachment on the Statute of Frauds.

(*k*) *Taylor v. Chapman*, Peake Ad. Cas. 19.

(*l*) *Stone v. Whiting*, 2 Stark. 235; *Nickells v. Atherstone*, 10 Q. B. 944;

Walker v. Richardson, 2 M. & W. 882; *Lawrence v. Faux*, 2 F. & F. 435; *Hobson v. Cowley*, 26 L. J., Ex. 209.

(*m*) *Davison v. Gent*, 1 H. & N. 744; 26 L. J., Ex. 122; *Lawrence v. Faux*, 2 F. & F. 435.

(*n*) *Thomas v. Cook*, 2 B. & Ad. 119; *Johnstone v. Hudleston*, 4 B. & C. 922; *Smith L. & T.* 308—310 (2nd ed.); *Wilson v. Sewell*, 4 Burr. 1975; *Hall v. Burgess*, 5 B. & C. 332; *Walls v. Atcheson*, 3 Bing. 462; *Woodcock v. Nuth*, 8 Bing. 170; *Lawrence v. Faux*, 2 F. & F. 435.

CH. VIII. s. 3.
Surrender (by
Operation of
Law).

By Accept-
ance of new
Tenant—cont

terests of the tenants (o). A tenant from year to year died, his widow remained in possession, and continued paying the rent to the landlord, with the knowledge of a person who, above a year after, took out administration; the widow still continued in possession for a year, paying the rent as before; it was held, that this did not amount to a surrender by operation of law of the tenancy from year to year (p). A tenant quitted possession of premises, and, on being applied to for rent, stated in a letter to his landlord, that he hoped his landlord would be able to let them to some other person on better terms; this the landlord did a few days after, and the new tenant entered and paid rent: it was held, that these facts amounted to a surrender, but the court declined to consider the effect of the letter as evidence of a surrender by a note in writing within the Statute of Frauds (q). Where W. and H., who were partners, by agreement, in March, 1827, became tenants to the plaintiff, and at Midsummer, 1828, W. retired from the partnership, and in January, 1829, H. entered into partnership with S.; and the plaintiff gave receipts for rent as received from H. after W. retired, and as received from H. and S. after S. became a partner; and also gave H. a letter to his attorney, signifying that a lease might be made to H. and S., but which was kept by H. and not acted upon, and no lease was prepared; it was held, that W. remained liable for the rent accruing at the time of H. and S. (r). Where premises had been let to B. for a term determinable by a notice to quit, and, pending the term, A., the landlord, agreed to let C. stand in B.'s place, and C. offered to pay rent; it was held, in an action for use and occupation against C., that he could not set up as a defence that B.'s term had not been determined either by a notice to quit, or a surrender in writing (s). Where a sole tenant from year to year, before the termination of his tenancy, entered into an agreement with his landlord for a lease to be granted to him and another jointly, and both entered upon and occupied the premises jointly; it was held, that the first tenancy was determined though the lease was never executed pursuant to the agreement (t).

(c) Operation of Surrender.

Surrender will not prejudice previous Sub-leases. The surrender of a lease will not affect or prejudice a sublease previously granted (u), unless indeed the subtenant expressly assents

(o) *Bees v. Williams*, 2 C., M. & R. 581;
Jyon v. Reed, 13 M. & W. 285; Smith L. & T. 310 (2nd ed.).

(p) *Doe d. Hull v. Wood*, 14 M. & W. 682.

(q) *Nickells v. Atherstone*, 10 Q. B. 944;
Smith L. & T. 311 (2nd ed.).

(r) *Graham v. Wichelo*, 1 Cr. & M. 188;
Woodcock v. Nuth, 8 Bing. 170.

(s) *Phipps v. Sculthorpe*, 1 B. & A. 50;
but see *Hyde v. Moakes*, 5 O. & P. 42.

(t) *Hamerton v. Steed*, 3 B. & C. 478.

(u) *Mellor v. Watkins*, L. R., 9 Q. B. 400; *Doe d. Beaden v. Pyke*, 5 M. & S.

to the surrender and in effect attorns to the surrenderee; to hold of him on new terms, or as his agent or servant (*x*). Where a lessee mortgaged tenant's fixtures, and afterwards surrendered his lease to the lessor, who granted a fresh lease to a third party; it was held, that the mortgagee had a right to enter and sever the fixtures, as it was not competent to the tenant to defeat his grant by the subsequent voluntary act of surrender (*y*). Formerly if a lessee for years, who had sublet for a less term, surrendered his term to the lessor, it followed that the reversion on the sublease being gone, the rent and the covenants were gone also (*z*). But the act 4 Geo. 2, c. 28, s. 6, enabled a lessee to surrender his lease for the purpose of taking a new one without a surrender of a sub-lease, and saved to the lessee all the same remedies against the sublessee for rents, covenants and duties, and to the original lessor the same remedies for rents and duties reserved by the new lease, so far as they exceed not the rents and duties reserved in the former one, out of which the sublease was derived, as if the original lease were still kept on foot (*u*). And now by 8 & 9 Vict. c. 106, s. 9, if a reversion expectant on a lease is surrendered, the estate which confers, as against the tenant, the next vested right to the tenements, shall be deemed the reversion for the purpose of preserving the incidents to and obligations on the reversion (*b*).

CH. VIII. s. 3.
Surrender
(Operation of).

Operation on
Rents re-
served in Sub-
leases.

Where a lease containing a personal covenant for the payment of rent is surrendered, the personal covenant is independent of the estate in the property, and as to rent previously due is not affected by the surrender, but the lessor remains a specialty creditor for the rent which accrued due before the surrender (*c*). Rent reserved by the lease at fixed periods, quarterly or otherwise, which is accruing when a surrender is made, sinks and is entirely lost (*d*).

Effect on Rent
previously
due.

Accruing
Rent is lost.

(d) *By and to whom Surrender made.*

Those persons who are disabled to grant are unable to surrender; and such persons as are disabled to take by a grant are unable to take

Surrenderee
must be the
immediate
Reversioner.

146; *Pleasant d. Hayton v. Benson*, 14 East, 232; *Torriano v. Young*, 6 C. & P. 8; *Piggott v. Stratton*, 1 De G., F. & J. 33; 29 L. J., Ch. 1, 7.

(*z*) *Lambert v. McDonnell*, 15 Ir. Com. L. R. 136.

(*y*) *London and Westminster Loan and Discount Co. Limited v. Drake*, 6 C. B., N. S. 798; 28 L. J., C. P. 297; and see *Saint v. Pilley*, L. R., 10 Ex. 137; 41 L. J., Ex. 33.

(*z*) *Thér v. Barton*, Moore, 94; *Webb v. Russell*, 3 T. R. 393; *Burton v. Barclay*,

7 Bing. 756.

(*a*) *Smith L. & T.* 317; *Doe d. Palk v. Marchetti*, 1 B. & Ad. 715. See this section at length, post, Chap. IX., Sect. 4.

(*b*) *Smith L. & T.* 316. See 286, post.

(*c*) *Att.-Gen. v. Cox*, 3 H. L. Cas. 240; *Smith L. & T.* 317 (2nd ed.).

(*d*) *Grimman v. Legge*, 8 B. & C. 321; *Slack v. Sharp*, 8 A. & E. 366; *Dodd v. Achlom*, 6 M. & G. 673; *Doe d. Philip v. Benjamin*, 9 A. & E. 644; *Furnicall v. Grove*, 8 C. B., N. S. 496; 30 L. J., C. P. 3.

CH. VIII. s. 3.
Surrender (by
and to whom
made).

by a surrender (e). Moreover, the surrenderee must be the immediate reversioner (f); if therefore A. let to B. for ten years, who lets to C. for five years, C. cannot surrender to A. by reason of the intermediate interest of B.; but in such case B. may surrender to A., and afterwards C. likewise, because then his lease for five years is become immediate to the reversion of A. (g). If a husband have a lease or estate for years in right of his wife, he alone, or he and his wife together, may surrender it; but if the husband have an estate for life in right of his wife, who is tenant in dower or otherwise, and he alone, or he and she together, surrender it, the surrender is good only during the life of the husband, unless the deed be acknowledged by the wife pursuant to the Act for the Abolition of Fines and Recoveries.

Joint Tenants, Executors, &c.

One joint tenant cannot *surrender* to another joint tenant, but he may grant, release or assign to him. One of two or more executors may also surrender an estate or lease for years, which the executors have in the right of their testator (h). Where the lessee of premises, under a covenant of re-entry if the rent should be in arrear twenty-eight days, died in bad circumstances, and his brother administered *de son tort*, and then after having agreed with the landlord to give him possession and suffer the lease to be cancelled on his abandoning the rent, which was twenty-eight days in arrear, took out letters of administration; it was held, that the agreement of the brother as administrator *de son tort* did not conclude him as rightful administrator, nor give a right of possession to the landlord who had entered under the agreement, but who had not made any formal demand of the rent, nor taken a regular surrender of the lease (i). Where a lessee who had paid rent sometimes to a trustee and sometimes to a *cestui que trust*, gave up possession on the last day of the term, but before it was ended, to the person who had been trustee, and not to the party then having the legal title; it was held, that as the act was equivocal, it did not amount to either a surrender or to a forfeiture (k).

Infants.

An infant may make a surrender in law by the acceptance of a new lease, if such new lease increase his term or decrease his rent; but a surrender by an infant lessee by deed is absolutely void.

Sequestrators.

A surrender of a lease cannot be made to sequestrators; it must be to the lessor, or to a party legally entitled under him (l).

What Estate
Surrender
may operate
on.

A lessee may surrender to him who has the immediate reversion, either in fee or for any less estate (m).

(e) Shep. Touch. 303.

(f) *Edwards v. Wickwar*, L. R., 1 Eq. 68, 403.

(g) Bac. Abr. tit. *Leases* (S. 2).

(h) Shep. Touch. 303.

(i) *Doe d. Hornby v. Glenn*, 1 A. & E. 49.

(k) *Ackland v. Lutley*, 9 A. & E. 879.

(l) *Cornish v. Searell*, 8 B. & C. 471.

(m) Bac. Abr. tit. *Leases* (S. 1, 2);
Challoner v. Davis, 1 Ld. Raym. 402;
Hughes v. Robotham, Cro. Eliz. 302.

SECT. 4.—*Merger.*CH. VIII. s. 4.
Merger.

A lease for years may be determined by merger; that is, when there is a union of the term with the immediate reversion, both being vested at the same time in one person in the same right. In such case the reversion merges or drowns the term, because they are inconsistent and incompatible (*n*). *Nemo potest esse tenens et dominus*. A person cannot be, at the same time, both landlord and tenant of the same premises. It may be laid down as a general rule, that whenever the particular estate and that immediately in reversion are both legal or both equitable, and by any act or event subsequent to the creation of the particular estate become for the first time vested in one person in the same right, their separate existence will cease and a merger will take place. But where a tenant for ninety-nine years purchases the reversion in fee, and takes a conveyance thereof to a trustee for himself, expressly to prevent a merger, the term becomes one in gross, and no merger takes place (*o*). A particular estate will merge in a reversion of a shorter duration than itself (*p*); as if one be lessee for twenty years, and the reversion expectant thereon be granted to another for one year, who grants it to the lessee, it will operate as a merger of the twenty years' term, and the term for one year will begin to run (*q*). Where a lessee made a sublease for all his term, except a few days, and then granted the sublease and the rent thereby reserved to his lessor for the term mentioned in the sublease (but not for the few days so excepted), it was held, that the chattel interest was not merged in the fee (*r*). Where a lessee of premises for a term of twenty-one years, which would expire at Michaelmas, 1809, in December, 1799, took a further lease of the same premises for sixty years, to commence from Michaelmas, 1809; and the lessor died in December, 1800, and devised the premises in question to A., the lessee, for his life, who by lease and release in 1806 conveyed his life estate to B.:—it was held that A.'s interest in the lease of 1799, which was to commence in 1809, was not merged in his estate for life (*s*). Sir Edward Coke lays it down as a general rule that a person cannot have a term for years in his own right, and a freehold in autre droit, but that his own term shall drown in the freehold; but a man may have a term of years in autre droit, and a freehold in his own right (*t*); and it seems to be agreed, that if a man, being possessed of a term of years in right of his wife, purchase the inheritance, the term for years, though in right of his wife, is

What
amounts to a
Merger of a
Term.

(*n*) Bac. Abr. tit. *Leases* (B.); 2 Blac. Com. 177; *Salmon v. Swan*, Cro. Jac. 619; *Burton v. Barclay*, 7 Bing. 745.

(*o*) *Belaney v. Belaney*, L. R., 2 Ch. Ap. 138; 36 L. J., Ch. 265.

(*p*) *Hughes v. Robotham*, Cro. Eliz. 302; Poph. 30.

(*q*) Cruise, Dig. 96; *Burton Conv.* 287; *Stephens v. Bridges*, 6 Madd. 66.

(*r*) *Burton v. Barclay*, 7 Bing. 745.

(*s*) *Doe d. Rawlings v. Walker*, 5 B. & C. 111.

(*t*) *Webb v. Russell*, 3 T. R. 401, Lord Kenyon, C. J.

CH. VIII. s. 4.

Merger.

merged and extinct, because the purchase was the express act of the husband, and therefore amounts in law to a disposition of the term, by reason of the merger consequent thereupon: but a bare intermarriage of a woman who is a termor with the reversioner will not merge the term, because by the intermarriage the term is cast upon the husband by act of law, without any concurrence or immediate act done by him to obtain the same; and therefore in such case the law will preserve the term in the same plight as it gave it to the husband, till he by some express act destroys it or gives it away (*u*). Where, however, the husband himself is lessee for life, and intermarries with the lessor, this merges his own term, because he thereby draws to himself the immediate reversion, in nature of a purchase by his own voluntary act, and so undermines his own term; whereas in the other case, the term existing in the woman until the marriage, is not thereby so drawn out of her or annexed to the freehold as to merge therein; because that attraction which is only by act of law consequent upon the marriage, would, by merging the term, do wrong to a married woman, and so take the term out of her, though the husband did no express act for that purpose, which the law will not allow. If a husband is possessed of a term of years, and the owner of the reversion in fee devises it to the wife, who has issue, the husband, who in the lifetime of the wife is tenant by the curtesy initiate, holds the two estates in different rights, without having acquired the freehold by his own act, and consequently there is no merger (*v*).

Administra-
tor.

C. as administrator held certain land for a term of years, which he demised to P. for a shorter term. P. afterwards assigned this land to C. for the shorter term. In the first deed C. was described as administrator, but not in the second. It was held that there had been no merger in equity (*x*).

When Reversion merged,
next vested
Estate to be
deemed Reversion.8 & 9 Vict.
c. 106, s. 9.

Formerly if a tenant for a term of years leased for a less term, and assigned his reversion, and the assignee took a conveyance of the fee, by which his former reversionary interest was merged, the covenants of the sublease incident to that reversionary interest were thereby extinguished (*y*). But by 8 & 9 Vict. c. 106, s. 9, "when the reversion expectant on a lease, made either before or after the passing of this act, of any tenements or hereditaments of any tenure, shall, after the 1st of October, 1845, be surrendered or merged, the estate, which shall for the time being confer as against the tenant under the same lease the next vested right to the same tenements or hereditaments, shall, to the extent and for the purpose of preserving such incidents to and

(*u*) Co. Lit. 338 b; *Lady Platt v. Sleep*, Cro. Jac. 275; Sug. V. & P. 617 (14th ed.).

(*v*) *Jones v. Davies*, 5 H. & N. 766; 7 Id. 507; 29 L. J., Ex. 374.

(*x*) *Chambers v. Kingham*, L. R., 10 Ch. D. 743; 39 L. T. 272, per Fry, J.

(*y*) *Webb v. Russell*, 3 T. R. 393; *Thorne v. Woolcombe*, 3 B. & Ad. 586.

obligations on the same reversion as, but for the surrender or merger thereof, would have subsisted, be deemed the reversion expectant on the same lease.”

CH. VIII. s. 4.
Merger.

By the Judicature Act, 1873, s. 25, subs. (4), “there shall not, after the commencement of this act (z), be any merger by operation of law only of any estate, the beneficial interest of which would not be deemed to be merged or extinguished in equity.”

Merger after
the Judicature
Acts.

SECT. 5.—*Forfeiture.*

(a) *How incurred generally.*

A lease may be determined by entry or ejectment for a forfeiture incurred either by (1) breach of a *condition* therein in the lease; or (2) for a breach of any covenant, in case (and in case only) the lease contain a condition or proviso for re-entry for breach of such covenant (a). The same rule applies to the breach of the terms of an agreement for a lease for years, under which a person has entered and holds as tenant from year to year (b). In that case also, if the agreement stipulate for a proviso for re-entry, ejectment can be brought at once. The lessor, having the *jus disponendi*, may annex whatever conditions he pleases to his grant, provided they be not illegal or repugnant to the grant itself; and upon the breach of any of these conditions may avoid the lease (c), although the damage he may have suffered by the breach of the covenant or condition be merely nominal (d).

By Breach of
Covenant,
where Con-
dition of Re-
entry.

Besides incurring a forfeiture by the breach of express conditions, which will be hereafter considered, a lessee may incur a forfeiture for breach of implied conditions, either by matter of record, or by act in pais: 1, by matter of record, where he sues out a writ, or resorts to a remedy which claims or supposes a right to the freehold, or where, in an action by his lessor grounded upon the lease, he resists the demand under the grant of a higher interest in the land; or where he acknowledges in court the fee to be in a stranger; for having thus solemnly protested against the right of his lessor, he is estopped by the record from claiming an interest under him (e), but anything of this sort can seldom, if ever, now happen, real actions having been

By what Acts
a Forfeiture
may be in-
curred.

(z) I. o., 1st of November, 1875.

(a) Lit. s. 326; *Doe d. Wilson v. Phillips*, 2 Bing. 13; *Doe d. Rudd v. Golding*, 6 Moo. 231; *Doe d. Rains v. Kneller*, 4 C. & P. 3; *Doe d. Darke v. Bowditch*, 8 Q. B. 973; *Cole Ejec.* 403.

(b) *Doe d. Thomson v. Amey*, 12 A. & E. 476; *Thomas v. Packer*, 1 H. & N. 669; *Hayne v. Cummings*, 18 C. B., N. S. 421; *Hyatt v. Griffiths*, 17 Q. B. 505.

(c) *Mulcarray v. Eyres*, Cro. Car. 511; *Doe d. Hunter v. Galliers*, 2 T. R. 133, 137; *Doe d. Griffith v. Pritchard*, 5 B. & Ad. 766; *Stansfield v. Mayor, &c. of Portsmouth*, 4 C. B., N. S. 120; 27 L. J., C. P. 124; *Baylis v. Le Gros*, 4 C. B., N. S. 537, 539; 6 Id. 552.

(d) As to “relief against forfeiture” see post, Sect. 6.

(e) Post, Sect. 8.

CH. VIII. s. 5. abolished: 2, by act in pais, where he aliens the estate in fee (*f*).
Forfeiture
(how incurred
generally). Where a tenant delivered up possession of the premises and the lease, in fraud of his landlord, to a person who claimed under a hostile title, with the intention of enabling him to set up that title, not with the intention that he should hold under the lease; it was held, that the term was forfeited (*g*). Where a lessee, who had paid rent sometimes to a trustee and sometimes to a cestui que trust, gave up possession on the last day of the term, but before the term was ended, to the person who had been trustee, and not to the party then having the legal title; it was held, that as the act was equivocal, it did not amount either to a surrender or a forfeiture of the term (*h*). Where a forfeiture may be incurred by a grant or deed, it is necessary that the deed be a valid instrument, for if by reason of any defect it be void, it will not work a forfeiture of the estate (*i*): but granting a lease of the land for more years than he himself has is no forfeiture, because it is only a contract between him and his sublessee (or rather assignee), which cannot possibly prejudice the interest of the original lessor, and does not even pretend to usurp or touch the freehold or inheritance. A proviso in a lease for re-entry on a condition broken can only operate during the term (*k*). But it will extend to any new implied tenancy from year to year upon the like terms and conditions (*l*).

Time and
Place of Per-
formance of
Condition.

Where a time certain is appointed in a proviso or condition for the performance of anything, neither party is bound to attend at any other time; and if it is provided that any act be done on a day certain, but no hour of the day is specified wherein the same shall be done, the party must attend such a length of time before and until sunset as may be convenient to do the act. If a place be limited and agreed on by the parties where the condition is to be performed, the party who is to perform is not obliged to seek the party to whom it is due elsewhere, nor is he to whom it is to be performed *obliged* to accept of the performance elsewhere; but he *may* accept it at another place, and it will be good (*m*).

Effect of the
Statute of
Limitations.

The Real Property Limitation Act, 1874 (37 & 38 Vict. c. 74), bars the party who has a right to enter for a forfeiture, but who neglects to do so for more than *twelve years* after his right accrued (*n*). Where an ejectment is founded on a particular forfeiture, it must be commenced within twelve years after such forfeiture accrued (*o*). But a lessor is not bound to take advantage of the first or any other

(*f*) *Rees v. Ervington*, Cro. Eliz. 322.
 (*g*) *Doe d. Ellerbrock v. Flynn*, 1 C., M. & R. 137.
 (*h*) *Ackland v. Luitley*, 9 A. & E. 879.
 (*i*) *Denn d. Dolman v. Dolman*, 5 T. R. 641; *Doe d. Lloyd v. Powell*, 5 B. & C. 308, 312.

(*k*) *Johns v. Whitley*, 3 Wils. 127.
 (*l*) *Thomas v. Packer*, 1 H. & N. 669.
 (*m*) Bac. Abr. tit. *Conditions* (O. 4).
 (*n*) *Doe d. Tarrant v. Hellier*, 3 T. R. 162.
 (*o*) *Cole Ejec.* 11.

forfeiture committed during the term (*p*). Therefore it is no defence to an ejectment commenced after the expiration of the lease that a forfeiture and right of re-entry thereon accrued under the lease more than twelve years before the commencement of the action (*q*).

CH. VIII. s. 5.
*Forfeiture
(how incurred
generally).*

It may be laid down for a general rule that he who enters or recovers by ejectment for a condition broken shall be seised or possessed of that estate which the lessor had at the time of the estate made upon condition; and he may avoid all mesne charges and incumbrances (*s*).

Estate of
Party enter-
ing.

(b) *Construction of Proviso for Re-entry.*

Provisoes for re-entry in leases are conditions annexed to the term, and are to be construed, like other contracts, according to the intent of the parties to be collected from the words used, and not with the strictness of conditions at common law (*t*); therefore, where there is a proviso in a lease, that on non-payment of rent or non-performance of any of the lessee's covenants the term shall cease, the lessor, and not the lessee, has the option of determining a lease upon a breach made (*u*). A proviso in a lease, that, upon breach of any of the covenants therein on the part of the lessee, the lessor may re-enter on the premises, "and the same have again, as if the said lease had never been made," means, that the lease is to be void from and after re-entry by the lessor, and does not deprive him of the right of bringing an action of covenant for rent which accrued previously; and this principle equally applies to a covenant for repairs or other services to be rendered by the lessee (*x*). An agreement of demise contained a clause that if the rent should be unpaid for ten days, or if the lessee should not observe all the conditions, &c., then it should be lawful for the lessor to enter upon and take possession of the premises, and to expel the lessee, without any legal process, and as effectually as a sheriff might do on a recovery in ejectment; and that, in case of such entry and an action being brought, the defendant might plead leave and licence in bar; it was held, that the lessee's right to possession as tenant continued until the lessor had availed himself of the licence given (*y*). Such a clause does not dispense with a formal

Construction
of Proviso for
Re-entry.

(*p*) *Doe d. Boscauren v. Bliss*, 4 Taunt. 735; *Doe d. Sheppard v. Allen*, 3 Taunt. 78; *Doe d. Bryan v. Hancs*, 4 B. & A. 401; *Doe d. Baker v. Jones*, 5 Exch. 498.

(*q*) *Cole Ejec.* 11; *Doe d. Allen v. Blakeway*, 5 C. & P. 563; *Doe d. Cook v. Danvers*, 7 East, 299.

(*r*) *Co. Lit.* 202; *Bac. Abr. tit. Conditions* (O. 4); *Cole Ejec.* 68.

(*s*) *Doe d. Davis v. Elsom*, Moo. & M. 189; *Doe d. Muston v. Gladwin*, 6 Q. B. 953, 961; *Croft v. Lumley*, 5 E. & B. 667;

6 H. L. Cas. 672; 27 L. J., Q. B. 321; *Perry v. Davis*, 3 C. B., N. S. 769.

(*u*) *Rede v. Farr*, 6 M. & S. 121. And see the cases ante, 181.

(*x*) *Hartshorne v. Watson*, 4 Bing. N. C. 178; 6 Dowl. 404; *Lord v. Green*, 15 M. & W. 216, 223; *Selby v. Browne*, 7 Q. B. 620; *Woolcock v. Dew*, 1 F. & F. 337; *Davies v. Underwood*, 2 H. & N. 573; *Att.-Gen. v. Cox*, 3 H. L. Cas. 240.

(*y*) *Karanagh v. Gudge*, 7 M. & G. 316; 1 D. & L. 928.

CH. VIII. s. 5.

*Forfeiture
(Construction
of Proviso for
Re-entry).*

demand of the rent (z). An agreement to let a house and for the lessee to make certain alterations, and if they were not done that the lessor might retake possession, and that the agreement should be null and void, is voidable only at the election of the lessor if the lessee does not make the alterations (a). Where in an agreement amounting to an actual demise there was a clause in the following form, "it is stipulated and conditioned that the lessee shall not underlet;" it was held, that these words created a condition, and being such, upon breach of it the lessor might maintain ejectment, without an express clause of re-entry (b). A proviso that the lessee shall pay 120*l.* per annum creates both a covenant and a condition, and therefore for breach of it an ejectment may be maintained without any express power of re-entry (c). If by a written agreement premises are let for a term, "at and under the rent of 80*l.*," it is an agreement by the lessee to pay that rent; and therefore if there be a power of re-entry in case of breach of "any of the agreements therein contained," the lessor has a right of re-entry on non-payment of rent, although there is no express agreement to pay rent (d). A proviso that if buildings should not be completed on a certain day "it shall be lawful for the lessors into the demised premises or any part thereof in the name of the whole [omitting the words 'to re-enter'] and repossess," would seem to give a right of re-entry (e). Where a proviso for re-entry was insensible, the court refused to decide its meaning, and nonsuited the plaintiff in an ejectment for a forfeiture (f). Where the lessee covenanted to pay the rent, and not to assign without the leave of the lessor, and there was a proviso for re-entry if the rent was in arrear, or if all or any of the covenants *thereinafter* contained on the part of the lessee should be broken; and there were no covenants on the part of the lessee after the proviso, but only a covenant by the lessor that upon the lessee paying the rent, and performing all and every the covenants *thereinbefore* contained on his part to be performed, he should quietly enjoy; it was held, that the lessor could not re-enter for breach of the covenant not to assign, for that the proviso was restrained by the word *thereinafter* to subsequent covenants; and though there were none such, yet the court could not reject the word (g). A proviso giving a power of re-entry if the lessee "shall do or cause to be done any act, matter or thing contrary to and in

Insensible
Proviso.

(z) *Barry v. Glover*, 10 Ir. Com. L. R. 113; *Acocks v. Phillips*, 6 H. & N. 183.

(a) *Doe d. Nash v. Birch*, 1 M. & W. 402; *Hayne v. Cummings*, 16 C. B., N. S. 421.

(b) *Doe d. Henniker v. Watt*, 8 B. & O. 308; *Simpson v. Titterell*, Cro. Eliz. 242; *Marsh v. Curleys*, Cro. Eliz. 528; Cole Ejec. 402.

(c) *Harrington v. Wise*, Cro. Eliz. 486; cited 8 B. & C. 316; Cole Ejec. 402.

(d) *Doe d. Rains v. Kneller*, 4 C. & P. 3.

(e) *Hunt v. Bishop*, 8 Exch. 675.

(f) *Doe d. Wyndham v. Carew*, 2 Q. B. 317; but see *Doe d. Darke v. Bowditch*, 8 Q. B. 973.

(g) *Doe d. Spencer v. Godwin*, 4 M. & S. 265.

breach of any of the covenants," does not apply to a breach of the covenant to repair, the omission to repair not being *an act done* within the proviso (*h*).

CH. VIII. s. 5.
*Forfeiture
(Construction
of Proviso for
Re-entry).*

It has been said to be a general rule that the proviso for re-entry applies only to the breach of an affirmative and not to the breach of a negative covenant (*i*). If the proviso be expressed to operate in case of "default in performance" or "failure to perform," or the like, this rule would seem to hold good; and indeed in *Hyde v. Warden* (*k*) the Court of Appeal was prepared to hold, if it were necessary, that the power of re-entry in event of the lessee "wilfully failing or neglecting to perform any of the covenants" does not apply to a breach of a negative covenant. But as was pointed out by Blackburn, J., in *Wadham v. Postmaster-General* (*l*), the difficulty arises in consequence of the form of the proviso for re-entry. A proviso expressed to operate in case of "breach" or "non-observance" for instance, as well as in case of non-performance, would seem clearly to apply to the breach of a negative covenant.

Proviso for
Re-entry for
Breach of
negative
Covenant.
*Hyde v.
Warden.*

Where a lease contained a proviso for re-entry, if the lessee committed waste to the value of 10s., and the lessor re-entered, and brought ejectment in consequence of the tenant's having pulled down some old buildings of more than 10s. value, and substituted others of a different description: it was held, that the waste contemplated in the proviso was waste producing an injury to the reversion, and that it was a question for the jury whether, under all the circumstances, such waste to the value of 10s. had been committed (*m*). Where there was, amongst others, a covenant not to carry off hay under a penalty, and a clause followed which enumerated all the covenants except that, and provided for re-entry upon breach of any of the covenants; it was held, that the penalty did not prevent the clause of re-entry from applying to the hay covenant, the words being large enough (*n*).

Proviso for
Re-entry for
Waste to
fixed Value.

Where a lease contained a clause of re-entry, in case the term of years thereby granted should be *extended or taken in execution*; and before the end of the term, the sheriff entered the premises under a writ of extent against the lessee at the suit of the crown, held an inquisition, and seized the lessee's interests into the king's hands; it was held, that this proceeding was a *taking in execution* within the

Proviso for
Re-entry in
case of Exe-
cution.

(*h*) *Doe d. Abdy v. Stevens*, 3 B. & Ad. 299; *Cole Ejec.* 407.

(*i*) *West v. Dobb*, 39 L. J., Q. B. 190; *Exch. Chamb. per Channell, B.*; see also *Doe d. Palk v. Marchetti*, 1 B. & Ad. 715; *Evans v. Davis*, 39 L. T. at pp. 392, 394.

(*k*) L. R., 3 Ex. D. at p. 82.

(*l*) L. R., 6 Q. B. at p. 648.

(*m*) *Doe d. Earl of Darlington v. Bond*, 5 B. & C. 855.

(*n*) *Doe d. Antrobus v. Jepsen*, 3 B. & Ad. 402.

CH. VIII. s. 5. Forfeiture (Construction of Proviso for Re-entry). latter clause of the condition, and that the term was determined and forfeited to the lessor (*o*); and where the condition was, amongst other things, to be void "if the lessee should incur any debt on which any judgment should be signed, entered up or given against him, and on which any writ of fieri facias, or other writ of execution, should be issued," and the tenant gave a warrant of attorney, on which judgment was entered up and execution issued and the tenant's goods were taken, and the lessor entered; it was held, that he was entitled to the emblements (*p*).

Proviso for Re-entry in case of Bankruptcy.

A proviso was, that in case the lessee should commit an act of bankruptcy, whereon a commission or fiat in bankruptcy should or might be issued, and under which he should be *duly* found and declared a bankrupt, the term should determine; the tenant became bankrupt, and was found and declared a bankrupt, but there was not a proper petitioning creditor's debt on which the fiat was founded; it was held by two judges, against the opinion of Parke, B., that the lessee was not *duly* found and declared a bankrupt within the meaning of the proviso (*q*). A proviso was, that if the lessee, his executors, administrators or assigns, should become bankrupt or insolvent, or suffer any judgment to be entered against him by confession or otherwise, or suffer any extent, process or proceedings to be had or taken against him, whereby any reasonable probability might arise of the estate being extended, &c., the estate should determine, and the lessor have a power to re-enter; the tenant died during the term, and by his will devised the premises to his executors on trust, and the surviving executor became a bankrupt; it was held that the lessor's right of re-entry thereupon accrued (*r*). The non-payment of a debt mentioned in an insolvent's schedule was held not to be a continuing insolvency, so as to constitute a new forfeiture of a lease, the former forfeiture by the insolvency having been waived (*s*). A lease for three lives contained a proviso that if the lessee, his heirs, &c., should, during the continuance of the term, happen to become insolvent, and unable in circumstances to go on with the management of the farm, the demise should from thenceforth cease and be absolutely void; the court doubted whether the attainder of the tenant for felony was a forfeiture of the lease; but held, that if it was a breach of the condition, it was not a continuing breach, but was contemporaneous with the conviction (*t*).

(*o*) *Rex v. Topping*, 1 M'Clol. & You. 544.

(*p*) *Davies v. Eyton*, 7 Bing. 151.

(*q*) *Doe d. Lloyd v. Ingleby*, 15 M. & W. 465.

(*r*) *Doe d. Bridgeman v. David*, 1 C.

M. & R. 405; *Doe d. Williams v. Davis*, 6 C. & P. 614.

(*s*) *Doe d. Gatehouse v. Rees*, 4 Bing. N. C. 384.

(*t*) *Doe d. Griffith v. Pritchard*, 5 B. & Ad. 765.

Where a lease of coal mines reserved a royalty rent for every ton of coal raised, and contained a proviso that the lease should be void altogether if the tenant should cease working at any time within two years; but after the working had ceased more than two years the lessor received rent; it was held, that the lease was not absolutely void by the lessee's ceasing to work, but voidable only at the option of the lessor; and that he might avoid the lease upon any cessation to work, commencing two years before the day of the demise in the ejectment (*u*).

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*Forfeiture
(Construction
of Proviso for
Re-entry).*

*Proviso for
Re-entry for
ceasing to
work Mines;*

In a lease for years if a person should so long live, there was a covenant to produce that person, or, if he should be in a foreign country, to make it appear by a good and sufficient certificate that he was living, with a proviso for re-entry on default; the person having gone to Brazil, an affidavit that the deponent had three years before seen him, and had often heard from him since, and was convinced that he was alive nine months before when the deponent left Brazil, was held not to be a sufficient certificate within the covenant, and that therefore a forfeiture was incurred (*x*).

*for Non-pro-
duction of
cestui que vie;*

Under a clause of forfeiture in case no sufficient distress can be found upon the premises, every part of the premises must be searched (*y*).

*for no suffi-
cient Distress;*

Where a lessee has broken his covenant to pay rates and taxes, the lessor may avail himself of the proviso for re-entry without proof of any demand made (*z*).

*for Non-pay-
ment of Rates.*

(c) *Who may avail themselves of a Forfeiture.*

A lessee cannot avail himself of his own act or default to vacate a lease; on the principle that no man shall be permitted to take advantage of his own wrong (*a*). No one can re-enter for a forfeiture but the person then *legally* entitled to the rent or to the reversion (*b*): but a lessor who has demised his whole interest, subject to a right of re-entry on breach of a condition, may enter on the condition being broken, though he have no reversion (*c*). A reversioner who has parted with his reversion, either absolutely or by way of mortgage, cannot re-enter or maintain ejectment for a forfeiture (*d*), nor after his reversion has been merged and extinguished (*e*).

*Not the
Lessee.*

*The Lessor or
his Assigns.*

(*u*) *Doe d. Bryan v. Banks*, 4 B. & Ad. 401; *Doe d. Bosawen v. Bliss*, 4 Taunt. 735; *Roberts v. Davey*, 4 B. & Ad. 664.

(*x*) *Randle v. Lory*, 6 A. & E. 218.

(*y*) *Rees d. Powell v. King*, Forrest, 19; 2 Brod. & B. 514.

(*z*) *Davis v. Burrell*, 10 C. B. 821.

(*a*) *Rede v. Farr*, 6 M. & S. 121.

(*b*) *Holley v. Scott*, Loft, 319 a; *Doe d. Barney v. Adams*, 2 C. & J. 232; *Doe d. Barker v. Goldsmith*, 2 C. & J. 674.

(*c*) *Doe d. Freeman v. Bateman*, 2 B. & A. 168; *Baker v. Gostling*, 3 Bing. N. C. 85; *Colville v. Hall*, 14 Ir. Com. L. R. 265, C. P.

(*d*) *Fenn d. Matthews v. Smart*, 12 East, 443; *Doe d. Marriott v. Edwards*, 5 B. & Ad. 1065; *Doe d. Prior v. Ongley*, 10 C. B. 25.

(*e*) *Webb v. Russell*, 3 T. R. 393, 402; *Threr v. Barton*, Moore, 94.

CH. VIII. s. 5. It was held before the Judicature Act that a right of entry could not be effectually reserved to a stranger to the legal estate, although he joined in the demise and had some equitable or beneficial estate or interest in the property (*f*). Thus, where by lease a mortgagee demised, and the executrix of the mortgagor demised and confirmed, and a power of re-entry for breach of covenants was reserved *to them or either of them*, it was held, that the deed operated as a demise by the mortgagee, and a confirmation by the executrix, and that the proviso for re-entry enured only to the mortgagee, and not to both (*g*). The same rule applied where trustees and cestui que trust joined in a lease, reserving rent to the cestui que trust, with a proviso for re-entry on non-payment (*h*), and where the tenant for life and the reversioner joined in a demise (*i*). The effect of the Judicature Act is to allow beneficiaries to avail themselves of a forfeiture (*k*), but in practice they will generally be represented by their trustees.

Persons having equitable Estates. Trustees. Devises, Coparceners, &c. Where a power to determine a lease is reserved to the lessor, his heirs, executors or administrators, it will extend to his devisee (*l*). Where a power for re-entry for breach of covenants is reserved, and the reversion descends to coparceners, it seems that one or more of them cannot, without the other or others, maintain ejectment for a forfeiture, the condition or proviso for re-entry not being divisible (*m*). A lease granted under a power contained in a settlement reserved a right of entry to the lessor and his assigns; it was held, that "assigns" meant assigns of the settlor; and that although the right of re-entry could not be well reserved to the lessor, yet that the owners of the reversion under the settlement for the time being were entitled to the advantage of it as "assigns" (*n*). Where a lease was granted of a piece of land with two partly-erected messuages thereon, and the lessee covenanted to complete them within two months, and also to keep the said messuages in repair during the term, with a proviso for forfeiture for breach of any of the covenants, and the messuages were never completed, but after the expiration of the two months the reversion was assigned to the plaintiff, and afterwards the messuages were much dilapidated in the roofs and other parts; it was held, that whether the plaintiff could or not maintain ejectment for not completing the messuages within the two months, he could certainly do so for the subsequent non-repair (*o*).

(*f*) *Doe d. Barber v. Lawrence*, 4 Taunt. 23; Lit. s. 347; Co. Lit. 214 b.

(*g*) *Doe d. Barney v. Adams*, 2 C. & J. 232; *Moore v. Earl of Plymouth*, 3 B. & A. 66.

(*h*) *Doe d. Barker v. Goldsmith*, 2 C. & J. 674.

(*i*) *Treport's case*, 6 Co. R. 15; Cole Ejcc. 404.

(*k*) Judicature Act, 1873, s. 24; R. S. C. Order XVI. rules 7, 11, 13.

(*l*) *Roe d. Bamford v. Hayley*, 12 East, 464.

(*m*) *Doe d. Rutzen v. Lewis*, 5 A. & E. 277.

(*n*) *Greenaway v. Hart*, 14 C. B. 348; 23 L. J., C. P. 115.

(*o*) *Bennett v. Herring*, 3 C. B., N. S. 370.

At common law, no one but the grantor could re-enter for a forfeiture; and no grantee or assignee of the reversion could take the benefit or advantage of a condition for re-entry (*p*); but by 32 Hen. 8, c. 34, all grantees of the reversion, their heirs, executors, successors and assigns, have the like advantage against the lessees, their executors, administrators and assigns, *by entry for non-payment of rent, or for doing waste or other forfeiture*, and the same remedy by action only for not performing other conditions, covenants and agreements contained in the said leases as the lessors or grantors themselves had (*q*).

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Forfeiture
(who may avail
themselves of).Right of As-
signee of the
Reversion to
re-enter.32 Hen. 8,
c. 34.(d) *Entry of Lessor.*

Generally speaking, where a forfeiture has been incurred for breach of any covenant or condition, the lessor must do some act evidencing his intention to enter for the forfeiture and determine the lease (*r*): and the lease will be avoided *from that time only* (*s*). Perhaps an actual entry should be made *before action* to avoid a freehold lease; but the action itself is sufficient to avoid a lease for years (*t*).

Entry for a
Forfeiture
generally.

A corporation aggregate cannot, without deed, authorize their servant or agent to enter into land on their behalf for a condition broken (*u*).

Entry by
Corporations
aggregate.(e) *For Non-payment of Rent.*

No ejectment can be maintained for non-payment of rent unless the reservation amount to a condition, or there is an express proviso in the lease or agreement giving the landlord a right to re-enter and determine the lease or tenancy for such non-payment (*x*). Such condition or proviso may by express words dispense with the necessity of a formal demand of the rent; as where it says, "although no formal demand shall have been made thereof," or to that effect (*y*). If the proviso be for re-entry on default in payment of rent within twenty-one days, *being demanded*, the demand must be made after the twenty-one days have elapsed (*z*).

In Ejectment,
Proviso for
Re-entry ne-
cessary.Demand of
Rent dis-
pensed with
by Agree-
ment.

By the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 210, a formal demand of the rent is rendered unnecessary in all cases between landlord and tenant when one half-year's rent is in

By C. L. P.
Act.^p) Lit. s. 374; Co. Lit. 214.^q) As to the application of this act, see Chap. VII., Sect. 3, "Assignment of Reversion," ante, 235.^r) *Fenn d. Matthews v. Smart*, 12 East, 444, 461; *Arnsby v. Woodward*, 6 B. & C. 519; *Roberts v. Davey*, 4 B. & Ad. 664; *Baylis v. Le Gros*, 4 C. B., N. S. 537; 6 Id. 552.^s) *Cole Ejec.* 408.^t) *Cole Ejec.* 403.^u) 1 Roll. 514.^x) *Doe d. Dixon v. Roe*, 7 C. B. 134; *Hill v. Kempshall*, Id. 975.^y) *Doe d. Harris v. Masters*, 2 B. & C. 490; *Goodright d. Hare v. Cater*, 2 Doug. 477, 488.^z) *Phillips v. Bridge*, 43 L. J., C. P. 13; 29 L. T. 692.

CH. VIII. s. 5. arrear, and no sufficient distress is *to be found* on the demised premises, or any part thereof, countervailing the arrears then due; and the lessor has power to re-enter for non-payment thereof (*a*).

To what Cases
C. L. P. Act
applies.

The above enactment only applies—1. As between landlord and tenant. But the assignee of a lessee, whether by way of mortgage or otherwise, is a “tenant” within the meaning of the enactment (*b*): so is a mere sublessee, because he is a person “claiming or deriving under the lease” (*c*). 2. One half-year’s rent at the least must be in arrear (*d*). 3. No sufficient distress to be found on the demised premises, or any part thereof, countervailing the arrears due (*e*); i. e. *all* the arrears, and not merely half-a-year’s rent where more is due (*f*). But a strict search must be made on the demised premises after the last day for saving the forfeiture, and before the writ issues (or at all events before the writ is served) (*g*), to ascertain that there is no sufficient distress on any part of the demised premises (*h*). Unripe growing crops may amount to a sufficient distress (*i*). A distress is not to be “found” on the demised premises where it cannot be got at by reason of the tenant having locked the outer doors, &c. (*k*), nor unless the goods are so visibly there that a broker going to distrain would, using reasonable diligence, find them so as to be able to distrain them (*l*). If a distress be found on the demised premises sufficient to satisfy so much of the rent as would reduce the arrears to less than half-a-year’s rent, and it is wished to bring ejectment, no distress should be taken (*m*); but clear proof should be obtained as to the insufficiency of the distress to satisfy *all* the arrears (*n*). A distress for rent, under which part was recovered, will not prevent an ejectment for the residue, provided such residue amount to half-a-year’s rent, or more, and there be no sufficient distress on the premises to satisfy such residue (*o*); but it is otherwise where the proceeds of the distress reduces the arrears to less than half-a-year’s rent (*p*). 4. The landlord or lessor to whom the arrears

(*a*) See post, Chap. XXII., Sect. 1.

(*b*) *Doe d. Whitfield v. Roe*, 3 Taunt. 402; *Williams v. Bosanquet*, 1 Brod. & B. 238.

(*c*) *Doe d. Wyatt v. Byron*, 1 C. B. 623; 3 D. & L. 31.

(*d*) *Hill v. Kempshall*, 7 C. B. 975; *Cotesworth v. Spokes*, 10 C. B., N. S. 103; 30 L. J., C. P. 220; 2 F. & F. 390.

(*e*) *Doe d. Forster v. Wandlass*, 7 T. R. 117.

(*f*) *Cross v. Jordan*, 8 Exch. 149; overruling *Doe d. Powell v. Roe*, 9 Dowl. 548.

(*g*) *Doe d. Dixon v. Roe*, 7 C. B. 134.

(*h*) *Rees d. Powell v. King*, Forrest, 19, cited 2 Brod. & B. 514; *Doe d. Forster v. Wandlass*, 7 T. R. 117; *Doe d. Smelt v. Fuchau*, 15 East, 286; *Doe d. Haverson v. Franks*, 2 C. & K. 678; *Price v. Worwood*,

4 H. & N. 512; 28 L. J., Ex. 329; *Wheeler v. Stevenson*, 6 H. & N. 155; 30 L. J., Ex. 66.

(*i*) *Ex parte Arnison*, L. R., 3 Ex. 56; 37 L. J., Ex. 57.

(*k*) *Doe d. Chippendale v. Dyson*, 1 Moo. & M. 77; *Doe d. Cox v. Roe*, 5 D. & L. 272; *Hammond v. Mather*, 3 F. & F. 151.

(*l*) *Doe d. Haverson v. Franks*, 2 C. & K. 678.

(*m*) *Cotesworth v. Spokes*, 10 C. B., N. S. 103; 30 L. J., C. P. 220; 2 F. & F. 390.

(*n*) *Doe d. Haverson v. Franks*, 2 C. & K. 678.

(*o*) *Brewer d. Ld. Onslow v. Eaton*, 3 Doug. 230.

(*p*) *Cotesworth v. Spokes*, 10 C. B., N. S. 103; 30 L. J., C. P. 220.

are due must have "right by law to re-enter for non-payment thereof" (g). The right to re-enter must be a right to enter *and determine the lease* for non-payment of the rent, and not merely a right to enter and hold the premises until the arrears are paid: otherwise this section will not apply (r). The twenty-one days or other specified period mentioned in the proviso must have elapsed before any forfeiture can accrue for non-payment of the rent (s). If the proviso contain the words "being lawfully demanded," no demand will be necessary if it be proved that half-a-year's rent was due before action brought, and no sufficient distress to be found on the demised premises (t). Service of the writ of ejectment under the above circumstances is sufficient "without any formal demand or re-entry" (u). The statute makes such service a substitute for, and equivalent to, a formal demand of the rent according to the strict rules of the common law (x). And the right of re-entry by virtue of the statute must be taken to have accrued on the day when the forfeiture would have accrued at common law if a demand of payment had been duly made, and not when the writ of ejectment was served (y). The statute merely authorizes an action of ejectment in those cases to which it applies, but it will not justify the landlord or lessor in making an actual entry for non-payment of the rent (z).

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Forfeiture (for Non-payment of Rent).

Demand of Rent dispensed by C. L. P. Act—*cont.*

Unless there are express words in the lease or agreement dispensing with a formal demand of the rent, or the case falls within the above enactment, no entry or ejectment can be maintained for non-payment of rent unless there has been a formal demand thereof made according to the strict rules of the common law (a). Such rules are as follow:

Demand of Rent according to the Common Law.

1. The demand must be made by the landlord or by his agent duly authorized in that behalf (b). 1. By whom.

2. It must be made on the *very last day* to save the forfeiture. Therefore, if the proviso for re-entry be on non-payment of rent for thirty days after it becomes due, the demand must be made on the thirtieth day *after* the rent became due (exclusive of the day on which it became due), and not on any other day before or afterwards (c). 2. On what Day.

(g) *Brewer d. Ld. Onslow v. Eaton*, 3 Doug. 230, cited 6 T. R. 220.

(r) *Doe d. Darke v. Bowditch*, 8 Q. B. 973.

(s) *Doe d. Dixon v. Roe*, 7 C. B. 134.

(t) *Doe d. Soolefield v. Alexander*, 2 M. & S. 525; *Doe d. Earl of Shrewsbury v. Wilson*, 5 B. & A. 364 (4th point); Id. 384, 394; 1 Wms. Saund. 287 a, n.; Cole Ejec. 417.

(u) 15 & 16 Vict. c. 76, s. 210.

(x) Cole Ejec. 417; *Hassell d. Hodgson v. Gouthwaite*, Willes, 500, 507.

(y) *Doe d. Lawrence v. Shawcross*, 3 B. & C. 752.

(z) Cole Ejec. 69.

(a) *Molineux v. Molineux*, Cro. Jac. 144; *Doe d. Forster v. Wandlass*, 7 T. R. 117; *Acocks v. Phillips*, 5 H. & N. 183; *Barr v. Glover*, 10 Ir. Com. L. R. 113.

(b) *Roe d. West v. Davis*, 7 East, 363; *Toms v. Wilson*, 32 L. J., Q. B. 33; Id. 382.

(c) *Doe d. Dixon v. Roe*, 7 C. B. 134; *Doe d. Forster v. Wandlass*, 7 T. R. 117; *Smith and Bustard's case*, 1 Leon. 141; Plow. 70; Co. Lit. 202 a.

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*Forfeiture (for
Non-payment
of Rent).*

3. At Sunset.

4. At the
proper Place.

3. It must be made *at a convenient time before and at sunset (d)*. It must be continued actively or constructively until sunset (e).

4. It must be made *at the proper place*. Therefore, if the lease or agreement specify the place at which the rent is to be paid, the demand must be made there and not elsewhere (f). But if no place be so appointed, the demand must be made upon the land, and at the most notorious place of it (g). Therefore, if there be a dwelling-house upon the land, the demand must be made at the front door of it; but it is not necessary to enter the house, although the door be open (h). If the premises consist of a wood only, the demand must be made at the gate of the wood, or at some highway leading through the wood, or other most notorious place. If one place be as notorious as another, the lessor hath election to demand it at which he will (i). Such demand must be actually made, although there be no person present on behalf of the tenant to answer it (k). Or it may be made on a subtenant (l).

Amount to be
claimed (no
previous
Arrears).

5. The demand must be made of *the precise sum* then payable, and not one penny more or less (m). If the rent be payable quarterly, and more than one quarter is due, only the last quarter's rent should be demanded, and not the previous arrears, otherwise the demand will be altogether bad (n).

(f) *Waiver of Forfeiture.*

Acknowledg-
ment of con-
tinuance of
Tenancy is
Waiver of
Forfeiture.

Courts of law always lean against forfeitures; therefore, whenever a landlord means to take advantage of any breach of covenant or condition so that it should operate as a forfeiture of the lease, he must take care not to do anything which may be deemed an acknowledgment of the continuance of the tenancy, and so operate as a waiver of the forfeiture. Merely lying by and witnessing the breach is no waiver: some positive act must be done (o). The general rule is, that if a lessor, or other person legally entitled to the reversion, knowing that a forfeiture has been incurred by the breach of any covenant or condition, *does any act* whereby he *acknowledges the continuance of the tenancy at a later period*, he thereby waives such forfeiture (p).

(d) Co. Lit. 202 a; 1 Wms. Saund. 287; Cole Ejec. 413.

(e) *Wood and Chiver's case*, 4 Leon. 179; *Acocks v. Phillips*, 5 H. & N. 183.

(f) *Borrough's case*, 4 Co. R. 73; *Buskin v. Edmunds*, Cro. Eliz. 415; Co. Lit. 202 a.

(g) Cole Ejec. 413.

(h) Co. Lit. 201 b; 1 Wms. Saund. 287.

(i) Co. Lit. 202 a.

(k) *Kidwelly v. Brand*, Plow. 70 a, 70 b; Co. Lit. 201 b.

(l) *Doe d. Brook v. Brydges*, 2 D. & R. 29.

(m) *Fabian and Winsor's case*, 1 Leon. 305; *Fabian v. Winston*, Cro. Eliz. 209.

(n) *Scot v. Scot*, Cro. Eliz. 73; *Tomkins v. Pincent*, 7 Mod. 97; 1 Salk. 141; *Doe d. Wheeldon v. Paul*, 3 O. & P. 613.

(o) *Doe d. Sheppard v. Allen*, 3 Taunt. 78, and 301, post.

(p) *Dendy v. Nicholl*, 4 O. B., N. S. 376; 27 L. J., C. P. 220; *Pellatt v. Bossey*, 31 L. J., C. P. 281; *Ward v. Day*, 4 B. & S. 337; 5 Id. 359; 33 L. J., Q. B. 3, 254.

Thus, the following acts amount to a waiver:—Demand of rent accruing due after the forfeiture, if the demand be absolute and unqualified (*q*). Acceptance of rent accruing due after the forfeiture (*r*). Such an acceptance operates as matter of law to waive all forfeitures then known to the lessor, *notwithstanding any protest on his part against such waiver* (*s*); but the subsequent receipt of rent due prior to the forfeiture is no waiver (*t*). Distress for rent accruing due after the forfeiture (*u*). Action for rent accruing due after the forfeiture (*x*).

CH.VIII. s. 6.

Forfeiture
(Waiver of).What Acts
amount to
Waiver.

A forfeiture of a lease by a lessee's insolvency has been held to be waived by acceptance of rent from him after his discharge under the Insolvent Act (*y*).

Forfeiture may be waived by a pleading, as was held in a case where a landlord, suing in respect of breaches of covenants agreed to be inserted in a lease contracted for, claimed an injunction and possession, but stated in his pleadings that he was willing to grant the lease (*z*).

Waiver of
Forfeiture by
Pleading.

If ejectment be brought on a forfeiture of a lease, and after the bringing of such ejectment the landlord accept rent (*a*), or distrain (*b*), or set up as a cause of forfeiture a subsequent non-payment of rent (*c*), it is no waiver. This best appears from *Grimwood v. Moss*, where a landlord brought ejectment on the 21st of July, and after action brought, distrained for rent due on the 24th of June. It was held that, in the action of ejectment, he might rely on a forfeiture accruing before the 24th of June, and it was said that the distress was a simple act of trespass (*d*).

No waiver by
acceptance of
Rent, &c.
after Eject-
ment.*Grimwood v.*
Moss.

In order to render acceptance of rent or any other act a waiver of a forfeiture, the lessor must have notice or knowledge of the forfeiture at the time of the supposed waiver (*e*), unless the forfeiture be of such a nature as to be equally within the knowledge of both the lessor and lessee (*f*). The act which is insisted on as amounting to a waiver is

Lessor must
have Notice
of Forfeiture.

(*q*) *Doe d. Nash v. Birch*, 1 M. & W. 402, at p. 408, per Parke, B.

(*r*) *Doe d. Gatehouse v. Rice*, 4 Bing. N. C. 384; *Doe d. Griffith v. Pritchard*, 5 B. & Ad. 765.

(*s*) *Croft v. Lumley*, 5 E. & B. 648; 6 H. L. Cas. 672; 27 L. J., Q. B. 321; *Davenport v. Reg.*, L. R., 3 App. Cas. 115—P. C.

(*t*) *Marsh v. Curteys*, Cro. Eliz. 528; *Price v. Worwood*, 4 H. & N. 512; 28 L. J., Ex. 329.

(*u*) *Cotesworth v. Spokes*, 10 C. B., N. S. 103; 30 L. J., C. P. 220.

(*x*) *Dendy v. Nicholl*, 4 C. B., N. S. 376; 27 L. J., C. P. 220.

(*y*) *Doe d. Gatehouse v. Rice*, 4 Bing. N. C. 384.

(*z*) *Evans v. Davis*, L. R., 10 Ch. D. 747; 48 L. J., Ch. 223; 39 L. T. 391; 27 W. R. 285.

(*a*) *Doe d. Moorecraft v. Meux*, 4 B. & C. 606; 1 C. & P. 346; *Jones v. Carter*, 15 M. & W. 718.

(*b*) *Grimwood v. Moss*, L. R., 7 C. P. 360; 41 L. J., C. P. 239; 27 L. T. 768.

(*c*) *Toleman v. Portbury*, 41 L. J., Q. B. 98, Ex. Ch.

(*d*) *Grimwood v. Moss*, ubi supra, per Willes, J.

(*e*) *Pennant's case*, 3 Co. R. 63 b; *Duppa v. Mayo*, 1 Wms. Saund. 288 a, b, note (16); *Harvie v. Osuel*, Cro. Eliz. 553, 572; *Goodright d. Walker v. Davids*, 2 Cowp. 803.

(*f*) *Roe d. Gregson v. Harrison*, 2 T. R. 425.

CH. VIII. s. 5. Forfeiture (Waiver of). matter of evidence only, to show with what intent it was done, to be left to the jury under the circumstances of the case (*g*). Where a lessor was too ill to attend to business, and it did not appear that he knew of a forfeiture, his son, who collected the rents, was held not to have authority to waive a forfeiture (*h*).

Continuing Breach.

Where the breach is of a continuing nature, the waiver of any forfeiture up to a certain day will afford no defence to an ejectment for a subsequent breach (*i*); as where the covenant is to keep the demised premises in repair during the term (*k*), or to keep them insured in a certain manner from loss or damage by fire during the term (*l*), or not to use certain rooms in a particular manner (*m*). Acceptance of rent which becomes due pending a notice to repair, is no waiver of a subsequent forfeiture occasioned by non-compliance with such notice (*n*). Indeed, it would seem that acceptance of rent due after the expiration of the notice will not bar an ejectment if the premises continue subsequently unrepaired (*o*).

Distress only acknowledges Tenancy up to Day of Distress.

A distress and continuance in possession may be a waiver of a forfeiture existing at the time (*p*); but a distress is only an acknowledgment of a tenancy to the day of the distress, and a waiver of any forfeiture to that time (*q*). Where the plaintiff after the service of a writ in ejectment for non-payment of rent, distrained for rent which subsequently became due; and by the notice of distress stated that such distress was made without prejudice to the year's rent due on the 25th of March, and for which ejectment proceedings were then pending; it was held, that such distress did not operate as a waiver of the ejectment (*r*).

Breach of Covenant to repair.

A forfeiture incurred by breach of a covenant to repair generally, is waived by a notice given by the landlord, under a special covenant that he should enter and do the repairs, and distrain for the expenses (*s*). A forfeiture, by omission to repair after notice, is suspended but not waived by an agreement to allow further time to repair (*t*).

Of Covenant not to sublet:

The acceptance of rent with knowledge of a written subletting for

(*g*) *Doe d. Cheney v. Batton*, Cowp. 243.
 (*h*) *Doe d. Nash v. Birch*, 1 M. & W. 402.
 (*i*) *Cole Ejec.* 409.
 (*k*) *Doe d. Baker v. Jones*, 5 Exch. 498.
 (*l*) *Doe d. Mustin v. Gladwin*, 6 Q. B. 953, 956; *Penniall v. Harborne*, 11 Q. B. 368, 374; *Hyde v. Watts*, 12 M. & W. 254; 1 D. & L. 479; *Doe d. Flower v. Peck*, 1 B. & Ad. 428.
 (*m*) *Doe d. Ambler v. Woodbridge*, 9 B. & C. 376.
 (*n*) *Doe d. Rankin v. Brindley*, 4 B. & Ad. 84; *Doe d. Baker v. Jones*, 5 Exch. 498, 505.

(*o*) *Fryett d. Harris v. Jefferys*, 1 Esp. 393; *Cole Ejec.* 409.
 (*p*) *Doe d. Taylor v. Johnson*, 1 Stark. 411; *Zouch d. Ward v. Willingale*, 1 H. Blac. 311.
 (*q*) *Doe d. Flower v. Peck*, 1 B. & Ad. 428; *Ward v. Day*, 4 B. & S. 337; 33 L. J., Q. B. 54; *S. C.*, in error, 5 B. & S. 359.
 (*r*) *Bailey v. Mason*, 2 Ir. Rep., N. S. 582.
 (*s*) *Doe d. Reutzen v. Lewis*, 5 A. & E. 277; *Roe d. Goatley v. Paine*, 2 Camp. 520.
 (*t*) *Doe d. Rankin v. Brindley*, 4 B. & Ad. 84.

a time certain is a waiver of a forfeiture for the breach of a covenant not to sublet, and the breach is not a continuing breach, although the covenant be that the lessee “will not permit any person to occupy” (u). CH. VIII. s. 5.
Forfeiture
(Waiver of).

If a lessee exercise a trade on the demised premises by which his lease is forfeited, the landlord does not, by merely lying by and witnessing the act, waive the forfeiture (x), as some positive act of waiver, as by receipt of rent (y), is necessary; but if he permit the tenant to expend money in improvements, it would seem that it is evidence to be left to a jury of his consent to the alteration of the premises (z): and if a lessor after a forfeiture advise a person to purchase the term of his lessee, he cannot maintain an ejectment for a forfeiture against such purchaser; but he may do so if the party have an interest, viz. an annuity secured on the premises, and the advice is merely “to take to them” (a). If A., tenant for life, subject to forfeiture, with a remainder over to B., lease to C. for a term, and afterwards apprehending that he has forfeited, acquiesce in B.’s claim to and receipt of the rent from C., his executor may, on showing that he acquiesced under a false apprehension, recover from C. the amount of the rent erroneously paid to B.; for in order to constitute a confirmation of the payment, some act must appear to have been done by A. with the knowledge of his own situation (b). Where land was demised with a covenant by the lessee to build and complete thereon houses within a year, and a proviso that if he did not, the lease should be void; the houses not being completed, it was held, that the forfeiture was not waived by the steward of the lessor having permitted the lessee to employ workmen in completing the houses for a short period after the forfeiture (c). When the landlord does any act amounting to a constructive eviction of the tenant he cannot maintain an ejectment for a forfeiture for not repairing during the continuance of such eviction (d). A. demised land with a covenant by the lessee to finish certain houses thereon, and with a power of re-entry in case of default, and by another indenture between A. and the plaintiff, reciting that A. had made subleases of the land in question, A. assigned the land to the plaintiff subject to the subleases; the court inclined to think that if the condition had been broken, the assignment, subject to the subleases, would have been a waiver of the forfeiture although the forfeiture was not known to A. (e). Though an acceptance of rent

Of Covenant
not to carry
on Trade, &c.

(u) *Watrend v. Hawkins*, L. R., 10 C. P. 342; 44 L. J., C. P. 116; 32 L. T. 119.

(x) *Doe d. Sheppard v. Allen*, 3 Taunt. 78.

(y) *Griſſin v. Tomkins*, 42 L. T. 359.

(z) *Doe d. Sheppard v. Allen*, ubi sup., per Mansfield, C. J.

(a) *Doe d. Sore v. Eykins*, 1 C. & P. 154;

Ry. & Moo. 29.

(b) *Williams v. Bartholomew*, 1 Bos. & P. 326.

(c) *Doe d. Ld. Kensington v. Brindley*, 12 Moo. 37.

(d) *Pillatt v. Doosey*, 31 L. J., C. P. 281.

(e) *Hunt v. Bishop*, 8 Exch. 675; *Hunt v. Remnant*, 9 Exch. 635.

CH. VIII. s. 5. or other act of waiver may make a voidable lease good, it cannot make valid a deed or a lease which was actually void at first; but where a lease for years contains the common proviso "that it shall and may be lawful for the lessor to re-enter," or a proviso "that the term shall cease and determine if the lessor please," the lease will be only voidable by a breach of covenant; and the forfeiture may be waived by a subsequent acknowledgment of a tenancy (*f*).

23 & 24 Vict.
c. 38, s. 6.

Actual
Waiver does
not operate
as general
Waiver.

By 23 & 24 Vict. c. 38, s. 6, "where any actual waiver of the benefit of any covenant or condition in any lease on the part of any lessor, or his heirs, executors, administrators or assigns, shall be proved to have taken place after the passing of this act in any one particular instance, such actual waiver shall not be assumed or deemed to extend to any instance or any breach of covenant or condition other than that to which such waiver shall specially relate, nor to be a general waiver of the benefit of any such covenant or condition, unless an intention to that effect shall appear."

SECT. 6.—*Relief against Forfeiture.*

Equitable
Relief.

An unqualified proviso for re-entry in case of breach of any covenant has long been usually inserted as a common form in leases, and the courts of law, though "leaning against forfeiture," invariably gave effect to such proviso upon a breach being clearly proved, however great the hardship to the lessee (*g*). Courts of equity were, therefore (before the Judicature Acts), frequently (*h*) applied to for relief by injunction to restrain actions of ejectment. In the case of the breach of the covenant to pay rent, relief was granted from very early times, the statute 4 Geo. 4, c. 28, only regulating the mode of granting the relief, and not originating it (*i*). As for forfeiture by other breaches, the early cases are not quite uniform.

No Equitable
Relief for
"Wilful
Breach.

They will be found reviewed by Lord Erskine in *Sanders v. Pope* (*k*), and by Lord Eldon in *Hill v. Barclay* (*l*), and in *Reynolds v. Pitt* (*m*). In *Sanders v. Pope*, Lord Erskine granted relief against forfeiture of a public-house lease incurred by not laying out a particular sum in repairs within a given time, and declared the result of the prior authorities to be that the court had jurisdiction to grant relief in all cases where full compensation could be made, although the breach might have been wilful. But in *Hill v. Barclay*, Lord Eldon, though distinguishing *Sanders v. Pope*, distinctly disapproved

Hill v.
Barclay.

(*f*) *Doe d. Bristow v. Old*, Ad. Ejec. 155 (4th ed.).

(*g*) See *Doe v. Gladwin*, 6 Q. B. at p. 981.

(*h*) See the whole series of cases up to 1847 reviewed in "Platt on Leases," Vol. 2, at p. 486 et seq.

(*i*) *Green v. Bridges*, 4 Sim. 96.

(*k*) 12 Ves. 262.

(*l*) 18 Ves. 56; and see *id.* 16 Ves. 402.

(*m*) 19 Ves. 134.

of the doctrine that relief could be given in case of a wilful breach, and refused relief in a case of non-repair in which the landlord had given a notice which had not been complied with. But, as was pointed out by Stuart, V.-C., in *Damford v. Creasy* (*n*), Lord Eldon expressly recognized the exceptions in case of accident or surprise, and accordingly relief was granted in a case (*o*) where it appeared that out of twenty-two items of repair twenty had been proceeded with, and fourteen completed, and that the repairs had been partially delayed by the weather; Stuart, V.-C., mentioning “as an equity always recognized” the equity of a tenant who has bound himself by a covenant to repair, and who can show to the court *equitable circumstances sufficient* to entitle him either to a relief from a strict performance of the lease, or to ensure him against a forfeiture by reason of the neglect to perform them.

CH. VIII. s. 6.
*Relief against
Forfeiture.*

The rule of *Hill v. Barclay* was recognized in *Gregory v. Wilson* (*p*) by Turner, V.-C., in refusing to grant specific performance of an agreement for a lease. In *Nokes v. Gibbon* (*q*), Kindersley, V.-C., refused relief where the breach consisted in a failure to construct certain drains, and in *Job v. Banister* (*r*), where a lease was granted with a covenant for perpetual renewal by the lessor, provided the lessee's covenants should be kept, Wood, V.-C., refused to compel the lessor to renew or to restrain him from ejecting the lessee for breaches of covenant to repair and insure, although the lessee had expended large sums of money on the premises, and their value was much increased, the lessee losing about 5,000*l.* for a breach of covenant which might be amply remedied by 500*l.*

In one case, however—subsequent to *Hill v. Barclay*—Lord Eldon granted relief against an ejectment for non-repair brought by the committee of a lunatic, on the principle that harsh proceedings would not be for the benefit of the lunatic's estate (*s*); but there does not seem to be any direct authority upon the question how far trustees neglecting to take advantage of a forfeiture would be protected by the court.

Lunatic.
Trustees.

The result of the modern cases appears to be that accident and surprise afford the only instances in which relief will be given, and that the fact that a landlord gains ever so large an improved value by insisting on the forfeiture is not to be taken into account (*t*).

Result of
Modern Cases.

(*n*) 3 Giff. 675. In this case the lessor had obtained judgment by default in ejectment.

(*o*) *Bargent v. Thompson*, 4 Giff. 473.

(*p*) 9 Hare, 683.

(*q*) 26 L. J., Ch. 483.

(*r*) 6 K. & J. 374.

(*s*) *Ex parte Vaughan*, 1 Turn. & Russ.

434.

(*t*) Only in *Job v. Banister* was the case a very hard one upon the tenant, such as might arise if the doctrine supposed to be laid down in *Hill v. Barclay* were carried to its fullest extent;—as for instance, if a ground lease for an unexpired term of 70 years, at a ground rent

CH. VIII. s. 6.
*Relief against
Forfeiture.*

The whole question is in a very unsatisfactory state. It is understood that an honourable understanding (*u*) exists between landlords and tenants that the proviso for entry shall not be harshly enforced, but to rely on such an understanding for security of tenure is dangerous in the highest degree. Remedial legislation has of late years been frequently proposed (*x*).

Statutory Relief against Forfeiture.

In two particular cases, however, the non-payment of rent, and the failure to insure, the courts have been expressly empowered by statute to grant relief.

For Non-payment of Rent. Before Trial, C. L. P. Act, 1852.

In the case of forfeiture for non-payment of rent at any time *before the trial* of an ejectment, the proceedings therein may be stayed upon a summary application to the court, or to a judge or master, upon payment of all arrears of rent, with costs (*y*). This may be done after the defendant has suffered judgment by default, and before execution executed (*z*).

After Trial, C. L. P. Act, 1860.

By 23 & 24 Vict. c. 126, s. 1, "in the case of any ejectment for a forfeiture brought for non-payment of rent, the court or a judge [or master] shall have power, upon rule or summons, to give relief in a summary manner, but subject to appeal as hereinafter mentioned (*a*), *up to and within the like time after execution executed*, and subject to the same terms and conditions in all respects as to payment of rent, costs and otherwise, as in the Court of Chancery: and if the lessee, his executors, administrators or assigns, shall upon such proceeding be relieved, he and they shall hold the demised lands according to the lease thereof made, without any new lease."

Practice in Equity before C. L. P. Acts.

According to the previous law, relief might have been obtained in equity *within six months after execution executed*, upon payment of the

of 10*l.* were purchased for 10,000*l.*, and an assignee of the ground landlord discovering that the house had been used as a shop eleven years before the purchase, were to eject the tenant, without any previous notice even of the assignment (see *Sealock v. Harston*, L. R., 1 C. P. D. 106, and 236, ante), and, though not having suffered any damage whatever by the breach, were to become enabled to acquire an improved rent of about 500*l.* a year.

(*u*) See per James, L. J., in *Hodgkinson v. Crowe*, L. R., 10 Ch. 622, and 114, ante, and 857, post.

(*x*) In the sessions of 1876 and 1877 a bill to amend the law of relief against forfeiture introduced by Mr. Marten, passed the House of Commons, but failed to pass the House of Lords. In 1876 it was sent up late to the House of Lords; in 1877 it was sent up very early, but the order for the second reading was discharged about a month before prorogation of Parliament.

In the first session of 1880, it was re-introduced by Mr. Marten in an improved form, and its clauses were incorporated in a further improved form in Lord Chancellor Cairns' "Conveyancing and Law of Property Amendment Bill," which passed the House of Lords, but did not reach the House of Commons. In the second session of 1880 a bill of similar scope was introduced by Mr. Warton, and read a second time in the House of Commons, but the order for committee was discharged, Mr. Osborne Morgan representing that the government intended to deal with the whole subject in the then next session.

See the bills printed in the Appendix (G.), 935, post.

(*y*) 15 & 16 Vict. c. 76, s. 212.

(*z*) Cole Ejec. 418.

(*a*) The appeal will now be to a divisional court or to the Court of Appeal, as the case may be.

rent, and all arrears, with full costs (*b*) ; and sometimes even at a later period, until from the great lapse of time or other special circumstances it became unreasonable to grant such relief (*c*).

CIV. VIII. s. 6.
Relief against Forfeiture.

The covenant to insure is one which from its nature may be broken without producing the slightest injury to the reversion, and yet a court of law allowed a lessor to re-enter on the smallest breach of it (*d*). And for a long period no relief could have been obtained in a court of equity against an ejectment for a forfeiture by not insuring (*e*), unless there had been fraud or misleading on the part of the lessor (*f*).

Statutory Relief against Failure to insure.

But by 22 & 23 Vict. c. 35, s. 4, “a court of equity shall have power to relieve against a forfeiture for breach of a covenant or condition to insure against loss or damage by fire, where no loss or damage by fire has happened, and the breach has, in the opinion of the court, been committed through accident or mistake, or otherwise without fraud or gross negligence, and there is an insurance on foot at the time of the application to the court, in conformity with the covenant to insure, upon such terms as to the court may seem fit.” By sect. 5, “the court, where relief shall be granted, shall direct a record of such relief having been granted to be made by indorsement on the lease or otherwise.”

Relief in Case of Accident, where no Loss by Fire.

By sect. 6, “the court shall not have power under this act to relieve the same person more than once in respect of the same covenant or condition ; nor shall it have power to grant any relief under this act where a forfeiture under the covenant in respect of which relief is sought shall have been already waived out of court in favour of the person seeking the relief.” By sect. 9, “the preceding provisions shall be applicable to leases for a term of years, absolute or determinable on a life or lives, or otherwise, and also to a lease for the life of the lessee, or the life or lives of any other person or persons.”

No Relief more than once.

This relief may be granted by the Queen’s Bench, &c. Division as well as by the Chancery Division of the High Court, it having been enacted by the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), s. 2, that in the case of an ejectment for a forfeiture for breach of covenant to insure, the court or a judge should have power, upon rule or summons, to give relief in a summary manner, “in all cases in which such relief might be obtained in the Court of Chancery under the provisions” of 22 & 23 Vict. c. 35. Orders

Relief may be obtained in all Divisions of High Court.

(*b*) 15 & 16 Vict. c. 76, s. 210.

(*c*) *Bowser v. Colby*, 1 Hare, 109.

(*d*) *Doe v. Gladwin*, 6 Q. B. 953 ; post, Chap. XVII., Sect. 1.

(*e*) *White v. Warner*, 2 Meriv. 459 ;

Green v. Bridges, 4 Sim. 96, cited 6 Q. B.

961 ; *Gregory v. Wilson*, 9 Hare, 683.

(*f*) *Meek v. Carter*, 4 Jur., N. S. 992.

CH. VIII. s. 6. made by a judge of a common law division will be subject to appeal to a divisional court, and afterwards to the Court of Appeal and to the House of Lords.

Relief against Forfeiture.

SECT. 7.—*Notice to Quit.*

(a) *Nature and Operation of.*

Nature of
Notice to
Quit.

A notice to quit is a certain reasonable notice required by law, or by custom, or by special agreement, to enable either the landlord or tenant, or the assignees or representatives of either of them, *without the consent of the other*, to determine a tenancy from year to year, or from two years to two years, or other like indefinite period (*g*). Without such notice, or an actual or implied surrender (*h*) or merger (*i*), a tenancy of the above nature would continue in the tenant and his assigns or representatives; and the immediate reversion would continue in the landlord and his assigns or representatives (*k*), until extinguished by the Statute of Limitations (*l*).

Special Stipulations as to
Notice to
Quit.

The right to determine a tenancy from year to year by a notice to quit is a *necessary incident* to such tenancy: a stipulation against any such notice being given by one party or by the other is repugnant to the nature of the tenancy, and therefore void, and mere surplusage (*m*). Thus, an agreement to let at a fixed yearly rental, and not to give notice to quit so long as the rent is paid, constitutes more than a yearly tenancy, and gives the tenant a right to stay in, so long as the landlord's interest continues and the tenant pays rent (*n*). The tenancy may generally be determined by half-a-year's notice expiring at the end of the first or any subsequent year of the term (*o*): but the parties may expressly stipulate for a longer or shorter notice to quit than that usually required by law (*p*); or for a notice expiring at some other period of the tenancy than at the end of the first or some other year, ex. gr. at the end of any quarter (*q*); or at some particular quarter (*r*); or at any time of the year, upon the expiration of a certain specified previous notice (*s*). But as the power of

- (*g*) Cole Ejec. 30.
- (*h*) Ante, Chap. VIII., Sect. 3.
- (*i*) Ante, Chap. VIII., Sect. 4, p. 281.
- (*k*) *Maddon d. Baker v. White*, 2 T. R. 159.
- (*l*) 3 & 4 Will. 4, c. 27; *Doe d. Landsdell v. Gower*, 17 Q. B. 589.
- (*m*) *Doe d. Warner v. Broune*, 8 East, 165.
- (*n*) *King's Leashold Estates, R.*, L. R., 16 Eq. 521; 29 L. T. 288; 21 W. R. 881.
- (*o*) *Doe d. Clarke v. Smaridge*, 7 Q. B. 957; *Doe d. Plumer v. Mainby*, 10 Q. B. 473.
- (*p*) Cole Ejec. 31, 32; *Doe d. Pitcher v. Donoran*, 1 Taunt. 555; 2 Camp. 78;

- Doe d. Green v. Baker*, 8 Taunt. 241;
- Doe d. Robinson v. Dobell*, 1 Q. B. 806;
- Tooker v. Smith*, 1 H. & N. 732; *Evans v. Whittingstall*, 2 F. & F. 175; *Rogers v. Kingston-upon-Hull Dock Co.*, 34 L. J., Ch. 165.
- (*q*) *Kemp v. Derrett*, 3 Camp. 510; *Rez v. Herstonceaux*, 7 B. & C. 551; *Collett v. Curling*, 10 Q. B. 785; *Bird v. Defonville*, 2 C. & K. 415, 418.
- (*r*) *Doe d. Riggs v. Bell*, 5 T. R. 471.
- (*s*) *Doe d. Green v. Baker*, 8 Taunt. 244; *Doe d. King v. Grafton*, 18 Q. B. 496; 21 L. J., Q. B. 276; *Bridges v. Potts*, 17 C. B., N. S. 314.

determining the tenancy at any time of the year is generally attended with inconvenience to one or both parties, the language conferring such power must be clear and explicit (*t*). Therefore, on a letting from year to year "to quit at a quarter's notice," such notice must expire *at the end* of the first or some other year of the tenancy, and not at any other part of the year; such stipulation merely substituting a three months' notice for the usual six months' notice (*u*). It seems, that where a "six months' notice" on either side is contracted for, a six lunar months' notice will be sufficient (*x*). Where a tenant is "*always* to be subject to quit at three months' notice," he will be deemed a quarterly tenant, and the notice to quit must expire with some quarter, and not at any other part of the year (*y*). Where premises are let at so much per quarter (not saying for what period), that creates a quarterly tenancy, and not a yearly tenancy at a rent payable quarterly (*z*). So where premises are let not for any definite period, but the tenant is to give up possession at any time on one month's notice, that creates a tenancy from month to month (*a*). But where premises are let for an indefinite period, at a yearly rent, payable weekly, with power to determine the tenancy at three months' notice from any quarter day, that creates a yearly tenancy, determinable at the end of any quarter (*b*). The parties to a demise may expressly stipulate that in a certain event the tenant may quit without any notice (*c*).

CH. VIII. s. 7.
Notice to Quit
(*Nature and*
Operation of).

An insufficient notice to quit given by the tenant and assented to by the landlord will not determine the tenancy, unless the assent be communicated to the tenant, nor operate as a surrender on the expiration of such notice (*d*). A tenancy from year to year created by parol is not determined by a parol licence from the landlord to quit in the middle of a quarter, and the tenant quitting the premises accordingly, without the landlord taking possession (*e*). An agreement for a new lease upon different terms (not amounting to an actual demise) will not be sufficient, without a notice to quit, to determine a previous yearly tenancy (*f*).

Effect of an
insufficient
Notice to
Quit.

(*t*) *Cole Ejec.* 31.

(*u*) *Doe d. Pitcher v. Donovan*, 1 Taunt. 555; 2 Camp. 78; *Brown v. Burtenshaw*, 7 D. & R. 603.

(*x*) *Rogers v. Kingston-upon-Hull Dock Co.*, 34 L. J., Ch. 185.

(*y*) *Kemp v. Derrett*, 3 Camp. 510.

(*z*) *Wilkinson v. Hall*, 3 Bing. N. C. 508.

(*a*) *Doe d. Lansdell v. Gower*, 17 Q. B. 589.

(*b*) *Rex v. Inhts. of Herstonceaux*, 7 B. & C. 551; *Overseers of Willesden, app., Overseers of Paddington, resp.*, 3 B. & S.

593; *Guardians of Hastings Union v. Guardians of St. James, Clerkenwell*, 35 L. J., M. C. 65.

(*c*) *Bethell v. Blencow*, 3 M. & G. 119; *Cole Ejec.* 31, 36.

(*d*) *Doe d. Hudleston v. Johnstone*, 1 M'Clel. & Y. 141; *Johnstone v. Hudleston*, 4 B. & C. 922; *Doe d. Murrell v. Miltard*, 3 M. & W. 328; *Bessell v. Landsberg*, 7 Q. B. 638.

(*e*) *Mollett v. Brayne*, 2 Camp. 103.

(*f*) *John v. Jenkins*, 1 Cr. & M. 227; *Jones v. Reynolds*, 1 Q. B. 506.

CH. VIII. s. 7.
Notice to Quit
(Nature and
Operation of).

Effect of a
 sufficient
 Notice to
 Quit.

Upon the expiration of a notice to quit duly given by either party the tenancy ceases, and, unless a fresh tenancy be afterwards created, the landlord cannot distrain for *subsequent* rent, notwithstanding the tenant continues in possession for a year or more after the expiration of the notice (*g*). The remedy in such case is by action for use and occupation (*h*), or for double value or double rent (*i*).

(b) *When necessary.*

When neces-
 sary.

A notice to quit is necessary—1. Where there is some express stipulation on the subject. 2. By local custom. 3. By the common law.

By express
 Stipulation.

Where there is any express stipulation as to the notice to be given by either party to determine the tenancy, such notice, whether more or less than that usually required by law, must be given and will be sufficient (*k*). But less than the stipulated notice will be bad (*l*). Where a “six months” notice on either side is to be given, it seems that a six lunar months’ notice is sufficient (*m*).

By local cus-
 tom.

Where there is a special local custom regulating the notice to be given to determine the tenancy, and there is no express stipulation on the subject, such custom will be deemed part of the contract as an *implied* term or condition thereof, and notice to quit must be given accordingly (*n*). The custom of the country is not admissible to prove that a notice to quit served on the 3rd of April is a good notice to quit by reason of the tenancy being a Michaelmas tenancy, but it must be proved by direct evidence that such is the case (*o*).

By the Com-
 mon Law—
 General Rule.

Where a tenancy from year to year is created by express agreement, and there is no special stipulation or local custom providing for the determination of the tenancy, the usual notice to quit required by law, i. e. half-a-year’s notice to quit at the end of the first or some other year of the tenancy, must be given (*p*). The same rule applies where a tenancy from year to year is *implied by law* from the payment and acceptance of rent, or from other circumstances (*q*), as where a person enters under a mere agreement for a lease (*r*), or under a void lease (*s*). Similarly, where a tenant for a term of years

(*g*) *Alford v. Vickery*, Car. & M. 280.

(*h*) Chap. XIV., post.

(*i*) Chap. XX., post.

(*k*) *Doe d. Green v. Baker*, 8 Taunt. 281;
Doe d. Robinson v. Dobell, 1 Q. B. 806;
Cole Ejec. 31, 32.

(*l*) *Doe d. Peacock v. Raffan*, 6 Esp. 4.

(*m*) *Rogers v. Kingston-upon-Hull Dock*
Co., 34 L. J., Ch. 165.

(*n*) *Tyley v. Seed*, Skin. 649; *Roe d.*
Henderson v. Charnock, Peake, 6. As to
 proof of custom, see *Doe d. Brown v.*
Wilkinson, Co. Lit. 270 b, note (228).

(*o*) *Hogg v. Norris*, 2 F. & F. 246.

(*p*) *Parker d. Walker v. Constable*, 3
 Wils. 25; *Right d. Flower v. Darby*, 1 T.
 R. 159; *Doe d. Shaw v. Porter*, 3 T. R.
 13; *Doe d. Martin v. Watts*, 7 T. R. 85;
Doe d. Pitcher v. Donovan, 1 Taunt. 555;
Goode v. Howell, 4 M. & W. 198; *Smith*
L. & T. 24, 319 (2nd ed.).

(*q*) *Doe d. Wawn v. Horn*, 3 M. & W.
 333; *Doe d. Cater v. Somerville*, 6 B. & C.
 126, 132.

(*r*) *Doe d. Thomson v. Amey*, 12 A. &
 E. 479. See ante, 118.

(*s*) *Doe v. Bell*, 5 T. R. 471. See ante,
 118.

holds over and continues to pay rent as before, which the landlord accepts (*t*); or where a lease becomes void upon the death of the lessor (a tenant for life), and the remainderman accepts subsequent rent, whereby a new implied tenancy is created (*u*); any such new tenancy will be deemed to have commenced from the same day of the year as the original term, and the notice to quit should be given accordingly (*x*).

CH. VIII. s. 7.
Notice to Quit
(when necessary).

The tenant is entitled to retain possession till midnight of the same day of the year on which the tenancy commenced; a notice to quit at noon of such day is bad (*y*).

Time of Day
for Quitting.

The common law rule, that in all cases of yearly tenancies, the tenant is entitled to half-a-year's notice expiring at that period of the year at which the tenancy commenced, is altered in favour of agricultural tenancies of two acres or more by the 51st section of the Agricultural Holdings Act, 1875 (38 & 39 Vict. c. 92) (*z*), which doubles the length of notice required. This section enacts that "where a half-year's notice, expiring with a year of tenancy, is by law necessary and sufficient for the determination of a tenancy from year to year, a year's notice so expiring shall by virtue of this act be necessary and sufficient for the same; but nothing in this section shall extend to a case where the tenant is adjudged bankrupt, or has filed a petition for a composition or arrangement with his creditors." This section applies only to the common case where a half-year's notice is necessary by implication of law (*a*), and has no application to the case where a half-year's notice, much less where six months' notice (*b*), is expressly stipulated (*c*).

Notice to Quit
under Agri-
cultural
Holdings Act,
1875.

The 52nd section of the same act provides that a notice to quit, which relates to part only of the holding, shall be good if given with a view to the use of land for the erection of labourers' cottages, the providing of gardens for labourers, the planting of trees, the working of coal, &c., "the obtaining of brick earth, gravel or sand," or the making of a watercourse or road, the tenant to be entitled to a proportionate reduction of rent. The same section provides that "the tenant shall further be entitled at any time within *twenty-eight* days after service of the notice to quit, to serve on the landlord a notice in writing to the effect that he (the tenant) accepts the same as a notice to quit the entire holding, to take effect at the expiration

Notice to
Quit Part of
Holding.

(*t*) *Hyatt v. Griffiths*, 17 Q. B. 570. See ante, 207.

(*u*) *Doe v. Watts*, 2 Esp. 501; 7 T. R. 83. See ante, 208.

(*x*) *Doe d. Jordan v. Ward*, 1 H. Blac. 96; *Doe d. Collins v. Weller*, 7 T. R. 478; *Humphreys v. Franks*, 18 C. B. 323.

(*y*) *Page v. More*, 15 Q. B. 684.

(*z*) See this act commented on, Chap.

XXI., and set out at length, Appendix A., post.

(*a*) See *Right d. Flower v. Darby*, 1 T. R. 159, and the other cases, ante, 308.

(*b*) *Wilkinson v. Calvert*, L. R., 3 C. P. D. 360; 47 L. J., C. P. 679; 38 L. T. 813; 26 W. R. 829, per Lord Coleridge, C. J.

(*c*) See Id.

CH. VIII. s. 7. of the then current year of tenancy; and the notice to quit shall have effect accordingly.” This last provision, which it is purely optional with the tenant to avail himself of, seems intended to give him the benefit of giving up the part of the holding to which the notice applies sooner than he would be entitled to do in the ordinary course of things; for if the tenant should not avail himself of the provision the notice will be a “year’s notice, expiring with a year of tenancy” (in accordance with sect. 51), and not with the “current year.”

Agricultural Holdings Act applies to all Tenancies unless excluded by Writing.

The Agricultural Holdings Act, 1875, it must be remembered, applies to all agricultural or pastoral tenancies of two acres or more, beginning after the commencement of that act (February 14th, 1876), unless the landlord and tenant agree in writing to exclude it; but does not apply to tenancies from year to year current at the commencement of the act, if within two months after that date either landlord or tenant has given written notice to the other that he does not wish it to apply (*d*).

What Tenancies are determinable by Notice at the End of the first Year.

A tenancy “from year to year so long as both parties please,” is determinable at the end of the first, as well as of any subsequent year, unless in creating such tenancy the parties use words showing that they contemplate a tenancy for two years at least (*e*). But where a tenancy is created for “one year certain, and so on from year to year” (which is often done by mistake), it enures as a tenancy for two years at the least, and cannot be determined by notice to quit at the end of the first year (*f*); but it may be determined by due notice to quit at the end of the second or any subsequent year of the tenancy (*g*). A tenancy “for twelve months certain and six months’ notice afterwards” may be determined by notice to quit at the end of the first year (*h*): but a demise “not for one year only, but from year to year,” has been held to constitute a demise for two years at least (*i*). A tenancy for six months, and so on from six months to six months until determined by either party, is a tenancy for one year at least (*k*). So a lease for three years, and so on from three years to three years, makes one term for six years (*l*). Such tenancy may be determined by a half-year’s notice to quit expiring at the end of the first six years, or of any subsequent period of three years, but not at any other time (*m*). A demise for “a term of three years determinable on a six months’ previous notice to quit, otherwise to continue

(*d*) See sects. 56, 57.

(*e*) *Dox d. Clarke v. Smaridge*, 7 Q. B. 957; *Dox d. Plumer v. Nainby*, 10 Q. B. 473; *Smith L. & T. 323* (2nd ed.).

(*f*) *Dox d. Chadborn v. Green*, 9 A. & E. 668.

(*g*) *Cole Ejec. 34*.

(*h*) *Thompson v. Maberley*, 2 Camp. 573; *Brown v. Symons*, 8 C. B., N. S. 208; 29

L. J., C. P. 251.

(*i*) *Dean d. Jacklin v. Cartwright*, 4 East, 31.

(*k*) *Reg. v. Chawton*, 1 Q. B. 247.

(*l*) *Hennings v. Brabason*, 2 Lev. 45.

(*m*) *Cole Ejec. 35*; *Dox d. Broo v. Lees*, 2 W. Blac. 1171; *Hennings v. Brabason*, 2 Lev. 45; *Jones v. Nizon*, 1 H. & C. 48.

from year to year until the term shall cease by notice to quit at the usual times," is a demise for three years certain, determinable only at the end of that period by six months' previous notice; and if not then determined, a subsisting tenancy from year to year. Such a demise cannot be determined by a notice to quit at the end of the first or second of the three years (*n*).

CH. VIII. s. 7.
Notice to Quit
(when necessary).

A husband cannot maintain ejectment for his wife's lands, let from year to year with his express or implied assent, without first giving due notice to quit (*o*).

By Husband.

Where an infant becomes entitled to the reversion of an estate leased from year to year, he cannot eject the tenant without giving the same notice to quit as the lessor must have given (*p*). So when an infant becomes of age, he cannot, without the usual notice to quit, eject a tenant who has attorned to him during his infancy after a previous ejectment in his name (*q*).

By Infant.

A notice to quit is not rendered unnecessary by the death of the landlord (*r*), or of the tenant (*s*), nor by an assignment of the term (*t*), or of the reversion (*u*). But in all such cases notice to quit should be given by or to the person or persons for the time being legally entitled to the term, or to the reversion, as the case may be (*x*).

After Death,
or Assign-
ment.

Where notice to quit is duly given by the landlord, or other person for the time being legally entitled to the reversion, and he afterwards assigns his reversion, the assignee may avail himself of the notice (*y*). So the churchwardens and overseers of a parish may avail themselves of a notice to quit duly given by their predecessors (*z*).

Subsequent
Reversioners
may avail
themselves
of previous
Notice.

A proper notice to quit given to the tenant or his assignee will operate against any subsequent assignee (*a*).

Notice-by
Tenant binds
Assignee.

(c) *When unnecessary.*

Where the demise or agreement specifies the term or event upon which the tenancy is to determine, no notice to quit is necessary (*b*);

Demise for
specific Term.

(*n*) *Jones v. Nixon*, 1 H. & C. 48; 31 L. J., Ex. 506; *Brown v. Trumper*, 26 Beav. 11.

(*o*) *Doe d. Leicester v. Biggs*, 1 Taunt. 367; 2 Id. 109.

(*p*) *Maddon d. Baker v. White*, 2 T. R. 159.

(*q*) *Doe d. Miller v. Noden*, 2 Esp. 530; *Cole Ejec.* 35.

(*r*) *Maddon d. Baker v. White*, 2 T. R. 159.

(*s*) *Doe d. Shore v. Porter*, 3 T. R. 13; *Doe d. Hull v. Wood*, 14 M. & W. 682; *Mackay v. Mackreth*, 4 Doug. 213; 15 Ven. 241; *Gulliver d. Tasker v. Burr*, 1

W. Blac. 596.

(*t*) *Doe d. Castleton v. Samuel*, 5 Esp. 173.

(*u*) *Birch v. Wright*, 1 T. R. 378; *Burroues v. Gradin*, 1 D. & L. 213, 218.

(*x*) *Cole Ejec.* 35.

(*y*) *Doe d. Earl of Egremont v. Forwood*, 3 Q. B. 627.

(*z*) *Doe d. Higgs v. Terry*, 4 A. & E. 274; *Doe d. Hobbs v. Cockell*, Id. 478.

(*a*) *Doe d. Castleton v. Samuel*, 5 Esp. 173.

(*b*) *Right d. Flower v. Darby*, 1 T. R. 162; Id. 54.

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Notice to Quit
(when unnecessary).

Agreement
for Lease for
specific Term.

When Term
limited till
specified
Event.

Where Notice
to Quit is ex-
pressly dis-
pensed with.

Monthly or
Weekly Te-
nancy.

Jones v. Mills.

as where the demise is for one year (c) : or for any certain number of years (d) : or till a particular day (e). Similarly, if a tenant enter under an agreement for a lease for seven years, which lease is never executed, at the end of the seven years the tenancy from year to year, created by the payment and acceptance of rent during that period, determines without any notice to quit (f). But if there be an agreement for a lease of twenty-one years, determinable at the end of the first seven or fourteen years, the tenant cannot quit at the end of the first seven years without giving any notice (g).

If a term is granted which in the lease is limited by the happening of a certain event, the term will end on the happening of the event without any notice to quit being required. Thus where there is a lease or agreement for a lease "during the joint lives of A. and B.," upon the death of either of them the term determines without any notice to quit (h) ; and where a house or part of a house is occupied by one of several partners "during the continuance of the partnership;" upon a dissolution thereof he may be ejected without any notice to quit (i). So where premises are occupied by a servant and his family as part of the remuneration for his services, whenever such service is determined, an ejectionment may be maintained against the servant without notice to quit (k). And where an intended purchaser is let into possession until a given day on terms the same rule will apply (l).

It may be expressly stipulated that the tenant may quit *without notice*, at any time, upon the happening or discovery of a particular event or fact (which happens), ex. gr. "if he finds anything that may at all lead him to suspect that there is any embarrassment in his landlord" (m).

Where the tenancy is otherwise than yearly, and there is no local custom or special stipulation as to notice, it is very doubtful what notice to quit is necessary. A notice corresponding with the period of tenancy, ex. gr. a week's notice in case of a weekly tenancy, is clearly sufficient (n), but whether it is necessary is not settled. It was ruled by Parke, B., at *nisi prius* (o), in an action for use and occupation,

(c) *Cobb v. Stokes*, 8 East, 358, 361 ;
Johnstone v. Huddestone, 4 B. & C. 937 ;
Strickland v. Maxwell, 2 Cr. & M. 539.

(d) *Messenger v. Armatrong*, 1 T. R. 54 ;
Doe d. Godsell v. Inglis, 3 Taunt. 54 ;
Roberts v. Hayward, 3 C. & P. 432.

(e) *Doe d. Leeson v. Sayer*, 3 Camp. 8.

(f) *Doe d. Tilt v. Stratton*, 3 C. & P. 164 ; 4 Bing. 446 ; *Berrey v. Lindley*, 3 M. & G. 498, 514 ; *Doe d. Davenish v. Moffatt*, 15 Q. B. 257, 265 ; *Tress v. Savage*, 4 E. & B. 36.

(g) *Chapman v. Turner*, 6 M. & W. 100 ;
and see *Brown v. Trumper*, 26 Boar. 11.

(h) *Doe d. Bromfield v. Smith*, 6 East,

530.

(i) *Doe d. Waithman v. Miles*, 1 Stark. 181 ; *Doe d. Colnaghi v. Bluck*, 8 C. & P. 464.

(k) *Doe d. Hughes v. Corbett*, 9 C. & P. 494.

(l) *Doe d. Leeson v. Sayer*, 3 Camp. 8 ;
Doe d. Parker v. Boulton, 6 M. & S. 148 ;
Doe d. Moore v. Lawder, 1 Stark. 308 ;
Right d. Lewis v. Beard, 13 East, 210.

(m) *Bethell v. Blencowe*, 3 M. & G. 119.

(n) See *Doe d. Peacock v. Raffan*, 6 Esp. 4.

(o) *Huffell v. Armitstead*, 7 C. & P. 56, 58.

that the well-known rule that a yearly tenancy cannot be determined without half-a-year's notice, "cannot be applied to a weekly taking," inasmuch as "the effect of it would be to show that half-a-week's notice was necessary to put an end to such a tenancy;" that a week's notice to quit is not implied as part of the contract in a weekly taking, and that a tenant who quitted on the same day of the week on which he entered was not bound to pay rent for the week subsequent. But in *Jones v. Mills* (p), the Court of Common Pleas held that a tenancy from week to week does not determine without *some reasonable notice*: and that an ejectment cannot be maintained against such tenant without any previous notice. Both these cases being decided in favour of the tenant, they are not so conflicting as has been generally supposed. On the whole, the law appears to be that, in the case of weekly tenancies, the landlord is entitled to such reasonable notice, not exceeding a week, as will enable him to get a new tenant, and the tenant to such reasonable notice, not exceeding a week, as will give him a reasonable time to remove his property from the premises (q). After notice given the tenant appears to be entitled in strict law to stay until *midnight* of the day on which the notice expires, at whatever hour of the day the tenancy may have commenced, or the notice may have been given;—for the law takes no account of fractions of a day. This seems to follow from the authority (r), in which a notice to quit at noon (of the proper day) was held bad in the case of a tenancy from year to year; but a custom to quit at a more convenient time, if it could be proved in fact, would no doubt be good in law.

CH. VIII. s. 7.
Notice to Quit
(when unnecessary).

After Notice,
Tenant may
stay till
Midnight.

The onus of proof of any custom (where a custom is relied on) lies on the party asserting its existence (s). If there be any such local custom or special stipulation, notice to quit must be given accordingly (t), and such notice will of course be sufficient (u).

Proof of
Custom.

A notice to quit is unnecessary to determine a strict tenancy at will (x). But such tenancy must be duly determined by a "demand of possession," or by entry, or by something equivalent, on or *before* the date of the plaintiff's alleged title in an ejectment (y). Implied tenancies at will frequently change into tenancies from year to year, upon payment of rent, &c. (z), in which case the usual notice to quit must be given.

Tenants at
Will.

(p) 10 C. B., N. S. 788; 31 L. J., C. P. 66. Williams, J., thought that a week's notice, and Willes, J., that half-a-week's notice, was necessary.

(q) See per Erle, C. J., in *Jones v. Mills*, ubi supra, citing *Thunder d. Weaver v. Belcher*, 3 East, 449.

(r) *Page v. Moore*, 15 Q. B. 66.

(s) *Cole Ejce*, 33, 37.

(t) *Doe d. Peacock v. Kaffan*, 6 Esp. 4; *Doe d. Finlayson v. Bayley*, 5 C. & P. 67.

(u) *Doe d. Parry v. Hazell*, 1 Esp. 94; *Doe d. Campbell v. Scott*, 6 Bing. 362.

(x) *Doe d. Tomes v. Chamberlaine*, 5 M. & W. 14; *Doe d. Milburn v. Edgar*, 2 Bing. N. C. 498; *Doe d. Jones v. Jones*, 10 B. & C. 718; *Doe d. Hall v. Wood*, 14 M. & W. 682 (2nd point); *Doe d. Hollingsworth v. Stennett*, 2 Esp. 717.

(y) *Goodtitle d. Galloway v. Herbert*, 4 T. R. 680; *Denn d. Brune v. Rawlins*, 10 East, 261; *Doe d. Jacobs v. Phillips*, 10 Q. B. 130; *Doe d. Nicholl v. M'Kneeg*, 10 B. & C. 721.

(z) *Clayton v. Blakey*, 8 T. R. 3, ante, 206.

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Notice to Quit
(when unnecessary).

Tenants on
Sufferance.

Intruders.

Mortgagors.

Tenants of
Mortgagor.

Corporations.

Where Plain-
tiff claims by
Title para-
mount.

A tenant on sufferance is not entitled to any notice to quit, nor even to a demand of possession, before an ejectment can be maintained against him (*a*). But such tenancy will easily change into a tenancy at will, or into a tenancy from year to year, whereupon a demand of possession, or a regular notice to quit, will become necessary (*b*).

If a man got into possession of a house to be let, without the privity of the landlord, and they afterwards enter into negotiations for a lease, but differ upon the terms, the landlord may maintain ejectment to recover possession of the premises without giving any notice to quit (*c*). But possession should be demanded before action, to put an end to any implied tenancy at will, arising from the negotiations (*d*).

A mortgagor who is suffered to remain in possession, or in receipt of the rents and profits of the property mortgaged, not being a tenant of the mortgagee, but in the nature of a bailiff to receive the rents, and thereout pay the interest, and keep the surplus for his own use (*e*), is not entitled to any notice to quit, nor even to a demand of possession, before ejectment (*f*).

Tenants from year to year of the mortgagor, whose tenancies commenced *before* the mortgage, are entitled to the usual notice to quit (*g*). But if their tenancies commenced *after* the mortgage, they are not entitled to any notice to quit, nor even to a demand of possession (*h*), unless a new tenancy has been created as between the mortgagees and the tenant (*i*).

It seems that notice to quit need not be given by or to a corporation aggregate where there has been no demise *under seal*, and that either party may determine the tenancy at any time without notice (*k*). A notice to quit (when necessary) may be given by the steward of the corporation without his being authorized so to do under the common seal (*l*). If given to a corporation it must be directed to them, and not to their head officers (*m*).

Where the plaintiff claims by title paramount to the tenancy from year to year notice to quit is unnecessary (*n*).

(*a*) *Doe d. Moore v. Lawder*, 1 Stark. R. 308; *Doe d. Leeson v. Sayer*, 3 Camp. 8; *Doe d. Roby v. Maisey*, 8 B. & C. 767.

(*b*) *Cole Ejec.* 38.
(*c*) *Doe d. Knight v. Quigley*, 2 Camp. 505.

(*d*) *Cole Ejec.* 58.
(*e*) *Trent v. Hunt*, 9 Exch. 14; ante, 47.

(*f*) *Doe d. Roby v. Maisey*, 8 B. & C. 767; *Doe d. Fisher v. Giles*, 5 Bing. 421; *Doe d. Snell v. Tom*, 4 Q. B. 615; *Doe d. Wilkinson v. Goodier*, 10 Q. B. 957; *Doe d. Garrod v. Olley*, 12 A. & E. 481; *Cole Ejec.* 38, 462; but see *West v. Fritche*, 3 Exch. 216.

(*g*) *Doe d. Bowman v. Lewis*, 13 M. & W. 241; 2 D. & L. 667.

(*h*) *Kecch v. Hall*, 1 Doug. 21; 1 Smith

L. C. 579; *Thunder d. Weaver v. Belcher*, 3 East, 450; *Doe d. Parker v. Boulton*, 6 M. & S. 148.

(*i*) *Doe d. Hughes v. Bucknell*, 8 C. & P. 566; *Doe d. Whittaker v. Hales*, 7 Bing. 322.

(*k*) *Finlay v. Bristol and Exeter R. Co.*, 7 Exch. 409; *Copper Miners' Co. v. Fox*, 16 Q. B. 229; *Pennington v. Cardale*, 3 H. & N. 656; but see *Doe d. Pennington v. Tanieres*, 12 Q. B. 998.

(*l*) *Roe d. Dean and C. of Rochester v. Pierce*, 2 Camp. 96; *Doe d. Birmingham Canal Co. v. Bold*, 11 Q. B. 127.

(*m*) *Doe d. Earl of Carlisle v. Woodman*, 1 East, 228.

(*n*) *Doe d. Putland v. Hilder*, 2 B. & A. 782; *Cole Ejec.* 40.

A disclaimer by a tenant from year to year of the reversioner's title renders any notice to quit unnecessary (o).

CH. VIII. s. 7.
Notice to Quit
(when unnecessary).

(d) *By whom and to whom given.*

Disclaimer.

A notice to quit may be given either by the landlord or by the tenant, or by the authorized agent of either party (p). The agent, who, if acting generally, may give the notice in his own name, but not if he is acting specially (q), ought to have sufficient authority when the notice is given, or, at the latest, when it begins to operate: a subsequent recognition is not sufficient (r). Where the trustees of a marriage settlement left the entire control and management of the trust estates to their cestui que trust, who was tenant for life in possession, it was held, that he was their general agent in that behalf, and had power to give notices to quit, and that such a notice given in his own name only was sufficient (s). But when a notice to quit is given by a particular agent, having a limited authority only, such notice should be given in the name of the principal, or expressly on his behalf (t). A notice given by an agent in the names of W. and B. "and others" is valid as a notice from W. and B. only (u). A notice by an agent of an agent is not generally sufficient (x).

By whom.
Agents.
Jones v.
Phipps.

Any person for the time being legally entitled to the immediate reversion of and in the demised premises, ex. gr. as assignee, devisee, heir, executor or administrator of the landlord, may give notice to quit (y). One of several executors or administrators is competent to give a notice to quit on behalf of all (z). Any subsequent owner deriving title through or under the party giving the notice may avail himself of it (a).

Assignees,
Devisees,
Heirs, Executors, &c.

A mortgagee whose mortgage is *subsequent* to the commencement of a tenancy from year to year created by the mortgagor is an assignee of the reversion, and he may give the tenant the usual notice to quit (b). But a *prior* mortgagee need not give any notice to quit (c).

Subsequent
Mortgagee.

Where A. demises to a mining company, and afterwards becomes Partners.

(o) Post, Sect. 8; Colo Ejec. 41.

(p) Cole Ejec. 42; see Forms, Appendix C., Nos. 3, 5.

(q) Jones v. Phipps, *infra*.

(r) Doe d. Mann v. Walters, 10 B. & C. 626; Doe d. Lyster v. Goldwin, 2 Q. B. 143, 146; Doe d. Rhodes v. Robinson, 3 Bing. N. C. 677; Doe d. Fisher v. Cuthell, 5 East, 491, 498.

(s) Jones v. Phipps, L. R., 3 Q. B. 303; 37 L. J., Q. B. 173.

(t) Doe d. Lyster v. Goldwin, 2 Q. B. 143, 146; Buron v. Denman, 2 Exch. 188; Cole Ejec. 44.

(u) Doe d. Bailey v. Foster, 3 C. R. 215.

(x) Doe d. Rhodes v. Robinson, 3 Bing. N. C. 677; Cole Ejec. 45.

(y) Cole Ejec. 42.

(z) Id. 43.

(a) Doe d. Earl of Egremont v. Hellings, 6 Jur. 821, Q. B.; Doe d. Earl of Egremont v. Forwood, 3 Q. B. 627; Doe d. Higgs v. Terry, 4 A. & E. 274.

(b) Burrows v. Gradin, 1 D. & L. 213, 218; Rawson v. Eicke, 7 A. & E. 451; Burton v. Dickenson, 17 L. T. 246.

(c) Ante, 314.

CH. VIII. s. 7.
Notice to Quit
(by and to whom
given).

a member of that company, he may nevertheless give the company notice to quit, and afterwards maintain ejectment against them (*d*). Where a brewer demised to a publican upon a yearly tenancy, determinable at any time by three months' notice, after which the brewer took in two new partners, and the subsequent receipts for rent were given in the name of the firm: held, that a notice to quit given by the lessor in his own name only was sufficient, and that it was not to be presumed from the receipts that the *legal* estate in the reversion had vested in the firm (*e*).

Joint Tenants.

Where several joint tenants demise from year to year, such of them as give notice to quit may severally recover their respective shares (*f*). A notice to quit signed by one of several joint tenants on behalf of himself and the others (whether authorized by them or not) is sufficient to determine a tenancy from year to year as to all; because the tenant holds *the whole premises of all* so long as he and all shall please, and a notice to quit given by any one effectually puts an end to that tenancy (*g*). And therefore also a notice to quit given on behalf of several joint tenants by a person authorized by one of them to give such notice is sufficient to determine the tenancy as to all (*h*). A notice given by an agent in the names of W. and B. "and others" is valid as a notice from W. and B. only (*i*).

Tenants in
 Common.

A notice to quit given by one of several tenants in common may be to quit his undivided part or share (*k*). Where they *demise jointly* they seem to stand on the same footing as joint tenants, and notice to quit may accordingly be given by either of them on behalf of himself and the others (*l*).

Receivers.

A receiver, whether appointed by the High Court, or by a private individual *with a general authority to let* the lands to tenants from year to year, has thereby implied authority to determine such tenancies by a regular notice to quit (*m*). But a person authorized to manage the affairs of another during his absence abroad, and to receive his rents, has no authority *implied by law* to determine a tenancy by notice to quit; but it is a question of fact for the jury whether he had such authority (*n*). "A mere receiver of rents, as such, has no authority to determine a tenancy" (*o*).

(*d*) *Doe d. Harvey v. Francis*, 4 M. & W. 331.

(*e*) *Doe d. Green v. Baker*, 8 Taunt. 241.

(*f*) *Doe d. Whayman v. Chaplin*, 3 Taunt. 120.

(*g*) *Doe d. Aslin v. Summersett*, 1 B. & Ad. 135, 140; *Doe d. Kinderley v. Hughes*, 7 M. & W. 141; *Alford v. Vickery*, Car. & M. 210; *Smith L. & T.* 327 (2nd ed.).

(*h*) *Doe d. Kinderley v. Hughes*, 7 M. & W. 141.

(*i*) *Doe d. Bailey v. Foster*, 3 C. B. 215.

(*k*) *Cutting v. Derby*, 2 W. Blac. 1075;

Doe d. Robertson v. Gardiner, 12 C. B. 323. See the form, post, Appendix C.

(*l*) *Cole Ejec.* 44.

(*m*) *Wilkinson v. Colley*, 5 Burr. 2696, 2698; *Doe d. Marsack v. Read*, 12 East, 57; *Doe d. Mauvers v. Mizem*, 2 Moo. & R. 56.

(*n*) *Doe d. Mann v. Walters*, 10 B. & C. 626.

(*o*) *Id.* 633, Parke, J.; *Doe d. Rhodes v. Robinson*, 3 Bing. N. C. 677; *Hassler v. Lemayne*, 5 C. B., N. S. 550; *Pearse v. Boulter*, 2 F. & F. 133.

A notice to quit given by the landlord should be given to his immediate tenant, or to his assignee, &c., in whom the term is then vested, and not to a mere subtenant (*p*). A notice addressed to the tenant, but served upon the subtenant upon the premises, is insufficient (*q*). The notice should be directed to the tenant, and may be delivered to his solicitor or agent (*r*). In *Tanham v. Nicholson* (*s*) it was held by the House of Lords that service upon a person whose duty it would be to deliver the notice to the tenant was sufficient to sustain ejectment, although in fact the notice was never delivered to the tenant: in this case the tenant was imbecile, and the notice was delivered to his daughter, who lived in the house and managed it. If the notice be served upon the tenant personally, it need not be directed to him by name (*t*). The tenant on being served with the notice should give a similar notice to his subtenant, and will be liable to an ejectment if his subtenant hold over (*u*). In the absence of proof to the contrary, a person who has obtained possession from a tenant will be presumed to be in possession as assignee of the term, and not as a mere subtenant (*v*). Where on the death of a tenant from year to year his widow remained in possession, and a notice to quit was given to her, this was held sufficient in the absence of any evidence of a probate or letters of administration granted to some other person (*y*). Where there are two or more joint lessees, a notice to quit given to one of them, even by parol, is sufficient for all (*z*). Where a corporation aggregate is the tenant, and a notice to quit is necessary (*a*), it should be addressed to the corporation, and not to its officers (*b*).

CH. VIII. s. 7.
Notice to Quit
(*by and to whom*
given).

To whom
given—by
Landlord.
Tanham v.
Nicholson.

A notice to quit given by the tenant should be given to his *immediate landlord* or his assigns, and not to the ground landlord or other person through whom the immediate landlord derives his title (*c*). If the immediate landlord is dead, or has assigned his reversion, the notice should be given to the person or persons for the time being *legally entitled to the immediate reversion*, ex. gr. to the heir, executor, administrator, devisee or assignee of such landlord, as the case may be (*c*). Or it may be given to the attorney or agent duly authorized

To whom
given—by
Tenant.

(*p*) *Pleasant d. Hayton v. Benson*, 14 East, 234; *Doe d. Morris v. Williams*, 6 B. & C. 41.

(*q*) *Doe d. Mitchell v. Levi*, Ad. Ejec. 92, note (*b*).

(*r*) *Doe d. Prior v. Ongley*, 10 C. B. 25, 34.

(*s*) L. R., 5 H. L. 561; 6 Ir., C. L. 188.

(*t*) *Doe d. Matthewson v. Wrightman*, 4 Esp. 5.

(*u*) *Roe v. Wiggs*, 2 Bos. & P., N. R. 330.

(*v*) *Doe d. Morris v. Williams*, 6 B. &

C. 41; *Roe d. Blair v. Street*, 2 A. & E. 329, 331; *Hindley v. Rickerby*, 5 Esp. 4.

(*y*) *Rees d. Meays v. Perrot*, 4 C. & P. 230.

(*z*) *Doe d. Ld. Macartney v. J. and W. Creek*, 5 Esp. 196 (the marginal note of this case is incorrect); *Doe d. Ld. Bradford v. Watkins*, 7 East, 551.

(*a*) Ante, 308.

(*b*) *Doe d. Ld. Carlisle v. Woodman*, 8 East, 228.

(*c*) *Woods v. Hyde*, 31 L. J., Ch. 295; 10 W. R. 339.

CH. VIII. s. 7. in that behalf of such landlord, or other person so entitled as afore-
Notice to Quit said (d): but not to a mere collector of rents who has no actual
(by and to whom authority to receive such notices (e).
given).

(e) *Form and Service of.*

Parol Notice
to Quit gene-
rally suffi-
cient.

A parol notice to quit is generally sufficient, whether given by or on behalf of the landlord (f), or the tenant (g). Even when given on behalf of a corporation aggregate by their steward or agent (h), if any notice be necessary in such case (i). A good parol notice will not be waived by a subsequent insufficient notice in writing (k).

Notice in
Writing.

Generally speaking, notice to quit is given in writing (l). No particular form is necessary; but if given by or on behalf of the landlord, it must in substance and effect request the tenant, or other the person for the time being legally entitled to the term (not a mere subtenant (m)), to quit and deliver up possession of *all* the demised premises *at the proper time*: if given by or on behalf of the tenant, it must in substance and effect inform the landlord, or other the person or persons for the time being legally entitled to the immediate reversion, that the tenant will quit and deliver up possession of *all* the demised premises *at the proper time* (n).

Certainty of
Notice to
Quit.

Ahearn v.
Bellman.

A notice to quit must be clear and certain, so as to bind the party who gives it, and to enable the party to whom it is given to act upon it at the time when he ought to receive it (o). And in conformity with the interpretation usually given to a dictum of Lord Mansfield (in a case in which the court held the particular notice before them to be good) (p), it was also laid down in prior editions of this work, and in the text books generally (q), that a notice to be good must not be optional, i. e. must not give the noticee an option to enter into a new contract of tenancy. But in *Ahearn v. Bellman* (r) the majority of the Court of Appeal held that a notice might be optional, and yet good. In that case the tenant held at 150*l.* a year, and the notice was this:—"I hereby give you notice to quit and deliver up possession

(d) *Doe d. Prior v. Ongley*, 10 C. B. 25 (last point); *Papillon v. Brunton*, 5 H. & N. 518; 29 L. J., Ex. 265.

(e) *Pearse v. Boulter*, 2 F. & F. 133.

(f) *Doe d. Ld. Macartney v. Crick*, 5 Esp. 198; 2 C. & K. 420.

(g) *Timmins v. Rawlinson*, 3 Burr. 1603; 1 W. Blac. 533; *Bird v. Devonville*, 2 C. & K. 415.

(h) *Roe d. Dean and C. of Rochester v. Pierce*, 2 Camp. 96; 7 Q. B. 577.

(i) *Cole Ejec. 39*; *Finlay v. Bristol and Exeter R. Co.*, 7 Exch. 409; *Copper Miners Co. v. Fox*, 16 Q. B. 229; *Doe d. Pennington v. Tanriere*, 12 Q. B. 998; *Pennington v. Cardale*, 3 H. & N. 656.

(k) *Doe d. Ld. Macartney v. Crick*, 5 Esp. 196.

(l) See the forms, post, Appendix C., Nos. 1—7.

(m) Ante, 317 (p).

(n) *Cole Ejec. 46, 47.*

(o) See *Doe d. Lyster v. Goldwin*, 2 Q. B. 143.

(p) *Doe d. Matthews v. Jackson*, 1 Dougl. 175. The words were, "I desire you to quit, or I shall insist on double rent."

(q) See *Smith's Landlord and Tenant*, 2nd ed. 326; *Adams on Ejectment*, 95; *Cole on Ejectment*, 46.

(r) L. R., 4 Ex. D. 201; 48 L. J., Ex. 681; 40 L. T. 711; 27 W. R. 928—C. A., reversing the ruling of *Lopes, J.*, at *Liverpool Assizes*; *Roberts v. Hayward*, 3 C. & P. 432.

of the shop, premises, and show rooms situate and being 20, Moss Street, Liverpool, and now held by you as tenant from me, on or before the 1st day of May, 1878. *And I hereby further give you notice that should you retain possession of the premises after the date before mentioned, the annual rental of the premises now held by you from me will be 160l., payable quarterly in advance.*" The court (Brett, L. J., dissenting), held that the words in italics did not invalidate the notice to quit. "It has been said, and truly said," observed Cotton, L. J., "that a notice to determine the tenancy must be clear and unambiguous; but that does not at all mean that a notice otherwise sufficient is made insufficient by its being accompanied by something else."

CH. VIII. s. 7.
Notice to Quit
(Form and
Service of).

A notice given by the grantor of a licence to mine, that *unless* the grantee kept a certain number of miners at work, as he was bound to do, the grantor *would* re-enter, is not a good notice to avoid the licence, which the grantor was entitled to give (s). A notice desiring the tenant to "quit the premises which you hold under me, your term therein having long since expired," does not recognize a subsisting tenancy from year to year, subsequent to the term, but is a mere demand of possession (t). A notice to quit and give up possession, but not stating to whom, is sufficient (u).

The notice must extend to *all* the demised premises, and *not to a part only*, otherwise it will be bad (v). But the court will if possible construe the notice as a good notice for the whole, rather than as a bad notice for part only. Therefore a notice to quit "Town Barton, &c." is sufficient for other lands having distinct names held therewith (x). So a notice to quit "all that messuage, tenement or dwelling-house, farm, lands and premises, with the appurtenances, which you rent of me in the parish of S.," is sufficient to include the great and small tithes held therewith under a parol demise (y). A joint tenant or tenant in common may give notice to quit *all his part or share* of the demised premises (z). A mere misdescription of the property in a notice to quit is not fatal if the tenant be not misled by it. Thus where the premises were fully and accurately described, except that they were called "The Waterman's Arms" instead of "The Bricklayer's Arms" (a), and where the premises were described as situate in the parish of D. (instead of the parish of H.), in the county of York (b), both these notices were held sufficient.

Must extend
to all the de-
mised Pre-
mises.

Misdescrip-
tions, when
immaterial.

The notice must require the tenant to quit, or give notice of his

When the
Notice must
expire in ordi-
nary Cases.

(s) *Muskett v. Hill*, 5 Bing. N. C. 694.

(t) *Doe d. Godsell v. Inglis*, 3 Taunt. 54.

(u) *Doe d. Bailey v. Foster*, 3 C. B. 215.

(v) *Right d. Fisher v. Cuthell*, 5 East,

498; *Doe d. Rodd v. Archer*, 14 East, 244.

(z) *Doe d. Rodd v. Archer*, 14 East, 244.

(y) *Doe d. Morgan v. Church*, 3 Camp. 71.

(z) *Ante*, 316.

(a) *Doe d. Cox v. —*, 4 Esp. 186.

(b) *Doe d. Armstrong v. Wilkinson*, 12 A. & E. 743.

CH. VIII. s. 7. intention to quit, *at the proper time*. This is the point with respect to which mistakes are most frequently made; and such mistakes are usually fatal to the validity of the notice (c). In the case of a tenancy from year to year, if the holding be agricultural, and exceed two acres, a year's notice expiring with a year of tenancy must be given, unless the Agricultural Holdings Act, 1875, has been excluded in writing (d). Where that act does not apply, or has been excluded, the law requires half-a-year's notice to quit at the end of the first or some other year of the tenancy, and not at any other period (e), whether the demised premises consist of land or houses (f).

Mining Lease. In a *mining* lease, where the lessees are to be at liberty to determine it at any time upon a six months' notice, such notice may expire at any time and not merely at the end of the year (g).

Weekly, &c. Tenancies. The peculiar case of weekly, &c. tenancies has been already dealt with (h).

Customary Half-Year's Notice. If the tenancy commence on one of the ordinary feast days, a notice on or before one of the feast days in the earlier half of the tenancy to quit on the feast day at the conclusion of the tenancy, is sufficient and necessary, although the period between the two feast days should exceed or fall short of the number of days which constitute a half-year (i). Thus a notice served on or before Michaelmas-day to quit on the following Lady-day (from which day the tenancy commenced), is sufficient (j), though there are fewer than 183 days between the 28th September and the 25th March. So a notice to quit on the 24th of June served on the preceding Christmas-day is sufficient (k); but a notice served on the 26th March to quit on the 29th of September then next, is insufficient (l), although there are more than 183 days between the 26th of March and the 29th of September. Where the tenancy commenced from some day in the year other than one of the usual quarter days, a full half-year's notice (183 days), expiring on such day, must be given (m). But

(c) *Cole Ejcc.* 48; *Doe d. Castleton v. Samuel*, 5 Esp. 173; *Doe d. Spicer v. Lea*, 11 East, 312; *Doe d. Finlayson v. Bayley*, 5 C. & P. 67; *Doe d. Daniel v. Williams*, 7 C. & P. 322; *Doe d. Murrell v. Milward*, 3 M. & W. 328; *Goode v. Howells*, 4 M. & W. 198.

(d) See sect. 51 of that act, ante, 309.
(e) *Parker d. Walker v. Constable*, 3 Wils. 26; *Right d. Flower v. Darby*, 1 T. R. 159; *Doe d. David v. Williams*, 7 C. & P. 322; *Doe d. Murrell v. Milward*, 3 M. & W. 328; *Roe d. Brown v. Wilkinson*, Co. Lit. 270 b, note (228).

(f) *Roe d. Brown v. Wilkinson*, Co. Lit. 270 b, note (228); *Right d. Flower v. Darby*, 1 T. R. 162.

(g) *Bridges v. Potts*, 17 C. B., N. S. 314; 33 L. J., C. P. 338.

(h) Ante, p. 312.

(i) *Morgan v. Davies*, L. R., 3 C. P. D. 260; 26 W. R. 816; *Doe v. Kightly*, 7 T. R. 63; *Howard v. Wemley*, 6 Esp. 53; *Smith L. & T.* 319 (2nd ed.).

(j) *Roe d. Durant v. Doe*, 6 Bing. 574; *Doe d. Matthewson v. Wrightman*, 4 Esp. 5; *Doe d. Harrop v. Green*, Id. 198, 199; *Doe d. Ld. Bradford v. Watkins*, 7 East, 551; *Papillon v. Brunton*, 5 H. & N. 518; 29 L. J., Ex. 265.

(k) *Doe d. Biddle v. Lines*, 11 Q. B. 402.

(l) *Morgan v. Davies*, 3 C. P. D. 360; 26 W. R. 816.

(m) *Doe d. Spicer v. Lea*, 11 East, 312; *Mills v. Goff*, 14 M. & W. 72; 2 D. & L. 23; *Doe d. Cornwall v. Matthews*, 11 C. B. 676.

where a "six months'" notice on either side is expressly agreed for, CIV. VIII. s. 7. it seems that a six lunar months' notice is sufficient (*n*). Notice to Quit (Form and Service of).

A notice to quit at "Michaelmas next" *prima facie* means Michaelmas, new style (29th of September); but it will be sufficient for a tenancy commencing at Michaelmas, old style (11th of October), because the tenant cannot have been misled or prejudiced by it (*o*). But a notice to quit "on the 11th of October, Old Michaelmas-day," is bad, if the tenancy commenced at New Michaelmas (*p*). Upon a written agreement to demise from the following "Lady-day," a notice to quit on the 6th of April is good, upon parol evidence that by "Lady-day" the parties meant Old Lady-day: such evidence is admissible where the written agreement is not under seal (*q*). A notice to quit on "Lady-day" is good either for the New or Old Lady-day, according to the holding, if served in due time (*r*). A notice to quit "on the 25th day of March or the 6th day of April next," if served in sufficient time, is good for New or Old Lady-day, according as the tenancy actually commenced (*s*).

Generally speaking, a notice to quit should expire *on the last day* of some year of the tenancy, and not on the same day on which the tenancy commenced (*t*). Thus, upon a tenancy *from* Lady-day, the notice should expire on Lady-day, and not on the 26th of March (*u*). A notice to quit on the proper day at twelve o'clock at noon is bad (*x*). Must expire on the last Day of some Year of the Tenancy. Not "at Noon."

The notice *need not mention the particular day* on which the tenant is required to quit. Thus a notice to quit "at the expiration of the current year of the tenancy which shall expire next after the end of one half-year from the date hereof" is sufficient (*y*). A notice on 22nd March to quit "at the expiration of the current year" is sufficient for the 29th September, if the tenancy commenced from that day (*z*), but it is better not to use the expression *current year* (*a*). A notice on 27th September to quit "at the expiration of the term for which you hold the same" is sufficient for Lady-day, if the tenancy commenced from that day (*b*). A notice to quit "at the expiration of the present year's tenancy" is sufficient, although it does not appear Need not mention the particular Day.

(*n*) *Rogers v. Kingston-upon-Hull Dock Co.*, 34 L. J., Ch. 765.

(*o*) *Furley d. Mayor, &c. of Canterbury v. Wood*, 1 Esp. 198; *Doe d. Hinde v. Vince*, 2 Camp. 256; *Doe d. Willis v. Perrin*, 9 C. & P. 467.

(*p*) *Doe d. Spicer v. Lea*, 11 East, 312; *Smith v. Walton*, 8 Bing. 235; *Caddy v. Martinez*, 11 A. & E. 720.

(*q*) *Denn d. Peters v. Hopkinson*, 3 D. & R. 507; *Doe d. Hale v. Benson*, 4 B. & A. 588.

(*r*) *Denn d. Willan v. Walker, Poake*, Ad. Cas. 194.

(*s*) *Doe d. Matthewson v. Wrightman*, 4 Esp. 6.

(*t*) *Poole v. Warren*, 8 A. & E. 587, 588.

(*u*) *Ackland v. Lutley*, 9 A. & E. 879.

(*x*) *Page v. Morr*, 15 Q. B. 684.

(*y*) *Doe d. Phillips v. Butler*, 2 Esp. 589; *Doe d. Williams v. Smith*, 5 A. & E. 350.

(*z*) *Doe d. Baker v. Wombwell*, 2 Camp. 559.

(*a*) *Doe d. Mayor of Richmond v. Morphett*, 7 Q. B. 577; *Smith L. & T.* 323, 326 (2nd ed.).

(*b*) *Doe d. Milnes v. Lamb*, Ad. Ejcc. 272, Holroyd, J.

CH. VIII. s. 7. *on the face of it* that it was given six months before the expiration of the current year of the tenancy (c).
Notice to Quit
(Form and
Service of).

When Commencement of Tenancy is unknown and cannot be ascertained.

Where it is unknown and cannot be ascertained or proved at what time of the year the tenancy actually commenced, the notice should be to quit on a specified quarter day, "or at the expiration of the current year of your tenancy which shall expire next after the end of one half-year from the service of this notice" (d). If an ejectment founded on such notice be not commenced, nor the claimant alleged in the writ to be entitled to possession, until some day after the third quarter day succeeding that mentioned in the notice, such notice will certainly be sufficient, supposing the rent to be payable on the usual quarter days and no rent to be received which accrued *subsequently* to the quarter day mentioned in the notice. This is the safest course to be pursued under such circumstances (e). But sometimes an implied admission may be obtained from the tenant, by serving him personally with a notice to quit on a particular day, and reading it to him, or getting him to read it, if he make an objection to it on the ground that it is to quit at the wrong time (f). But the defendant may rebut such *primâ facie* evidence as to the time when the term commenced by proof that the tenancy actually commenced at a different part of the year (g). In the absence of such proof the jury should be directed to infer and find that the tenancy commenced at the time mentioned in the notice (h). If the tenant, in answer to an application by the landlord or his agent, state that the tenancy commenced on a particular day, and a notice is thereupon given him to quit on that day, it seems that he will be estopped from afterwards proving that the tenancy commenced on a different day (i). Formerly it was held that a notice to quit upon a particular day was *primâ facie* evidence that the tenancy commenced on that day, and threw upon the defendant the onus of proof that it commenced on some other day (k). But that doctrine has long been exploded, and it is now settled that such a notice (without more) is not even *primâ facie* evidence that the tenancy commenced on the day therein mentioned (l).

(c) *Doe d. Gorst v. Timothy*, 2 C. & K. 351.

(d) *Doe d. Digby v. Steel*, 3 Camp. 117; *Hirst v. Horn*, 6 M. & W. 393.

(e) *Cole Ejec.* 51.

(f) *Thomas d. Jones v. Reece*, 2 Camp. 647; *Doe d. Clarges, Bart. v. Forster*, 13 East, 405; *Doe d. Leicester v. Biggs*, 2 Taunt. 109; *Walker v. Godé*, 6 H. & N. 594; 30 L. J., Ex. 172.

(g) *Oakapple d. Green v. Copous*, 4 T. R. 361; *Caddy v. Martinez*, 11 A. & E. 720.

(h) *Walker v. Godé*, 6 H. & N. 594; 30 L. J., Ex. 172.

(i) *Doe d. Eyre v. Lambley*, 2 Esp. 625; but see *Doe d. Murrell v. Milward*, 3 M. & W. 331.

(k) *Matthewson v. Wrightman*, 4 Esp. 7.

(l) *Doe d. Ash v. Calvert*, 2 Camp. 388; *Cole Ejec.* 50.

When a tenant enters in the middle of a quarter, and *pays rent for the broken period* to the next regular quarter day, and subsequently pays his rent from quarter to quarter, his tenancy will be deemed to have commenced, not when he first entered, but at the ensuing quarter day, and notice to quit should be given accordingly (*m*). But if he has not paid any rent the tenancy will be deemed to have commenced on the day when he entered, and notice to quit at that time will be good (*n*).

CH. VIII. s. 7.
Notice to Quit
(Form and
Service of).

When Tenant
enters in the
Middle of a
Quarter.

Where different parts of the demised premises were entered upon at different times the notice should be to quit at corresponding periods, "or at the expiration of the year of the tenancy which will expire next after the expiration of half a year from the delivery of this notice" (*o*). Such notice will be sufficient for the whole of the premises, if served in time for the principal subject of the demise (*p*). If any doubt arise as to which is the principal and which the accessorial subject of the demise, that is a question of fact for the jury (*q*); but if the judge assumes the fact either way, and decides accordingly, that the notice to quit is or is not sufficient, the party against whom he so decides should expressly desire him to leave the question of fact to the jury, otherwise it will be taken, upon any application for a new trial, &c., that he acquiesced in the fact assumed by the judge as the ground of his decision (*r*). No new tenancy is created by a mere agreement for an increase of rent in the middle of the year of a tenancy, and a notice to quit after the receipt of the increased rent must expire at the time when the tenant originally entered (*s*).

When different
Parts of
the Premises
are entered on
at different
Times.

Generally speaking, an implied tenancy from year to year, created by the payment and acceptance of rent after the end or determination of a previous term, will be deemed to have commenced at the same time of the year as the original term, and notice to quit should be given accordingly (*t*). And this rule prevails even where the original term did not cease at the same time of the year as it commenced, as where premises were originally demised for five and a half years,

Where a Ten-
nant holds
over.

*Kelly v. Pat-
terson.*

(*m*) *Doe d. Holcomb v. Johnson*, 6 Esp. 10; *Savage v. Stapleton*, 3 C. & P. 276; *Doe d. King v. Grafton*, 18 Q. B. 496; 21 L. J., Q. B. 276; *Smith L. & T.* 321 (2nd ed.).

(*n*) *Doe d. Cornwall v. Matthews*, 11 C. B. 676.

(*o*) *Doe d. Williams v. Smith*, 5 A. & E. 350.

(*p*) *Doe d. Dagget v. Snowden*, 2 W. Blac. 1224; *Doe d. Strickland v. Spence*, 6 East, 120; *Doe d. La. Bradford v. Watkins*, 7 East, 561; *Doe d. Davenport v. Rhodes*, 11 M. & W. 602, 603.

(*q*) *Smith L. & T.* 322 (2nd ed.).

(*r*) *Doe d. Heapy v. Howard*, 11 East, 498; *Doe d. Kindersley v. Hughes*, 7 M. & W. 141.

(*s*) Ad. Ejcc. 107 (4th ed.); *Doe d. Holcombe v. Johnson*, 6 Esp. 10; *Crowley v. Vitty*, 7 Ex. 319; 21 L. J., Ex. 136.

(*t*) *Roe d. Jordan v. Ward*, 1 H. Blac. 96; *Doe d. Martin v. Watts*, 7 T. R. 83; *Doe d. Collins v. Weller*, 7 T. R. 478; *Doe d. Castleton v. Samuel*, 5 Esp. 173; *Doe d. Spicer v. Lea*, 11 East, 312; *Doe d. Zucker v. Morse*, 1 B. & Ad. 365; *Humphreys v. Franks*, 18 C. B. 323.

CH. VIII. s. 7. and an implied tenancy from year to year was afterwards created (*u*);
Notice to Quit
(Form and
Service of). and where a new landlord allowed the tenant of his predecessor to remain in occupation and receive rent from him (*x*). But this rule applies only to a case where the tenant holds over on a lease made to himself (*y*).

Where a subtenant by assignment holds over, and pays rent after the expiration of a lease commencing at Christmas and expiring at Midsummer, a notice requiring him to quit at Midsummer is good (*z*).

Where there
 is Possession
 under a void
 Demise.

Doe v. Bell.

Where the tenant comes into possession under a void lease, a tenancy from year to year is created; but, generally speaking, the holding must be taken with reference to the period of entry under the lease so far as regards the expiration of the notice to quit: thus where a remainderman creates a new tenancy with a tenant in possession under a void lease granted by a tenant for life, and receives rent on the days of payment mentioned in the lease, a notice to quit must expire on the day of entry under the original demise (*a*). And it was held in the leading case of *Doe d. Rigge v. Bell*, that if a landlord lease for seven years by parol, and agree that the tenant shall enter at Lady-day and quit at Candlemas, though the lease be void by the Statute of Frauds as to the duration of the term, the tenant holds under the terms of the lease in other respects; and therefore the landlord can only put an end to the tenancy at Candlemas (*b*).

Where Three
 Months' No-
 tice is suffi-
 cient by
 Agreement.

Where premises are let from year to year upon an agreement that either party may determine the tenancy by a quarter's notice, the notice must expire at the period of the year when the tenancy commenced (*c*): so where premises are taken under an agreement, by which the tenant "is always to quit at three months' notice," the notice must expire either on the same day of the year the tenancy commenced, or on one of the three other corresponding quarter days (*d*).

Weekly To-

It appears not to have been expressly decided what notice to quit is necessary in the case of a weekly tenancy. The authorities on the point have already been examined (*e*).

(*u*) *Berrey v. Lindley*, 3 M. & G. 498; *Doe d. Robinson v. Dobell*, 1 Q. B. 806; *Kemp v. Derrett*, 3 Camp. 510.

(*x*) *Kelly v. Patterson*, L. R., 9 C. P. 681; 43 L. J., C. P. 320; 30 L. T. 842, where see the cases reviewed by Brett, J.

(*y*) Per Brett, J., *id.*

(*z*) *Doe d. Buddle v. Lines*, 11 Q. B. 402.

(*a*) *Doe d. Jordan v. Ward*, 1 H. Blac. 96; *Doe d. Collins v. Weller*, 7 T. R. 478; *Beale v. Sanders*, 3 Bing. N.C. 850; *Lee v. Smith*,

9 Exch. 662.

(*b*) *Doe d. Rigge v. Bell*, 5 T. R. 571; 2 Smith L. C. 96 (7th ed.); *Doe d. Peacock v. Raffan*, 6 Esp. 4; *Richardson v. Giffard*, 1 A. & E. 52; *Doe d. Thomson v. Amey*, 12 A. & E. 476; *Doe d. Davenish v. Moffatt*, 15 Q. B. 257.

(*c*) *Doe d. Pitcher v. Donovan*, 1 Taunt. 555; 2 Camp. 78.

(*d*) *Kemp v. Derrett*, 3 Camp. 510.

(*e*) Ante, 302; see especially *Jones v. Mills*, 31 L. J., C. P. 66.

The day or time mentioned in the notice to quit should always be correct with reference to the date of the notice. Any mistake in this respect is generally fatal to the validity of the notice (*f*). But a notice dated on the 27th, and served on the 28th *September*, requiring a tenant to quit “at *Lady-day* next, or at the end of his current year,” was held in one case to mean a six months’ and not a two days’ notice to quit (*g*): but this decision has been since overruled in a case where a notice was held bad which was served on the 21st of October, to quit “on the 13th of *May* next, or upon such other day as the *current* year for which you now hold will expire,” the holding being one from a day in November (*h*). A notice served on the 17th June, to quit “on the 11th October now next ensuing, or such other day and time as your said tenancy may expire on,” is not a good notice for the *Michaelmas* in the following year (*i*). A notice delivered to a tenant at *Michaelmas*, 1795, to quit “at *Lady-day* which will be in the year 1795,” was held to be a good notice to quit at *Lady-day*, 1796; for the intention was clear, and 1795 was to be rejected as an impossible year (*k*). So where a yearly tenancy expired in February, and in October, 1833, a notice was given to quit “at the expiration of half a year from the delivery of this notice, or at such other time or times as your *present* year’s holding of or in the said messuage, &c. shall expire after the expiration of half a year from the delivery of this notice,” it was held a good notice for February, 1835 (*l*).

CH. VIII. s. 7.
Notice to Quit
(Form and
Service of).
Date of No-
tice.

It is not necessary that a notice to quit should be directed to the tenant in possession, if proved to have been delivered to him as tenant at the proper time (*m*): and if a notice to quit be directed to the tenant by a wrong christian name, and he keeps it without objection, it is a waiver of the misdirection (*n*): and where two tenants hold premises in common, a notice to quit to one of them is sufficient to determine the tenancy (*o*): at least it is evidence that the notice reached the other tenant who lived elsewhere (*p*). Where a tenant from year to year sublet part of the premises, and then gave up to his landlord the part remaining in his own possession, the landlord cannot entitle himself to recover against the sublessee, no notice to quit having been given to the lessee, but only a notice to the sublessee, and that by the landlord, in his own name, and not in the

To whom the
Notice should
be directed
and given.

(*f*) *Cole Ejec.* 52.

(*g*) *Doe d. Ld. Huntingtower v. Culliford*, 4 D. & R. 249; *Doe d. Earl of Egremont v. Forwood*, 3 Q. B. 627.

(*h*) *Doe d. Mayor, &c. of Richmond v. Morphett*, 7 Q. B. 577.

(*i*) *Mills v. Goff*, 14 M. & W. 72.

(*k*) *Doe d. Duke of Bedford v. Kightley*, 7 T. R. 63.

(*l*) *Doe d. Williams v. Smith*, 5 A. & E. 350; *Doe d. Kindersley v. Hughes*, 7 M. & W. 139.

(*m*) *Doe d. Matthewson v. Wrightman*, 4 Esp. 5; and see ante, 322 (*k*).

(*n*) *Doe v. Spiller*, 6 Esp. 70.

(*o*) *Doe d. Ld. Macartney v. Crick*, 5 Esp. 196.

(*p*) *Doe d. Ld. Bradford v. Watkins*, 7 East, 551.

CH.VIII. s. 7. name of the first lessee (*q*). In ejectment against S. and F., where it is shown that B., not a party to the cause, came into possession of the premises under an unperformed contract of sale, and that S. and F. held under him, notice to quit served upon S. and F. is sufficient (*r*).

Attestation of Notice. A notice to quit need not be attested. If attested it may be proved without calling the attesting witness (*s*); but this was formerly otherwise (*t*). It may be proved by an examined copy or duplicate, without any notice to produce the original (*u*).

When and how served. The notice must generally be served *half a year* before the time when the tenant is to quit possession (*x*). But a customary half-year's notice is sufficient where the tenancy is from one of the usual quarter days (*y*). Where a greater or less notice than that usually required by law is provided for by express stipulation or local custom, it will be sufficient to give notice accordingly (*z*). Where a "six months'" notice is agreed for, it seems that a six lunar months' notice is sufficient (*a*). The notice may be served on a Sunday (*b*).

Service of Notice to Quit. A notice to quit *need not be served personally* on the tenant. It is sufficient to leave it at his dwelling-house with his wife or servant (*c*). Such service is sufficient although the notice does not actually reach the tenant's (or landlord's) hands before the half-year has commenced (*d*). But merely leaving the notice at the tenant's house, without any explanation, and without proof that the person to whom it was delivered was the tenant's wife or servant, or that it ever came to his hands, is not sufficient (*e*). So service on the tenant's wife, off the demised premises and without proof that it was at her husband's residence, where she was then living with him, appears to be insufficient (*f*). Service of the notice upon a relative of the *subtenant* upon the premises is not sufficient, although the notice was properly addressed to the tenant (*g*). Putting the notice under the door of the tenant's house, or any other mode of service, has been said to be sufficient, if it be shown that the notice came to the tenant's hands before the commencement of the six months (*h*); and in *Tanham v.*

(*q*) *Pleasant d. Hayton v. Benson*, 14 East, 234.

(*r*) *Roe d. Blair v. Street*, 2 A. & E. 329.

(*s*) C. L. P. Act, 1854, s. 26.

(*t*) *Doe d. Sykes v. Durnford*, 2 M. & S. 62; *Poole v. Warren*, 8 A. & E. 682.

(*u*) *Doe d. Fleming v. Somerton*, 7 Q. B. 58; *Reg. v. Mortlock*, Id. 459; *Cole Ejec.* 54, 159.

(*x*) *Right d. Flower v. Darby*, 1 T. R. 159, 163; *Johnstone v. Huddleston*, 4 B. & C. 932.

(*y*) Ante, 320.

(*z*) Ante, 306; *Cole Ejec.* 32, 53.

(*a*) *Rogers v. Kingston-upon-Hull Dock Co.*, 34 L. J., Ch. 165.

(*b*) The act 29 Car. 2, c. 7, s. 6, makes only writs, &c. void.

(*c*) *Smith v. Clarke*, 9 Dowl. 202; *Jones d. Griffiths v. Marsh*, 4 T. R. 464; *Roe d. Blair v. Street*, 2 A. & E. 329; *Reg. v. Jo. of North Riding of Yorkshire*, 7 Q. B. 164; *Appleton v. Murray*, 8 W. R. 653; *Mason v. Bibby*, 2 H. & C. 886; *Pollock, C. B.*

(*d*) *Doe d. Neville v. Dunbar*, Moo. & M. 10; *Papillon v. Brunton*, 5 H. & N. 518; 29 L. J., Ex. 265.

(*e*) *Doe d. Buross v. Lucas*, 5 Esp. 153.

(*f*) *Roe d. Blair v. Street*, 2 A. & E. 328, 331; *Cole Ejec.* 54.

(*g*) *Doe d. Michell v. Levi*, Ad. Ejec. 92.

(*h*) *Alford v. Vickery*, Car. & M. 280.

Nicholson (i) it was held that it was sufficient to serve the notice upon a person whose duty it was to deliver it to the tenant.

CIV. VIII. s. 7.
Notice to Quit
(Form and
Service of).

In *Papillon v. Brunton* (j), between nine and ten o'clock on the 25th March a tenant put into a post-office in London a letter containing a notice to quit on the following Michaelmas, and addressed to the place of business in London of his landlord's agent. The agent was at his place of business until between six and seven o'clock in the evening and did not receive the letter, but found it on the following morning. This was held a sufficient notice to determine the tenancy, the jury having found that the letter was delivered on the 25th March, after the agent left (j). If a notice be posted on one day, and delivered in due course of post on the next, the latter is considered as the day on which it was sent (k).

Sending of
Notice to Quit
by Post.

Service on one of several joint tenants is *prima facie* sufficient for all of them (l). Service on a corporation may be on one of its officers (m), and in the case of a company "incorporated by act of parliament for the purpose of carrying on any undertaking," the Companies Clauses Consolidation Act, 1845 (8 Vict. c. 16), prescribes by sect. 135, that "any notice" may be served "by the same being left at or transmitted through the post, directed to the principal office of the company, or one of their principal offices where there shall be more than one, or being given personally to the secretary, or in case there be no secretary, then by being given to any one director of the company."

Joint Tenants, Corporations, &c.

A proper indorsement of the service should be made in the usual course of business, which will be admissible in evidence after the death of the witness (n). It is not necessary to prove the signature to the notice (o); nor to produce the attesting witness (if any (p)); nor to give notice to produce the original notice served (q). The regular service of a notice to quit, held to have been properly inferred from the circumstance of the tenant speaking about "the notice to quit which he had received," and engaging a valuer to value his rights as an outgoing tenant (r). But a party who is driven to rely on such evidence should, as a matter of precaution, give a notice to produce the notice to quit, describing its contents fully (s).

Indorsement
of Service.

Proof of Notice.

(i) Ante, 317.

(j) *Papillon v. Brunton*, 5 H. & N. 518; 29 L. J., Ex. 265. This case does not decide that mere posting amounts to a service in law; it seems, however, that a notice to quit, if posted so as to be delivered in due time, will be presumed to have been so delivered, but that the presumption may be rebutted by proof that the notice was not in fact received—the question being for the jury. See *Roscoe on Evidence*, 13th ed., citing *Gresham House Estate Co. v. Rossa Grande Mining Co.*, 5 W. N. 1870.

(k) *Reg. v. Recorder of Richmond*, E., B. & E. 253 (notice of chargeability of pauper); *Trew v. Harris*, 11 Q. B. 7 (notice of appointment of referee).

(l) *Doe v. Watkins*, 7 East, 551; *Doe v. Crick*, 5 Esp. 196.

(m) *Doe v. Woodman*, 8 East, 228.

(n) *Doe d. Patteshall v. Turford*, 3 B. & Ad. 890; *Stapylton v. Clough*, 2 E. & B. 933; *Smith L. & T.* 328 (2nd ed.).

(o) *Forman v. Dawes*, 1 Car. & M. 127.

(p) C. L. P. Act, 1854, s. 26.

(q) Ante, 326.

(r) *Doe d. Simpson v. Hall*, 5 M. & G. 795.

(s) *Cole Ejco.* 160

CH. VIII. s. 7.

Notice to Quit
(*Waiver of*).

Creation of
new Tenancy
by Waiver,
with Consent
of both
Parties.

(f) *Waiver of Notice.*

A notice to quit can be waived, and a new or continual tenancy created, only by the express or implied consent of both parties (f). "There is this difference between a determination of a tenancy by a notice to quit and a forfeiture; in the former case the tenancy is put an end to by the agreement of the parties, which determination of the tenancy cannot be waived without the assent of both; but in the case of a forfeiture the lease is voidable only at the election of the lessor: in the one case the estate continues though voidable, in the other the tenancy is at an end" (u). By a notice to quit given to a tenant from year to year, his tenancy is determined on the expiration of the current year; and a waiver of the notice creates a new tenancy, taking effect on the expiration of the old one (x).

Guarantee for
Rent ceases.

A guarantee for the rent will not extend to such new tenancy (x).

By Accept-
ance of Rent.

If a landlord receive, or distrain for, rent due after the expiration of a notice to quit, it is a waiver of that notice (y): but an acceptance of rent which became due *before or on* the expiration of the notice to quit, is not a waiver of such notice: where rent is usually paid at a banker's, if the banker, without any special authority, receive rent accruing after the expiration of a notice to quit, the notice is not thereby waived (a): so if the money be not paid or received *as rent*, but as a satisfaction for the injury done by the tenant in continuing on the premises as a trespasser, it will not have such an operation (b). But where the money is expressly *paid as rent*, the landlord cannot, under protest or otherwise, receive it only as compensation for subsequent occupation: such payment and receipt, notwithstanding the protest, will operate as matter of law to waive all forfeitures then known to the landlord (c). A demand of rent accruing subsequently to the expiration of a notice to quit is not necessarily a waiver of the notice, but is a question of intention which ought to be left to the jury (d).

By giving a
second Notice
to Quit.

Generally speaking, giving a second notice to quit amounts to a waiver of a notice previously given (e); but a good parol notice to quit will not be waived by a subsequent insufficient notice in writing (f). Where a landlord gave a notice to quit different parts of a farm at

(f) *Colo Ejec.* 55.

(u) *Blyth v. Bennet*, 13 C. B. 178, 180; 22 L. J., C. P. 79, 80; *Dendy v. Nicholl*, 4 C. B., N. S. 381.

(x) *Tayleur v. Wildin*, L. R., 3 Ex. 303; 37 L. J., Ex. 173.

(y) *Goodright d. Charter v. Cordwent*, 6 T. R. 219; *Croft v. Lumley*, 5 E. & B. 648; 6 H. L. Cas. 672.

(a) *Doe d. Ash v. Calvert*, 2 Camp. 387.

(b) *Goodright d. Charter v. Cordwent*, 6 T. R. 220; *Zouch d. Ward v. Willingale*, 1 H. Blac. 311.

(c) *Croft v. Lumley*, 5 E. & B. 648; 6 H. L. Cas. 672.

(d) *Blyth v. Bennett*, 13 C. B. 178; *Doe d. Cheny v. Batten*, Cowp. 243.

(e) *Doe d. Brierly v. Palmer*, 16 East, 53.

(f) *Doe d. Ld. Macartney v. Crick*, 5 Esp. 196.

different times which the tenant neglected to do in part, in consequence of which the landlord commenced an ejectment; and before the last period mentioned in the notice was expired, the landlord, apprehending that the witness by whom he was to prove the notice would die, gave another notice to quit at the same respective times in the following year, but continued to proceed with his ejectment, it was held that the second notice was not a waiver of the first (*g*). If, after the expiration of a notice to quit, the landlord give the tenant a fresh notice, that unless he quit in fourteen days, he will be required to pay double value, the second notice is no waiver of the first (*h*): so if a landlord give notice to his tenant to quit at the expiration of the lease, and the tenant hold over, and a second notice be delivered to the tenant, after the expiration of such notice, "to quit on a subsequent day or to pay double rent;" it is no waiver of the first notice (*i*).

CH. VIII. s. 7.
Notice to Quit
(Waiver of).

If the landlord has given a notice to quit, and the tenant holds over, the landlord cannot waive his notice and distrain for rent subsequently accruing (*k*). Where a three months' notice was given, the rent being reserved quarterly, and the landlord expressed neither his assent nor dissent to admit it, and took the rent up to the time when his tenant quitted; it was construed to be such an acquiescence as amounted to presumptive evidence that the parties intended to dispense with the notice, and was therefore deemed a waiver of it (*l*). If at the end of the year (where there has been a tenancy from year to year) the landlord accept another person as his tenant in the room of the former tenant, without any surrender in writing, such acceptance is a dispensation of the notice to quit (*m*). Where a landlord of premises about to sell them, gave his tenant notice to quit on the 11th October, 1806, but promised not to turn him out unless they were sold; and not being sold till February, 1807, the tenant refused, on demand, to deliver up possession; on ejectment brought, it was held that the promise (which was performed) was no waiver of the notice, as it did not operate as a licence to be on the premises, otherwise than subject to the landlord's right of acting on such notice, if necessary; and, therefore, that the tenant not having delivered up possession on demand after a sale, was a trespasser from the expiration of the notice to quit (*n*). Where a landlord gave his tenants a good parol notice to quit at Old Michaelmas, but at the same time said

By other Acts.

(*g*) *Doe d. Williams v. Humphrey*, 2 East, 237.

(*h*) *Doe d. Digby v. Steel*, 3 Camp. 117; *Doe d. Godsell v. Inglis*, 3 Taunt. 64; *Blyth v. Dennett*, 13 C. B. 178.

(*i*) *Messenger v. Armstrong*, 1 T. R. 53.

(*k*) *Jenner v. Clegg*, 1 Moo. & R. 213; *Alford v. Vickery*, 1 Car. & M. 280; *Williams v. Stiven*, 9 Q. B. 14.

(*l*) *Shirley v. Newman*, 1 Esp. 266.

(*m*) *Sparrow v. Hawkes*, 2 Esp. 605.

(*n*) *Whiteacre d. Boulton v. Symonds*, 10 East, 13, 16.

CH. VIII. s. 7. that if it would be any convenience to them he would permit them to occupy till Christmas, and that they should pay no rent; and one of the tenants expressed himself well satisfied and grateful for the indulgence; after which a written notice was served on the tenants to quit at Christmas: it was held, that an ejectment commenced after Christmas might be maintained upon the parol notice to quit at Old Michaelmas (o). Where a tenant gave notice of his intention to quit at Michaelmas, but before that time offered to continue tenant at a reduced rent, which the landlord agreed to, provided he could not find another tenant at a better rent before the 12th day of August then next; but before that day the tenant refused to permit a third person, who contemplated taking the farm, to go over it: it was held, that the conditional agreement for a new tenancy was thereby determined, and that the notice to quit at Michaelmas remained in force and would support an ejectment (p).

*Notice to Quit
(Waiver of).*

SECT. 8.—*Exercise of Option to determine Lease.*

Form of Pro-
viso.

A lease is often made for a term of years subject to a proviso or power therein contained, enabling either (or one) of the parties to determine it at an earlier period by notice, &c. For instance, the lease may be for twenty-one years, determinable at the end of the first seven or fourteen years by either party (or by the lessee) upon giving [twelve] calendar months' previous notice, &c. (q). Sometimes a proviso of this sort is framed very strictly as regards the tenant by making it a *condition precedent* on his part not only to give the notice, but also duly to pay all the rent and perform all and singular the covenants on his part to the termination of the notice. The consequence of this is, that in case of any breach of covenant the lessee is unable to determine the lease at the end of the first seven or fourteen years, in pursuance of the proviso: his power to do so being conditional only, and the condition not having been performed (r). Such conditions should be carefully considered, on behalf of the tenant, before the lease is executed.

Form of No-
tice.

Where a power is given to a party to determine a lease on giving a notice *in writing*, he cannot determine it by giving a parol notice (s). The notice need not refer to the power (t), but must end with the first seven or fourteen years, or other specified period, according to the

(o) *Doe d. Id. Macartney v. Crick*, 5 Esp. 196.

(p) *Doe d. Marquis of Hertford v. Hunt*, 1 M. & W. 690.

(q) See form of proviso, post, Appendix B., Sect. 13.

(r) *Friar v. Grey* (in error), 5 Exch. 584, 597; 4 H. L. Cas. 665; *Friar v. Grey*, 16 Q. B. 891; *Porter v. Shepherd*, 6 T. R. 665; *Jervis v. Tomkinson*, 1 H. & N. 195.

(s) *Legg d. Scott v. Benion*, Willes, 43.
(t) *Giddens v. Dodd*, 3 Drew. 486; 25 L. J., Ch. 451.

terms of the proviso, and not at any other time (u), and must be to quit all the demised premises and not part only (x). The landlord may however reserve to himself the right to determine the lease by notice as to all or any part of the land which he may want for building purposes (y); and after the stipulated notice has been given, if possession be refused, the landlord may maintain ejectment (z).

CH. VIII. s. 8.
*Exercise of
Option to de-
termine Lease.*

If a lease be granted "for seven, fourteen or twenty-one years," the lessee only has the option of determining it at the end of the first seven or fourteen years (a). But a demise for twenty-one years "determinable nevertheless in seven or fourteen years if the said parties hereto shall so think fit," is determinable only by the consent of both the parties, although it may have been their intention to give the option to either of them (b).

Option
whether with
Lessor or
Lessee.
*Dann v. Spur-
rier.*

Where the demise was for twenty-one years, and it was stipulated that if either party should die before the end of the said term, then the heirs, executors, &c. of the person so dying should give twelve months' notice to quit, &c., it was held, that the lease could only be determined by twelve months' notice given by the representatives of the party dying before the end of the term; and consequently, that such notice given by the lessor to the representatives of the lessee (who died during the term) did not determine the lease (c). A proviso in a lease for twenty-one years, that if either of the parties shall be desirous to determine it in seven or fourteen years it shall be lawful for either of them, his executors or administrators, so to do, upon twelve months' notice to the other of them, his heirs, executors or administrators, extends by reasonable intendment to the devisee of the lessor, he being entitled to the rent and reversion (d). Where a lease for twenty-one years contained a proviso that in case either the landlord or tenant, or their respective heirs, executors or administrators, wished to determine it at the end of the first fourteen years, and should give six months' notice in writing under his or their respective hands, the term should cease: it was held, that a notice to quit signed by two only of three executors of the lessor, to whom he had bequeathed the freeholds as joint tenants, was not good under the proviso, although such notice purported to be given on behalf of all

Notice by
Executors, &c.

(u) *Cadby v. Martinez*, 11 A. & E. 720; 3 P. & D. 386; *Bird v. Baker*, 1 E. & E. 12; 28 L. J., Q. B. 7; *Jones v. Nixon*, 1 H. & C. 48; 31 L. J., Ex. 505; *Sharp v. Milligan*, 22 Beav. 612.

(x) *Doe d. Rodd v. Archer*, 14 East, 245, 248. See form of notice, post, Appendix C., No. 8.

(y) See form of proviso, Appendix B., Sect. 23; also form of notice to take part, Id., Sect. 24.

(z) *Doe d. Wilson v. Abel*, 2 M. & S. 541.

(a) *Dann v. Spurrier*, 3 Bos. & P. 399, 442; *Doe d. Webb v. Dixon*, 9 East, 15; *Fallor v. Robins*, 16 Ir. Ch. R. 422.

(b) *Fowell v. Frantz*, 3 H. & C. 458; 34 L. J., Ex. 6.

(c) *Legg d. Scott v. Denion*, Willes, 43.

(d) *Roe d. Bamford v. Hayley*, 12 East, 464.

CH. VIII. s. 8. the executors—the proviso requiring the notice to be given “under the respective hands” of all of them (*e*).

*Exercise of
Option to de-
termine Lease.*

No Bail in
Ejectment
after such
Notice.

When a lease has been determined by notice pursuant to a proviso in that behalf, and the landlord brings ejectment, he cannot compel the tenant to find sureties to pay the costs and damages, pursuant to 15 & 16 Vict. c. 73, s. 213 (*f*); nor can any accruing or subsequent rent be recovered after any such determination (*g*).

SECT. 9.—Disclaimer.

Disclaimer by
Parol by
Lessee for
Years, insuffi-
cient.

It is a general rule that the tenant commits a forfeiture if he disclaim and deny his landlord's title (*h*). But a denial by parol of a landlord's title does not cause a forfeiture of a lease for a *term certain*, whether under seal or not (*i*); nor will payment to a third person of the rent reserved by such lease (*k*). Where a tenant for five years delivered up possession of the demised premises and of the lease *in fraud* of his landlord, to a person claiming under a hostile title, with the intention of enabling him to set up such title and not to hold under the lease: it was held, that the term was thereby forfeited (*l*). But that case turned upon the fraud of the tenant, and can only be sustained on that ground. All the other cases in the books of forfeiture by disclaimer have been by matter of record (*m*). Any person who obtains possession from the tenant or subtenant, by an arrangement made with him, whether by collusion or otherwise, but without any deed of assignment or sublease, will not be permitted to defend such possession by proof of a title *aliunde*, but will be estopped from denying the landlord's title in like manner as the tenant or subtenant would have been had he remained in possession (*n*).

Disclaimer by
Tenant from
Year to Year.

A disclaimer by a tenant from year to year of the title of his landlord, or of the person for the time being entitled to the immediate reversion as assignee, heir, devisee, executor or administrator of the landlord, will operate as a waiver by the tenant of the usual notice to

(*e*) *Right d. Fisher v. Cuthell*, 5 East, 491; 2 Smith, 83; recognized and distinguished in *Doe d. Aslin v. Summersett*, 1 B. & Ad. 135, 141. See also *Turner v. Hardy*, 9 M. & W. 770.

(*f*) *Doe d. Cardigan v. Roe*, 1 D. & R. 540; *Doe d. Cundey v. Sharpley*, 15 M. & W. 558. As to the evidence in such action, see *Colo Ejec.* 399.

(*g*) *Furnivall v. Grove*, 8 C. B., N. S. 496; 30 L. J., C. P. 3.

(*h*) *Bac. Abr. tit. Leases and Terms for Years* (T. 2).

(*i*) *Doe d. Graves v. Wells*, 10 A. & E. 427; *Rees d. Powell v. King*, Forrest, 19; *Colo Ejec.* 42.

(*k*) *Doe d. Dillon v. Parker*, Gow, 180; *Doe d. Williams v. Pasquali*, Peake, 196.

(*l*) *Doe d. Ellenbrock v. Flynn*, 1 C., M. & R. 137.

(*m*) Per Lord Denman, C. J., in *Gregg v. Wells*, 10 A. & E. 427.

(*n*) *Doe d. Buller v. Mills*, 2 A. & E. 17; *Doe d. Haden v. Burton*, 9 C. & P. 254; *Doe d. Thomas v. Shadwell*, 7 Dowl. 527; *Colo Ejec.* 216, 218.

quit, and will in effect determine the tenancy at the election of the landlord or other person so entitled (o). A tenancy from year to year is in effect a tenancy at will, determinable by notice to quit according to law, or to special custom, or to an express stipulation: or it may be regarded as a tenancy for a year certain, with a growing interest during every year thereafter springing out of the original contract and parcel of it (p). "A notice to quit is only requisite where a tenancy is admitted on both sides, and if a defendant denies the tenancy there can be no necessity to end that which he says has no existence" (q).

CH. VIII. s. 9.
Disclaimer.

It is sometimes a nice question whether what has taken place does or does not amount to a disclaimer of the tenancy. It is difficult, if not impossible, to reconcile all the cases on this point. But the result of them seems to be, that if a tenant from year to year use any expressions which, being reasonably construed with reference to the circumstances under which they were uttered or written, amount to a denial of the existence of any tenancy as between him and the claimant, such expressions amount to a disclaimer, and render a notice to quit unnecessary (r). On the other hand, if the expressions used cannot under the circumstances be reasonably construed to amount to such a denial, they will not operate as a disclaimer nor render a notice to quit unnecessary (s). In order to make either a verbal or written disclaimer sufficient, it must amount to a *direct repudiation of the relation of landlord and tenant*, or to a distinct claim to hold possession of the estate upon a ground wholly inconsistent with that relation, which by necessary implication is a repudiation of it (t). "A disclaimer, as the word imports, must be a renunciation by the party of his character of tenant, either by setting up a title in another or by claiming title in himself" (u). But a very slight matter, not really intended as a repudiation, will sometimes be construed as a repudiation, in order to defeat an objection of a technical nature (x).

What
amounts to a
Disclaimer.

(o) *Doe d. Bennett v. Long*, 9 C. & P. 773; *Doe d. Grubb v. Grubb*, 10 B. & C. 816; *Doe d. Phillips v. Rollings*, 4 C. B. 188; *Doe d. Davies v. Evans*, 9 M. & W. 48; *Doe d. Land-sell v. Gower*, 17 Q. B. 589.

(p) *Cutlley v. Arnold*, 1 Johns. & H. 651; 28 L. J., Ch. 352.

(q) Per Best, C. J., in *Doe d. Calvert v. Frowd*, 4 Bing. 560; *Doe d. Phillips v. Rollings*, 4 C. B. 188, 200; *Doe d. Jefferies v. Whittick*, Gow, 195.

(r) Cole Ejec. 41; *Doe d. Calvert v. Frowd*, 4 Bing. 560; *Doe d. Grubb v. Grubb*, 10 B. & C. 816; *Doe d. Bennett v. Long*, 9 C. & P. 773; *Doe d. Hughes v. Bucknell*, 8 C. & P. 566; *Doe d. Whitehead v. Pittman*, 2 N. & M. 673; *Doe d. Davies v. Evans*, 9 M. &

W. 48; *Doe d. Phillips v. Rollings*, 4 C. B. 188, 200; *Doe d. Land-sell v. Gower*, 17 Q. B. 589.

(s) Cole Ejec. 41; *Doe d. Lewis v. Earl Cawdor*, 1 C. M. & R. 398; *Doe d. Williams v. Cooper*, 1 M. & G. 135; 1 Scott, N. R. 36; *Doe d. Williams v. Pasquali*, Peake, 259 (3rd ed.); *Hunt v. Allgood*, 10 C. B., N. S. 253; *Jones v. Mills*, Id. 788.

(t) *Doe d. Grey v. Stanion*, 1 M. & W. 695, 703; *Doe d. Williams v. Cooper*, *Hunt v. Allgood*, and *Jones v. Mills*, *supra*.

(u) Per Tindal, C. J., in *Doe d. Williams v. Cooper*, 1 M. & G. 135; *Jones v. Mills*, 10 C. B., N. S. 788, 796, 801.

(x) *Doe d. Davies v. Evans*, 6 M. & W. 48.

CH. VIII. s. 9.

Disclaimer.Refusal to pay
Rent.

A refusal to pay rent to a devisee in a will which is contested is not a disavowal of the title of such devisee. But where the defendant held premises under a tenant for life, on whose death possession was claimed and rent demanded by the heir at law of the deviser; whereupon the defendant wrote to the attorney of the heir at law, stating that he held as tenant to J. S. (the husband of the tenant for life) in right of his wife; that he had never considered the claimant as the landlord of the house; and that he should be ready to pay the arrears to any person who should be proved to be heir at law; but that he must decline taking upon himself to decide upon the claim made on him without more satisfactory proof in a legal manner; it was held, that this letter amounted to a disclaimer of the title of the heir at law, and that he might maintain ejectment against the tenant without giving him a previous notice to quit (*y*). A remainderman, after the death of tenant for life who had made a voidable lease, applied for rent to the tenant, who at first did not refuse to pay, but after some negotiation did so, saying that he understood that another person was entitled to the estate; held that the remainderman might maintain ejectment without notice to quit or demand of possession, there being a disclaimer of the remainderman's title (*z*). Where several persons joined in letting land, and it was agreed that the rent should be paid to an agent for them, and afterwards one of the lessors, to whom alone in fact the land belonged, demanded rent of the tenant, who said "you are not my landlord:" it was left to the jury to say whether he intended that the relation of landlord and tenant did not exist between them or merely that the rent was to be paid to the agent (*a*). An attornment by a tenant from year to year to a third person amounts to such a disclaimer of the landlord's title as will enable him to maintain ejectment without any notice to quit (*b*). "I have no rent for you, because A. B. has ordered me to pay none." This is evidence of a disclaimer of the tenancy (*c*). In another case the defendant had for several years occupied a cottage as tenant from week to week to one M., and after the death of M. the defendant continued to pay his rent weekly to certain persons to whom M. had devised the premises. The devise being discovered to be void by reason of the Mortmain Act, the heir at law of M., by his agent, demanded the rent. The defendant said that he had *received notice from the other party and would not pay any more rent until he knew who was the right owner*. It was held, that this did not amount to a disclaimer or

(*y*) *Doe d. Calvert v. Froud*, 4 Bing. 557;
1 Moo. & P. 480.

(*z*) *Doe d. Phillips v. Rollings*, 4 C. B.
188.

(*a*) *Doe d. Bennett v. Long*, 9 C. & P. 773.

(*b*) *Throgmorton v. Whelpdale*, Bull. N
P. 96; Cole Ejec. 42.

(*c*) *Doe d. Whitehead v. Pittman*, 2 N.
M. 673.

repudiation of the title of the heir at law so as to entitle him to eject the defendant without any notice to quit (*d*). CH. VIII. s. 9
Disclaimer.

Where a disclaimer is relied on, it must appear to have been made *before or on* the day mentioned in the writ of ejectment as the time when the claimant was entitled to possession (*e*). But where the defendant by his agent, on 26th June, answered an application for rent by saying that his “connection as tenant with the late John Grubb, Esq. (through whom the plaintiff derived his title), has *ceased for several years*, and that he now pays his rent to his brother; this was held to be evidence of a disclaimer of title *before the 1st May* (on which day the demise was laid in the ejectment), and rendered any notice to quit unnecessary (*f*). In ejectment against two persons as landlord and tenant, an admission by the tenant, after action brought, of an attornment by him to the landlord having taken place before the day from which possession was claimed in the ejectment, was held sufficient evidence of a disclaimer as against both the defendants (*g*). Date of Dis-
claimer.

A disclaimer may be waived by any act of the landlord acknowledging the party as his tenant at a later period, as by a distress for subsequent rent (*h*). Waiver of
Disclaimer.

SECT. 10.—*Death*.

A tenancy does not determine by the death of the lessee, but will vest in his legal personal representatives, who are entitled to give or receive the usual notice to quit (*i*). So it will not determine by the death of the lessor (*k*), unless he was only a tenant for his own life, and the demise was not made in pursuance of any power or statute (*l*). And even in such case the tenant, if the holding be agricultural, is entitled (in lieu of emblements (*m*)) to hold the demised premises until the end of the then current year of the tenancy (*n*). Death of Te-
nant.

Death of
Landlord.

Sometimes a lease is granted for a certain term of years, if the lessee shall so long live; in which case it will determine either at the When the
Term is
limited con-
ditionally.

(*d*) *Jones v. Mills*, 10 C. B., N. S. 788.

(*e*) *Doe d. Lewis v. Earl Cawdor*, 1 C., M. & R. 389; 4 Tyrw. 852; *Doe d. Bennett v. Long*, 9 C. & P. 773.

(*f*) *Doe d. Grubb v. Grubb*, 10 B. & C. 816.

(*g*) *Doe d. Mee v. Litherland*, 4 A. & E. 784.

(*h*) *Doe d. David v. Williams*, 7 C. & P. 322.

(*i*) *Mackay v. Mackreth*, 4 Doug. 213; *Doe d. Shore v. Porter*, 3 T. R. 13; *Parker d. Walker v. Constable*, 3 Wils. 26; *James*

v. Dean, 11 Ves. 391; *Rez v. Stowe*, 6 T. R. 295, 298; *Doe d. Hull v. Wood*, 14 M. & W. 682.

(*k*) *Maddan d. Baker v. White*, 2 T. R. 159; *Cole Ejec.* 31.

(*l*) *Doe d. Thomas v. Roberts*, 16 M. & W. 778; *Doe d. Kirby v. Carter*, Ry. & Moo. 237.

(*m*) *Kelly v. Webber*, 11 Ir. Com. L. Rep. 67.

(*n*) 14 & 15 Vict. c. 26, s. 1; post, Appendix A., Sect. 4.

CH. VIII. s. 10. end of the specified term or upon the death of the lessee, which shall
Death. first happen (o).

Death of
 cestui que vie. When a person holds for the term of another's life he is called tenant pur autre vie ; leases made by him of course determine on the death of the cestui que vie, or person for whose life he holds, or at the end of the then current year of the tenancy (p) : but not on his own death ; and a lease by him may be made to commence on his own death (p). We have already considered how a tenant pur autre vie may be compelled to produce his cestui que vie, if living (p).

(o) Ante, Chap. IV., Sect. 3.

(p) Ante, 8.

CHAPTER IX.

OF THE RENEWAL OF LEASES, AND OF THE EXERCISE OF AN OPTION
TO PURCHASE.

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SECT. 1.—*Covenants to renew—whether perpetual or not.*

SOME nice points occur in the books concerning the construction of covenants for the renewal of leases; the question in general being whether the renewed lease is to contain a similar covenant for renewal, so giving a right of renewal for ever. Covenants for renewal of leases are considered as real agreements, and go with the land, and therefore will affect even the legal interest of those who take the estate with notice of such leases and covenants (*a*): but a covenant for perpetual renewal, entered into by a person having a limited interest in lands, does not bind the estate; and therefore, if his assignee acquire the inheritance, it is not bound by the covenant (*b*). A covenant for renewal, which is so framed as to create a perpetuity in the heirs of the body of a particular person, is invalid (*c*).

Construction of Covenants for the Renewal of Leases.

The leaning of the courts is against perpetual renewals (*d*); and therefore, in order to establish this construction, the intention must be unequivocally expressed, and a proviso in general terms, that the lease to be granted shall contain the same covenants and agreements as the lease containing the covenant, has been repeatedly held not to extend to the covenant for renewal (*e*). An agreement in a lease for lives, that upon the renewing or inserting of any life or lives, a certain sum shall be paid by the lessee, his heirs and assigns, to the lessor, his heirs and assigns, does not amount to a covenant for

Ordinarily not held perpetual.

(*a*) *Earl of Shelburne v. Biddulph*, 6 Bro. P. C. 363.

(*b*) *Brereton v. Tuohey*, 8 Ir. Ch. R. 190; *Postlethwaite v. Lewthwaite*, 2 J. & H. 237; 31 L. J., Ch. 584; and see *Trumper v. Trumper*, L. R., 14 Eq. 295; 41 L. J., Ch. 295.

(*c*) *Hope v. Mayor, &c. of Gloucester*, 7 De G., M. & G. 647; 25 L. J., Ch. 145.

(*d*) *Baynham v. Guy's Hospital*, 3 Ves. 298.

(*e*) 4 Jarm. Prec. 391 (3rd ed.); *Tritton v. Foote*, 2 Bro. C. C. 636; 2 Cox, 174.

CH. IX. s. 1.
Renewal
(whether Cove-
nants per-
petual).

perpetual renewal (*f*). A covenant in a lease of land for ninety-eight years, that the lessor will from time to time renew the lease, and perfect such other assurances as the lessee should reasonably require for strengthening, confirming and sure-making the demised premises, at such rents, and under such covenants and conditions, as in the lease were contained, is not a covenant for perpetual renewal (*g*). Where one, in consideration of 5*l.* 8*s.* in nature of a fine, and of a yearly rent of 6*s.* 9*d.*, demised certain ground, with the buildings, &c., for twenty-one years, with a proviso for distress if the rent were in arrear for fourteen days; and the lessor covenanted at the end of eighteen years of the term, or before, on request of the lessee, to grant a new lease of the premises “for the like fine, for the like term of twenty-one years, at the like yearly rent, with all covenants, grants, and articles, as in that indenture were contained:” it was held, that this covenant was satisfied by the tender of a new lease for twenty-one years, containing all the former covenants except the covenant for future renewal (*h*). Where a lessor covenanted to renew the lease at the request of the lessee within the term; and the lessee did not request, but his executors did; Lord Macclesfield, C., ordered the lessor to renew the demise of the premises for twenty-one years, that being the usual term, but said that though the new lease was to be made on the same covenants, yet that that did not take in a covenant for renewing (*i*). In another case, premises were demised for three lives and for twenty-one years after the death of the last survivor. The lessor covenanted with the lessee that if he should lose a life and think proper to have a new life put in, then, within six months after the death of the first life, and so on continuing the term and estate thereby demised, the lessor would put in a new life; it was held, that the lessee had power to introduce one new life only, and that one in the place of the first life dropping, but with a new term of twenty-one years, commencing with the death of the survivor of the two survivors and the new life (*k*).

Perpetual Re-
 newal.

But although *prima facie* a lessor is not taken to have intended to enter into a covenant for perpetual renewal, if there are in the lease expressions indicative of such an intention, the High Court will give effect thereto (*l*). Thus, where a lease for lives contained a covenant on the death of either of the cestui que vies to execute a renewed lease at the same rent, and subject to the same covenants, “including this present covenant:” it was held, that this was a covenant for

(*f*) *Smyth v. Nangle*, 7 Cl. & Fin. 405; 1 West, 184.

(*g*) *Bravone v. Tighe*, 2 Cl. & Fin. 396.

(*h*) *Iggulden v. May*, 7 East, 237; 2 New R. 449; 9 Ves. 331.

(*i*) *Hide v. Skinner*, 2 P. Wms. 197; but see 3 Atk. 448.

(*k*) *Walmsley v. Pilkington*, 35 Beav. 362.

(*l*) *Hare v. Burgess*, 4 K. & J. 45; 27 L. J., Ch. 86; *Bridges v. Hitchcock*, 1 Bro. P. C. 522; *Furnival v. Crewe*, 3 Atk. 83.

perpetual renewal, and that the lessee was entitled to have inserted in the renewed lease a covenant for renewal *totidem verbis* with that contained in the original lease, but with the name of the new cestui que vie substituted for that of the deceased (*m*). It was once held that a lessor and his ancestors had, by their own acts of successive renewals, construed a covenant in a lease for lives to be for a perpetual renewal, and that he was therefore bound by it (*n*). But in a subsequent case, this method of construing the covenant by the equivocal acts of the parties was repudiated (*o*).

CH. IX. s. 1.
Renewal
(whether Covenants per-
petual).

One of two lessees has no single right of renewal (*p*).

Renewal to
one of two
lessees.
Breach of
Covenant to
"endeavour"
to renew.

If a lease for ninety-nine years, determinable on three lives, be conveyed in trust for A. for life, and A. covenant to use his utmost endeavours, as often as any of the persons on whose lives the premises are held shall die, to renew the same by purchasing of the lord of the fee a new life in the room of such as shall fail, it is no breach of the covenant, if upon one of the lives failing he procure a renewal upon his own life (*q*). A sum falling short of three years' annual value of premises, calculated on the rack rent, is not an unreasonable fine for the renewal of a lease by the Duchy of Cornwall; and therefore the lessee having covenanted in a sublease to do his utmost endeavours to procure a renewal of the letters-patent, on either of three cestui que vies dying, commits a breach of his covenant by not paying such a fine demanded for a renewal (*r*).

Under a trust to renew leases out of the rents, issues and profits, followed by a power to mortgage in case, from any cause, the money wanted to pay the fines should not be produced by the ways and means aforesaid, it was held that the rents being sufficient for that purpose, the fines ought to be paid out of the income (*s*). A trust for renewal fails if renewal be impossible (*t*).

Trust for Re-
newal.

SECT. 2.—Forfeiture of Right to renew.

Where it was covenanted that the lessor would renew whenever any life or lives dropped, provided that if the lessee, his executors or administrators, upon or after the death of any of the life or lives, should refuse or neglect to renew the said lease, or make application therein, or tender such new lease, and pay or tender a certain fine, then the indenture should be void; it was held, that the lessee

Forfeiture of
Right to re-
new by not
applying in
Time.

(*m*) *Hare v. Burgess*, *supra*.

(*n*) *Cooke v. Booth*, Cowp. 819.

(*o*) *Baynham v. Guy's Hospital*, 3 Ves. 298; *Eaton v. Lyon*, Id. 694; *Iggulden v. May*, 9 Ves. 331; 7 East, 237; 2 New R. 449.

(*p*) *Finch v. Underwood*, 45 L. J., Ch.

522; post, 340.

(*q*) *Scudamore v. Stratton*, 1 Bos. & P.

455.

(*r*) *Simpson v. Clayton*, 4 Bing. N. C.

758.

(*s*) *Solley v. Wood*, 29 Beav. 482.

(*t*) *Maddy v. Hale*, 45 L. J., Ch. 791.

CH. IX. s. 2.
Renewal
(Forfeiture of
Right to).

By not apply-
 ing in Time
 —*contd.*

forfeited his right of renewal for not applying when the first life dropped (*u*). But where a lease, for sixty-one years, of house property contained a covenant that the lessee might renew, on certain terms, at the end of each and every term of fourteen years, on giving ten days' notice of such his desire; and the lessee, or those claiming under him, continued in possession after the two first terms of fourteen years each had expired, and then, before the expiration of the third fourteen years, desired to renew: held, that the lessee was not precluded, by his not having given notice earlier, from claiming his right to have a renewed lease in the terms of the covenant (*r*). A covenant in a corporation lease to renew upon the falling in "of one life for ever," cannot be extended to the case where two are suffered to fall in, although a compensation be offered (*y*). Where A. and B. covenanted in a lease for sixty-one years, that at any time within one year after the expiration of twenty years of that term, upon the request of the lessee and his paying 6*l.* to the lessors, they would execute another lease of the premises for the further term of twenty years, to commence from the expiration of the said term of sixty-one years, &c., and so in like manner at the end of every twenty years during the said term of sixty-one years, for the like consideration and upon the like request, would execute another lease for the further term of twenty years, &c., to commence at the expiration of the term then last before granted, &c.; it was held, that, under this covenant, the lessee could not claim a further term at the end of the last term of twenty years in the lease, where he had omitted to claim a further term at the end of the first and second twenty years in the lease (*z*). Where a lease renewable for ever had expired by the dropping of the lives, so that, in fact, only a tenancy from year to year existed; but the owner in fee of the land, the tenants, and their subtenants, had all been acting for years on the terms of the lease, which was at length duly renewed: held, that no one of them could subsequently set up in equity claims adverse to the several characters they bore under such lease and the sublease (*a*).

Forfeiture of
 Right to Re-
 newal by
 Non-per-
 formance of
 Covenants.
Finch v.
Underwood.

Where the lessee has not performed his covenants to repair and insure, the court will not decree a specific performance of a perpetual covenant to renew "provided the rent should have been paid and the covenants kept" (*b*). So where the covenant was to renew at the end of the term "if it should not be sooner determined by the lessee's acts or defaults" (*c*). The covenant to renew in case the lessee's

(*u*) *Baynham v. Guy's Hospital*, 3 Ves. 295; *Eaton v. Lyon*, Id. 690.

(*r*) *Bogg v. Midland R. Co.*, L. R., 4 Eq. 310, 313; 36 L. J., Ch. 440.

(*y*) 3 Bro. C. C. 529.

(*z*) *Rubery v. Jervoise*, 1 T. R. 229.

(*a*) *Archbold v. Scully*, 9 H. L. Cas. 360.

(*b*) *Job v. Banister*, 2 Kay & J. 374; 26 L. J., Ch. 125.

(*c*) *Thompson v. Guyon*, 5 Sim. 65; cited 2 K. & J. 381.

covenants are duly performed is construed strictly against the lessee, and will not be specifically enforced if the lessor have a right of action for the breach of covenant to repair, although the want of repair be but small. If there be any repairs wanted at all, the lessee should have them done before applying to the court (*d*). One of two lessees has no single right of renewal (*e*). Where there was a lease for twenty-one years at 1*l.* rent, with a covenant to the tenant to renew from twenty-one years to twenty-one years, to make up ninety-nine years; and at the expiration of the first term an arrear of rent being due, and no application being made for a renewal, the lessor brought an ejectment and obtained judgment and possession; on a bill filed in Chancery, a renewal was decreed, on payment of the rent in arrear and interest; the delay being accounted for, and there being no neglect on the part of the lessee, or prejudice to the lessor (*f*).

CH. IX. s. 2.
Renewal
(*Forfeiture of*
Right to).

A. agreed to let premises to B. for three years, and at the expiration of that term to grant him a lease for an extended term. A. died, and three years having expired B. continued to hold on under A.'s executors for four years without asking for a lease. He then required a lease: held, that B.'s option had not determined, and that he was entitled to the extension of the term (*g*).

When Option
for Renewal
not deter-
mined.

SECT. 3.—*Renewal by Minors, Lunatics and Married Women.*

Where guardians of minors, married women and infants are concerned, and a renewal of leases is required, existing leases may be surrendered and new leases granted by direction of the Chancery Division of the High Court (*h*). The Lunacy Regulation Act, 1853 (16 & 17 Vict. c. 70), contains detailed provisions for renewal to the committee of a lunatic tenant (*i*) and by the committee of a lunatic landlord (*k*). Where a person bound by covenant to renew a lease if required "at the cost and charges in all things" of the lessee, subsequently devised the land in strict settlement, and died pending the arrangements for a renewal, leaving the first person entitled to an estate of inheritance under his will an infant, so that it was necessary to institute a suit in Chancery to obtain a renewal of the lease, it was

Renewal in
the Case of
Minors, &c.

(*d*) *Finch v. Underwood*, L. R., 2 Ch. D. 310; 45 L. J., Ch. 522; 34 L. T. 779 (C. A.).

(*e*) *Id.*

(*f*) *Rawston v. Bentley*, 4 Bro. C. P. 415; *Statham v. Liverpool Docks Trustees*, 3 Y. & J. 565; *Hunter v. Earl of Hopetoun*, 13 Law T., N. S. 130 (H. L.).

(*g*) *Mass v. Barton*, 35 Beav. 197; L. R., 1 Eq. 474; and see *Buckland v. Papillon*, L. R., 2 Ch. Ap. 67; 36 L. J., Ch. 81.

(*h*) 11 Geo. 4 & 1 Will. 4, c. 65, ss. 16, 17; ante, 36.

(*i*) Sect. 113.

(*k*) Sect. 131.

CH. IX. s. 3. held, that the cost of the suit must be paid out of the estate of the
Renewal by covenantor, because it had been rendered necessary by his own act
Minors, &c. done subsequently to entering into the covenant (*m*). . . .

SECT. 4.—*Renewal by Trustees, &c. in their own Names.*

Renewal by Trustees.

A lease renewed by a trustee or executor in his own name, even in the absence of fraud, and upon the refusal of the lessor to grant a new lease to the cestui que trust, will be ordered to be held in trust for the person entitled to the old lease (*n*). The same rule applies to an executor de son tort renewing a lease in his own name (*o*). Where a trustee obtains a new lease which comprises not only the premises in the original lease, but also additional lands, the trusts will not attach upon the additional lands (*p*). The ground of decreeing renewals by trustees and executors to enure to the benefit of cestui quo trusts is public policy, to prevent persons in such situations from acting so as to take a benefit to themselves (*q*).

By Agents.

A person acting as agent, or in any similar capacity for a person having an interest in a lease, cannot renew it for his own benefit (*r*).

By Tenant for Life.

If a person having a limited interest in a renewable lease, as a tenant for life, renews it in his own name, he will be held a trustee for those entitled in remainder to the old lease (*s*).

By a Person jointly interested with Others.

If one of several persons jointly interested in a lease renew it in his own name he will hold in trust for the others according to their respective shares (*t*). And if a person jointly interested with an infant renew, and the renewed lease turn out not to be beneficial, the person renewing must sustain the loss; if beneficial the infant can claim his share of the benefit to be derived from it (*t*).

By a Partner.

If a partner renew a lease of the partnership premises in his own name and on his own account he will be held a trustee of it for the firm (*u*).

By a Mortgagee.

If a mortgagee renew a lease in his own name the renewal shall be for the benefit of the mortgagor, paying the mortgagee his charges (*x*); nor will the case be altered by the expiration of the lease before

By a Mortgagor.

renewal (*y*). On the other hand, if a lessee mortgage leaseholds, and

(*m*) *Wortham v. Id. Dacre*, 2 Kay & J. 437.

(*n*) *Keech v. Sandford*, Select Cas. Ch. 61; *Fitzgibbon v. Scanlan*, 1 Dow, 261 (after twenty years); *Mill v. Mill*, 3 H. L. Cas. 828; *Cooper v. Phibbs*, L. R., 2 H. L. Cas. 149; *White & Tudor L. C.* 36, 37 (2nd ed.).

(*o*) *Mulraney v. Dillon*, 1 Ball & B. 409; *Griffin v. Griffin*, 1 Sch. & Lef. 352.

(*p*) *Acheson v. Fair*, 3 Dru. & W. 512; 2 Conn. & Law. 208.

(*q*) *Griffin v. Griffin*, 1 Sch. & Lef. 352; *Blewett v. Millett*, 7 Bro. P. C. 387.

(*r*) *White & Tudor L. C.* 41 (2nd ed.).

(*s*) *Id.* 38.

(*t*) *Id.* 39.

(*u*) *Id.* 40; *Clegg v. Edmondson*, 8 Do Gox, M. & G. 787; *Tudor's L. C. Mero. L.* 359 (2nd ed.).

(*x*) *White & Tudor L. C.* 40 (2nd ed.).

(*y*) *Id.* 40; *Rakestraw v. Brewer*, 2 P. Wms. 510; *Newbitt v. Tredenick*, 1 Ball & B. 29.

afterwards obtain a new lease in his own name, the new lease will be held a graft on the old one for the benefit of the mortgagee (z). Upon the same principle, if a person entitled to a lease subject to debts, legacies or annuities, renews in his own name, the incumbrances will remain a charge upon the renewed lease (a).

Cn. IX. s. 4.
Renewal by Trustees, &c.

By Owner of incumbered Lease.

The same remedies which may be had against trustees, executors, and persons with limited interests renewing leases in their own names, may also be had against volunteers claiming through them (b). And against purchasers from them with notice express or implied (b). But the cestui que trust may be barred by acquiescence and lapse of time (b).

Against Volunteers.

Or Purchasers with Notice.

A quasi tenant in tail of leaseholds being the absolute owner of them is not barred by the same equities as persons having merely limited interests (c).

Not against a quasi Tenant in Tail of Leaseholds.

Where a stranger obtains a renewal of a lease, or a reversionary lease, the old tenant has no equity against him (d); nor, it seems, has a lessee any equity against his sub-lessee who obtains a renewal from the head landlord without consulting him (e).

Nor against a Stranger.

If a person having a right of renewal sells such right, the money produced by the sale will be affected with the same trusts as the leaseholds, if renewed, would have been (f).

Sale of Right of Renewal.

A trustee who has renewed will be directed to assign the lease, free from incumbrances, except, as it seems, any lease made by him bona fide at the best rent (g): and he must account also for the mesne rents and profits which he may have received (h), notwithstanding the lease had expired before the action was brought (i). But where a tenant for life has renewed, the account will commence only from his decease (k). On the other hand, the person who has renewed the lease will be entitled to be indemnified against the covenants he may have entered into with the lessor (l), and he will have a lien upon the estate for the costs and expenses of renewing the lease, with interest (m), and for the expenses of lasting improvements (n), but not for any improvements adopted as a mere matter of taste, or as matter of personal convenience (o); at the same time there may be many charges in the nature of waste, and as to deterioration, which must be set off against anything found due in respect of improvements (o). So also will a tenant for life have a lien for such proportion of the fine upon renewal as ought to be borne by the remainderman (p).

Nature of Relief in Equity and upon what Terms.

(z) *Smith v. Chichester*, 1 Conn. & Law. 486.

(a) *White & Tudor L. C.* 41 (2nd ed.).

(b) *Id.* 42.

(c) *Blake v. Blake*, 1 Cox, 266.

(d) *White & Tudor L. C.* 44 (2nd ed.).

(e) *Maunsell v. O'Brien*, 1 Jones (Ir. Ex.) 176.

(f) *White & Tudor L. C.* 41; *Owen v. Williams, Ambler*, 734.

(g) *Id.* 41; *Bowles v. Stewart*, 1 Sch. & Lef. 230.

(h) *Id.* 41.

(i) *Eyre v. Dolphin*, 2 Ball & B. 290.

(k) *Geddings v. Geddings*, 3 Russ. 241.

(l) *Keech v. Sandford*, Select Cas. Ch. 61; *Mill v. Mill*, 3 H. L. Cas. 828; *White & Tudor L. C.* 36; *Geddings v. Geddings*, 3 Russ. 241.

(m) *White & Tudor L. C.* 41, 42.

(n) *Id.* 42.

(o) *Mill v. Mill*, 3 H. L. Cas. 869.

(p) *White & Tudor L. C.* 42.

CH. IX. s. 6.

*Renewal without Surrender of Sub-leases.*4 Geo. 2,
c. 28.Renewal in
Case of Sub-
lease.New Lease is
as good as if
Sub-leases
surrendered.SECT. 5.—*Renewal without Surrender of Sub-leases.*

By 4 Geo. 2, c. 28, s. 6, after reciting "that many persons hold considerable estates by leases for lives or years, and lease out the same in parcels to several under-tenants; and many of those leases cannot by law be renewed without a surrender of all the under-leases derived out of the same, so that it is in the power of any such under-tenants to prevent or delay the renewal of the principal lease by refusing to surrender their under-leases, notwithstanding they have covenanted so to do, to the great prejudice of their immediate landlords the first lessees;" it is enacted, "that in case any lease shall be duly surrendered in order to be renewed, and a new lease made and executed by the chief landlord or landlords, the same new lease shall, without a surrender of all or any the under-leases, be as good and valid to all intents and purposes as if all the under-leases derived thereout had been likewise surrendered at or before the taking of such new lease; and all and every person and persons in whom any estate for life or lives, or for years, shall from time to time be vested by virtue of such new lease, and his, her and their executors and administrators, shall be entitled to the rents, covenants and duties, and have like remedy for recovery thereof; and the under-lessees shall hold and enjoy the messuages, lands and tenements in the respective under-leases comprised as if the original leases, out of which the respective under-leases are derived, had been still kept on foot and continued; and the chief landlord and landlords shall have and be entitled to such and the same remedy by distress or entry in and upon the messuages, &c., for the rents and duties reserved by such new lease, so far as the same exceed not the rents and duties reserved in the lease out of which such under-lease was derived, as they would have had in case such former lease had been still continued, or as they would have had in case the respective under-leases had been renewed under such new principal lease."

The effect of this enactment, while it gives a lessee the right to surrender notwithstanding his contracts with his sub-lessee, leaves untouched the sub-contract, though it is merely an agreement for a sub-lease; and the effect of a new demise after the surrender for the residue of the original term is to make the new lessee the assignee of the reversion of the terms created by the surrenderor (q).

By 8 & 9 Vict. c. 106, s. 9, "when the reversion expectant on a lease made either before or after the passing of this act, of any tenements or hereditaments of any tenure, shall after the said first day of October, 1845, be surrendered or merge, the estate which shall for the

8 & 9 Vict.
c. 106, s. 9.
Substituted
Reversion on
Leases.

(q) *Cousins v. Phillips*, 3 H. & C. 892; 1 B. & Ad. 715; *Wootley v. Gregory*, 2 Y. 35 L. J., Ex. 84; *Doe d. Palk v. Marchetti*, & J. 536.

time being confor as against the tenant under the same lease the next vested right to the same tenements or hereditaments, shall, to the extent and for the purpose of preserving such incidents to and obligations on the same reversion as but for the surrender or merger thereof would have subsisted, be deemed the reversion expectant on the same lease." The object of this enactment was to do away with the rule that the covenants of and remedies against the lessee, and the obligations on the lessor, being incident to the *immediate* reversion, cease as regards the land on the merger of that reversion in another estate (*r*). Such rule was altogether technical, and generally productive of injustice.

CH. IX. s. 6.
Renewal without Surrender of Sub-leases.

It has long been an established practice to consider those who are in the possession of lands under leases for lives or years, particularly from the crown, colleges, &c., as having an interest beyond the subsisting term: and this interest is usually denominated "the tenant right of renewal," which though not any certain or even contingent estate, there being no means of compelling a renewal, yet is so adverted to in all transactions relative to leasehold property, that it influences the price in sales, and is often an inducement to accept of it in mortgages and settlements.

"Tenant Right of Renewal."

SECT. 6.—*Exercise of Option to purchase.*

A lease frequently contains a clause enabling the tenant, upon giving certain notice to the landlord, to purchase the reversion. Such a clause is always for the interest of the tenant, as it binds him to nothing, and allows him the advantage of a trial of the demised premises. A form is given hereafter (*s*).

Time has been held to be of the essence of a stipulation that the lessee may purchase (*t*).

Time of the Essence of the Contract.

The purchase-money goes to the lessor's personal representatives, if the option be exercised after the lessor's death (*u*).

Purchase-money goes to Lessor's Personal Representatives. Insurance Money.

Where the landlord covenanted to insure, and the tenant had the option to purchase, and before the time for exercising the option expired the demised premises were burnt, the landlord receiving the insurance money; it was held that the tenant, upon exercising the option, could not sustain a claim to the insurance money as part of his purchase (*v*).

(*r*) *Webb v. Russell*, 3 T. R. 393; *Stokes v. Russell*, 3 T. R. 678; *Wootley v. Gregory*, 2 Y. & J. 536; *Burton v. Barclay*, 7 Bing. 745; *Thorn v. Woolcombe*, 3 B. & Adol. 586.

(*s*) See post, Appendix B., Sect. 7, and see also Dav. Prec., Vol. V., p. 157. "Lease to Builder's Nominee of First-Class House in London," Pridgeaux Prec., Vol. II., p. 44.

(*t*) *Lord Ranelagh v. Melton*, 2 Dr. &

Sin. 278. And see the cases cited ante, 108. As to reinstating property out of insurance money after exercise of option, see *Reynard v. Arnold*, L. R., 10 Ch. 386.

(*u*) See *Wetling v. Wetling*, 1 J. & H. 421; *Pridgeaux*, 45.

(*v*) *Edwards v. West*, L. R., 7 Ch. D. 858; 17 L. J., Ch. 463; 38 L. T. 481; 26 W. R. 507, distinguishing *Reynard v. Arnold*, L. R., 10 Ch. 386.

CHAPTER X.

R E N T.

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SECT. 1.—*Different kinds of Rent.*

Definition of Rent.

RENT (redditus) is a retribution or compensation for the lands demised. It is defined to be a certain profit issuing yearly out of lands and tenements corporeal: and may be regarded as of a twofold nature:—first, as something issuing out of the land, as a compensation for the possession during the term; and, secondly, as an acknowledgment made by the tenant to the lord of his fealty or tenure (*a*).

Rent need not be in Money, but it must be certain, and must issue out of the Thing demised.

Rent must always be a profit; but there is no occasion for it to be, as it usually is, a sum of money; for spurs, capons, horses, corn, and other matters, may be, and occasionally are, rendered by way of rent (*b*): it may also consist in services and manual operations; as to plough so many acres of ground, and the like; which services, in the eye of the law, are profits (*c*). This profit must also be certain, or capable of being reduced to a certainty by either party, and must issue out of the thing granted, and not be part of the land or thing itself, wherein it differs from an exception in the grant, which is always of part of the thing granted (*d*). But a royalty payable to a landlord upon the bricks which are made out of a brickfield, is a rent, although it is not paid for the produce of the land, which is periodically renewed, but for portions of the land itself, which is gradually exhausted by the working (*e*).

(*a*) Bradby, 24; 2 Blac. Com. 41; Co. Lit. 142 a; Gilb. Rents, 9; Smith L. & T. 111 (2nd ed.).

(*b*) 1 Inst. 142 a.

(*c*) *Doe d. Edney v. Benham*, 7 Q. B. 976; *Doe d. Robinson v. Hindr*, 2 Moo. &

R. 441; *Duke of Marlborough v. Osborn*, 5 B. & S. 67; 33 L. J., Q. B. 148 (team work); Smith L. & T. 111, 112 (2nd ed.).

(*d*) Smith L. & T. 112; Bac. Abr. Rent (A.).

(*e*) *Reg. v. Westbrook*, 10 Q. B. 178.

The lessee of tithes, advowsons or any incorporeal hereditaments, is liable to an action for the gross sum or sums agreed upon for the use and enjoyment but not for "rent" (*f*). Where the owner of a factory let "standings" in some of its rooms for lace machines, he himself supplying the steam power by which they were put in motion; it was held, that there was no demise of the room, and consequently that the weekly payments reserved could not be distrained for, *as rent* (*g*). But where A. let to B. a defined portion of a room in a factory, with steam-power for working lace-machines belonging to B., at a certain sum per annum, payable quarterly, a deduction to be allowed in the event of hindrances in the supply of power beyond seven days in each quarter; this was held a sufficient demise to entitle A. to distrain (*h*).

CH. X. SEC. 1.
Different kinds of Rent.

Incorporeal Hereditaments.
"Standings" for Machi-

There are at common law three sorts of rents:—rent-service, rent-charge and rent-seck (*i*). Rent-service was so called because it had some corporeal service incident to it, as, at the least, fealty (*k*). Every copyhold rent (*l*), and every rent reserved on a lease, is a rent-service (*m*).

Rent-service.

A rent-charge is where land is charged with a rent by deed or will *with power to distrain* for the same, but the owner of the rent has no reversion in the land: as where a person conveys to another land in fee simple, reserving a certain rent payable thereout, with a clause of distress, that if the rent be in arrear or behind for a specified number of days it shall be lawful to distrain for the same. In such case the land is liable to the distress, not of common right, but by virtue of the clause in the deed; and therefore it is called a rent-charge, because in this manner the land is charged with a distress for the payment of it (*n*).

Rent-charge.

A fee-farm rent is a rent-charge reserved on a grant in fee; the name is founded on the perpetuity of the rent or service, and not on the amount (*o*).

Fee-farm Rent.

Rent-seck (*redditus-siccus*), or barren rent, is in effect nothing more than a rent reserved by deed or will, but *without any clause of distress*: and differs from a rent-charge only in being reserved without a clause of distress (*p*). A right to distrain for rent-seck, however, "as in the case of rents reserved upon lease," and also for rent of assize and

Rent-seck.

And see *Daniel v. Gracie*, 6 Q. B. 145; post, 349.

(*f*) Co. Lit. 47 a; Gilb. Rents, 24.

(*g*) *Hancock v. Austin*, 14 C. B., N. S. 634.

(*h*) *Selby v. Greaves*, L. R., 3 C. P. 594; 37 L. J., C. P. 251. And see *Smith v. Eginton*, 43 L. J., C. P. 110; L. R., 9 C. P. 145; 30 L. T. 521.

(*i*) Bac. Abr. Rent (A.); Smith L. & T. 112, 114 (2nd ed.).

(*k*) Co. Lit. 87 b; Gilb. Rents, 9.

(*l*) *Laugher v. Humphrey*, Cro. Eliz. 524.

(*m*) Smith L. & T. 112.

(*n*) Co. Lit. 143 b; Gilb. Rents, 17, 38; *Bradbury v. Wright*, 2 Doug. 628; Smith L. & T. 113, 116 (2nd ed.).

(*o*) Co. Lit. 143 b, n. (5); *Governors of Christ's Hospital v. Harrild*, 2 M. & G. 713, n.; Smith L. & T. 114 (2nd ed.).

(*p*) Gilb. Rents, 33.

CH. X. SEC. 1. chief rents, is given by the statute 4 Geo. 2, c. 28, s. 5, which applies
Different kinds to all rents “duly answered or paid for the space of three years
of Rent. within the space of twenty years” before that session of parliament,

Rents of
Assize.

“or should be thereafter created.” The three years mentioned in this section need not be consecutive (*g*), and a fee-farm rent may be distrained for if brought within the section (*r*). Rents of assize are the certain established rent of the freeholders and ancient copyholders of a manor, and which cannot be departed from: those of the freeholders are frequently called chief-rents, and both sorts are indifferently denominated quit-rents, because thereby the tenant goes quit and free of all other services (*s*). Payment of an unvaried rent for a long series of years to the lord of a manor, is evidence only of a title to the rent (which is presumed to be a quit-rent), but not to the land in respect of which the rent is paid (*t*).

Chief-rents.
Quit-rents.

Rack-rent.

Rack-rent is a rent of the full annual value of the tenement, or near it (*u*).

Fore-hand
Rents or
Fines.

A fine or premium given by the lessee to the lessor at the time of taking or renewing a lease is in the nature of a fore-hand rent, and has been considered as an improved rent (*x*). In the case of renewal of a lease by an ecclesiastical corporation, if an accident, which has not happened from their fault or that of the tenant, delay the lease, a new member coming in has his proportion of the fine (*x*).

Rent payable
in Advance.

Sometimes rent is made payable from quarter to quarter or otherwise *in advance*. Such rent could not of course be recovered in advance in an action for use and occupation (*y*), but a distress may be made, or an action maintained for such rent, as soon as it becomes payable, according to the terms of the demise (*z*). The reservation should be clearly expressed so as to make the rent payable from time to time in advance: otherwise it may perhaps be construed as applicable to the first quarter only (*a*). Thus where premises were let, “the yearly rent to be 110*l.*, and to be payable in advance if the landlord required the same,” nothing being said as to the days of payment; and after a quarter had expired the landlord demanded a quarter’s rent only: it was held, that he was not entitled to distrain for the whole 110*l.* (*b*). But where it was a condition in the lease of a farm that the tenant should pay the last half-year’s rent in advance, which last half-year’s rent should be considered as reserved and due on the 29th

(*g*) *Musgrave v. Emerson*, 10 Q. B. 326.

(*r*) *Id.*; *Bradbury v. Wright*, 2 Dougl. 624.

(*s*) 2 Blac. Com. 41; *Gilb. Rents*, 38; *Co. Lit.* 144, *Harg. n.* (5).

(*t*) *Doe d. Whitlick v. Johnson*, *Gow*, 173.

(*u*) 2 Blac. Com. 42.

(*x*) *Irish Society v. Needham*, 1 T. R. 486; *Southall v. Leadbetter*, 3 T. R. 461;

Wynne v. Dampton, 3 Atk. 473.

(*y*) *Angell v. Randall*, 16 L. T. 480.

(*z*) *Jenner v. Clegg*, 1 Moo. & R. 213; *Lee v. Smith*, 9 Exch. 662; *Morton v. Woods*, L. R., 3 Q. B. 658; 37 L. J., Q. B. 242; *Smith L. & T.* 218 (2nd ed.).

(*a*) *Holland v. Palmer*, 2 Stark. R. 161; *Hopkins v. Helmore*, 8 A. & E. 463.

(*b*) *Clarke v. Holford*, 2 C. & K. 540.

September preceding, if the landlord should see cause for such demand; CH. X. SEC. 1. it was held, that the landlord was entitled to demand the last half-year's rent, and to distrain for it at any time between the 29th September and the expiration of the tenancy, without demand previous to the 29th September (e). Different kinds of Rent.

SECT. 2.—Reservations of Rent.

(a) Mode of Reservation.

The usual formal reddendum in a lease is not essential. Any expressions showing the intention of the parties that a rent shall be payable will be a sufficient reservation (d). The reservation of rent, however, ought to be certain as to the amount and the time when payable (e); although if there be any thing in the reservation by which the amount of the rent may be ascertained, this will be as good as if the sum itself were clearly specified, in accordance with the maxim *Id certum est quod certum reddi potest* (f). Thus in *Daniel v. Gracie*, the proprietor of a house, and of a marl pit and brick mine, demised the house by unwritten agreement to D. from a day named, and it was at the same time agreed between them, without writing, that D. should take the marl pit and the brick mine, and should pay quarterly, at the usual quarter days, *8d. per solid yard* for all the marl that he got, and *1s. 8d. per thousand* for all the bricks that he made. D. took the marl and made bricks accordingly, and paid the stipulated sums for a time; but they afterwards fell into arrear. It was held, that the agreement for the marl pit and brick mine was a demise of the land from year to year, at a rent capable of being ascertained with certainty, for which, consequently, the lessor might distrain (g). Reservation ought to be sufficiently certain.
Daniel v. Gracie.

Rent may be reserved to commence before the lessee is to enter upon the enjoyment of the land. Thus where a man made a lease of Blackacre to commence in futuro, and of Whiteacre to begin in præsentî, rendering rent payable at Michaelmas before the commencement of the term in Blackacre; it was held to be a reservation immediately; for it was but one entire rent, and as such was payable according to the reservation (h). A subsequent agreement may by relation operate to make a reservation of rent from the beginning (i). Rent may commence before Enjoyment.

(e) *Witty v. Williams*, 12 W. R. 755.

(d) *Gilb. Rents*, 30, 33; *Doe d. Ruins v. Kneller*, 4 C. & P. 3; *Atto v. Hemmings*, 2 Bulstr. 281; cited 2 H. & C. 427.

(e) *Parker v. Harris*, 1 Salk. 262; 4 Mod. 79; Lit. s. 213; *Gilb. Rents*, 9.

(f) *Orby v. Mohun*, 2 Vern. 531, 512; 2 Freem. 291; 3 Bro. P. C. 248; *Gilb. Eq.*

R. 45; *Gilb. Rents*, 9, 10; *Co. Lit.* 96 a, 142 n.

(g) *Daniel v. Gracie*, 6 Q. B. 145; and see *Pollitt v. Forrest*, 11 Q. B. 949; *Bowers v. Nixon*, 12 Q. B. 546; *Edmonds v. Eastwood*, 2 H. & N. 811, 826.

(h) *Gilb. Rents*, 25.

(i) *M'Leish v. Tate*, Cowp. 781.

CH. X. SEC. 2.

Reservations of Rent (Mode of).

From what Rent must issue.

Properly speaking, a rent can be reserved out of no inheritance but such as is manurable, as it is called, or upon which the lessor may enter to distrain (*k*); a lease of the vesture or herbage of the land reserving rent, is good, because the lessor may come upon the land to distrain the lessee's beasts feeding thereon; but a reservation of grass, herbage, or other vesture of the land, would be bad, because they are part of the thing demised (*l*). There is this difference between a reservation, which is always of a thing not in being, but newly created or reserved out of the land or tenement demised; and an exception, which is ever a part of the thing granted, and of a thing in being (*m*).

Where Reservations are entire or several.

There is a difference between a rent reserved entire, upon a demise of several things in the same lease, and where the rent is not originally reserved entire, but the reservation is several and apportioned to the several things demised: for instance, if a lease be made of several houses, rendering the annual rent of 5*l*. at the two usual feasts—viz. for one house 3*l*., for another 10*s*., and for the rest of the houses the residue of the said rent of 5*l*.—with a clause of re-entry into all the houses for non-payment of any parcel of the rent: this is but one reservation of one entire rent; because all the houses were leased, and the 5*l*. was reserved as one entire rent for them all, and the “viz.” afterwards does not alter the nature of the reservation, but only declares the value of each house (*n*). But if the lease had been of three houses, rendering for one house 3*l*., for another 20*s*., and for the third 10*s*., with a condition to re-enter into all for the non-payment of any parcel; these are three several reservations, and in the nature of three distinct demises: and each house in this case is only chargeable with its own rent (*o*).

Whole Demise void if Part cannot be legally demised.

Where there is a demise of premises, and an entire rent reserved, if any part of the premises could not be legally demised, the whole demise is void (*p*). But in an action for rent upon an indenture of demise, a plea of the defendant that prior to the making of the demise the plaintiff had demised two roods, part of the demised premises, to A., which demise to A. was still in force, whereby the defendant was kept out of possession of that part of the demised premises, was held no answer to the claim for the entire rent reserved. This was because the demise to the defendant, which was under seal, operated as a lease in possession of all that part of the lands of which the lessor had the possession at the time of the demise, and as a lease of the reversion, with the rent incident thereto, of that part of the lands of which the lessor had not the possession, and thereby con-

(*k*) Gilb. Rents, 20.

(*l*) Co. Lit. 47, 142 a; Gilb. Rents, 26.

(*m*) Ante, 161.

(*n*) Gilb. Rents, 34.

(*o*) Gilb. Rents, 35; *Tanfield v. Rogers*, Cro. Eliz. 341.

(*p*) *Doe d. Griffith v. Lloyd*, 3 Esp. 78.

vayed to the defendant the whole interest in respect of which the entire rent was reserved (q). CII. X. SEC. 2.
*Reservations of
Rent (Mode of).*

In early times it was much the practice to reserve the rent payable on two alternate days, as on the usual feasts or days of payment, or within a certain number of days afterwards (r). But this being found to be attended with serious inconveniences (s), rent is now generally reserved on a day certain, with a proviso for re-entry on nonpayment within a specified number of days after the day appointed. Reservation
on specified
Days.

If rent is intended to be paid in advance (t), the reservation should be clearly expressed. Rent in
Advance

A restriction occurs with regard to college leases, created by statute 18 Eliz. c. 6 (u), by which it is directed that one-third of the old rent then paid should for the future be reserved in wheat or malt, reserving a quarter of wheat for each 6s. 8d., or a quarter of malt for every 5s., or that the lessees should pay the same according to the price that wheat and malt should be sold for in the market next adjoining to the respective colleges, on the market day before the rent becomes due. This sagacious plan is said to have been the invention of Lord Treasurer Burleigh and Sir Thomas Smith, then principal Secretary of State; who, observing how greatly the value of money had sunk, and the price of all provisions risen, by the quantity of bullion imported from the newly-found America, devised this method for upholding the revenues of colleges. Their foresight and penetration have in this respect been very apparent. The corn-rent has made the old rent approach in some degree nearer to its present value; otherwise it would seem that the principal advantage of a corn-rent is to secure the lessor from the effect of a sudden scarcity of corn (x). If the reservation be of corn—as in the case of a hospital renewed lease, where the reddendum was “so many quarters of corn”—it will be understood to mean legal quarters, reckoning the bushel at eight gallons (y). A reservation of eight bushels of grain in lieu of one quarter is good, because it is all one in quality, value and nature (z). Corn-rent.

In a lease of land for twenty-one years from the 25th of March, 1848, it was covenanted that the lessee should pay a stipulated sum for the first year, with a proviso that the rent for each subsequent year of the term should be reduced or increased according to the “average price of wheat in any one year of the said term,” such average “to be taken and ascertained from the then current year’s averages, which were taken in the month of January in every year under and by virtue Computation
of Rent by
average Price
of Corn.
*Kendall v.
Baker.*

(q) *Ecc. Commrs. of Ireland v. O'Connor*, 9 Ir. Com. L. R. 242. from the operation of 39 & 40 Geo. 3, c. 41, by sect. 7 of that act.

(r) *Anon.*, 2 Show. 77. (x) 2 Blac. Com. 322.

(s) *Gilb. Renta*, 52, 53; *Chun's case*, 10 Co. R. 127; *Biggin v. Bridge*, 3 Keb. 534. (y) *Master, &c. of St. Cross v. Ld. Howard de Walden*, 6 T. R. 338.

(t) See the cases ante, 348. (z) *Mountjoy's case*, 5 Co. R. 3 b; Sug.

(u) This statute is specially exempted Pow. 797.

CH. X. SEC. 2. of the Tithe Commutation Act (6 & 7 Will. 4, c. 71), s. 56," which is the result of the sales "during seven years ending on the Thursday next before Christmas-day then next preceeding." It was held, that the rent might be computed according to such septennial average so published in each year(*a*).

Reservations of Rent (Mod. of).

(b) *Construction of Reservations.*

Construction of Reservations generally.

Where there are special days of payment mentioned in the reddendum, the rent ought to be computed according to the reddendum and not according to the habendum(*b*); but where the reservation is general, as half-yearly or quarterly, and no special days are mentioned, there the half-year or quarter must be computed according to the habendum(*c*). If a man make a lease the first day of May, reserving rent payable quarterly, this means quarterly from the making of the lease: for if the beginning of the quarter should be construed to be any other day than the date of the lease, the lessor would lose the profits of his land for some time, and consequently not have quarterly payment made during the continuance of the lease(*d*). Where rent was to be payable by a parol demise from the Lady-day following, evidence of the custom of the country was admitted to show that by "Lady-day," "Old Lady-day" was intended(*e*).

A *net* rent is a sum to be paid to the landlord clear of all deductions, so as to include, for instance, land tax and sewers rate(*f*).

Mining Leases.

Where a lessee of a colliery covenanted to pay as rent "one-third part of the money that should arise, be made, received or produced from the sale of the coals;" and also covenanted to keep "true accounts of all coal daily raised, and to make and deliver true copies thereof;" it was held, that the rent was to be calculated on the amount of coals sold, not on the amount of money actually received for them(*g*). Mining leases frequently stipulate for two rents; first, a dead rent, i. e. a rent payable whether the mines be worked or not; and secondly, a royalty upon the minerals raised. In one case the demise was of all right and interest in coals and other minerals in a certain estate, yielding and paying yearly for every ton of coal that should be worked, not exceeding 13,000 tons in any year, the sum of 8*d.* per ton, or yielding that amount of money, viz. 433*l.* 6*s.* 8*d.*, as fixed rent, whether the coals

Dead Rent.

(*a*) *Kendall v. Baker*, 11 C. B. 842.
 (*b*) As to discrepancy between the habendum and reddendum with respect to the length of the term, see *Burchell v. Clark*, 46 L. J. 115 (C. A.), and 134, ante.
 (*c*) *Tomkins v. Pincent*, 2 Ld. Raym. 819; 1 Salk. 141; 7 Mod. 96.
 (*d*) *Gilb. Rents*, 50; 2 Roll. Abr. 449, 450.

(*e*) *Doe d. Hall v. Benson*, 4 B. & A. 588; *Denn v. Hopkinson*, 3 D. & R. 507; *Smith v. Walton*, 8 Bing. 235; but see *Hogg v. Norris*, 2 F. & F. 246.
 (*f*) *Jennett v. Womack*, 7 B. & C. 627; 3 C. & P. 96.
 (*g*) *Edwards v. Rees*, 7 C. & P. 340.

CH. X. SEC. 2.
Reservations of
 Rent (Con-
 struction of).

should be worked or not, and for every ton above 13,000 tons 9*l.* per ton. The lessee covenanted to raise 13,000 tons of coal in each year, and to pay in the same terms as the *reddendum*. This was held to be an absolute covenant to pay that fixed rent, although the mine became exhausted (*h*). In another case the covenant was, that the lessee would deliver quarterly to the lessor a certain proportion of all coal raised, or pay him quarterly the value in money; provided, that in case at the end of the first quarter of any year the quarterly delivery or payment should not be equal to 37*l.* 10*s.*, then the lessee should pay such additional sum as would make up 37*l.* 10*s.*; and in case at the end of the second quarter such deliveries or payments for that and the preceding quarter should not be equal to 75*l.*, then the lessee should pay such additional sum as would make up 75*l.*, with a similar provision for the third and fourth quarters, it being the intent and meaning of the parties that the royalties thereby named should always amount to the sum of 150*l.* per annum at the least. This was held to be a *quarterly* minimum rent, and it was decided that an excess of this royalty in one quarter could not be set off against a deficiency in a previous quarter (*i*). But where A. demised to B. certain pits of clay on his land for twelve years, B. to pay 2*s.* 6*d.* per ton on all clay raised half-yearly, and B. covenanted to raise not less than 1,000 tons, nor more than 2,000 tons yearly: it was held that this was not an absolute covenant by B. to raise 1,000 tons yearly or else pay the rent, but that there was an implied condition that there existed clay to the amount of 1,000 tons yearly capable of being raised (*j*).

If rent be made payable *yearly*, without saying "during the said term," the payment must nevertheless be made every year during the continuance of the lease (*k*). If a lease be made for years, provided that the lessee shall pay at Michaelmas and Lady-day 10*l.* by equal portions "during the term," though this rent is not made payable *yearly*, yet the law construes it to be so, because it is payable at the two feasts during the term (*l*): so, if a man demise for five years, rendering 100*l.* to be paid by equal portions during the term, it must be paid *yearly*, though that word was omitted (*m*). If a lease be made rendering rent at the two usual feasts of the year, without specifying what feasts, the law construes such payments to be made at Michaelmas and Lady-day, because those are the usual days

Supply of
 Words in the
 Construction.

(*h*) *Marquis of Bute v. Thompson*, 13 M. & W. 487; *Jervis v. Tomkinson*, 1 H. & N. 195, 208.

(*i*) *Bishop v. Goodwin*, 14 M. & W. 260.

(*j*) *Clifford v. Watts*, L. R., 5 C. P. 577; 40 L. J., C. P. 36; 22 L. T. 717;

18 W. R. 925.

(*k*) *Gilb. Rents*, 51; *Harrington v. Wise*, Cro. Eliz. 486; *Moore*, 459; *Noy*, 57.

(*l*) *Gilb. Rents*, 50.

(*m*) *Com. Dig. tit. Rent* (B. 8).

CH. X. SEC. 2. Reservations of Rent (Construction of). appointed in contracts of this nature for payments (*n*): so, if a man grant a rent payable at the two usual feasts of the year, this means by equal portions, though not so mentioned in the deed, because where there are two several days appointed for payment, it is the most reasonable construction that a moiety of the rent shall be paid at each day (*o*). If a man make a lease to another on the 6th day of August, rendering yearly rent at two terms of the year, viz. at Lady-day and Michaelmas, by equal portions; though in this case, by the appointment of the parties, Lady-day be the first term mentioned, yet the first payment shall be made at Michaelmas ensuing the date of the lease, for without such transposition of the words of the deed, the intention of the parties could never be fulfilled, because the rent is reserved annually, and the lessor would lose the profits of one half-year if the first rent was not payable at Michaelmas; and the lessee would enjoy the land from the date of the lease to the first Michaelmas, and likewise from the last Lady-day of the term to the expiration of it, without paying anything: because, though the rent ended in August, yet the payment was not to be made till the Michaelmas following, before which time the lease would have expired (*p*). By indenture dated 21st March, a messuago was demised from 25th March then instant, for seven years wanting seven days, paying therefor yearly and every year during the term the yearly rent of 28*s* 7*d*. by four equal quarterly payments on the 25th of March, 24th June, 29th September, and 25th December, in every year commencing from the said 25th March then instant; it was held, that this was either a covenant to pay a before-hand rent, whereby all the payments would become due within the term, or else that, by virtue of the words yearly and every year, the lessee would be liable for the last quarter's rent on a day after the expiration of the term (*q*). Where by agreement, dated 8th September, a house was let for seven years at an annual rent payable quarterly, the *first payment* to be made on the 25th March following, it was held that only a quarter's rent became due on the 25th March, and that in effect the payment for the first quarter was postponed until after the end of the term (*r*).

“Gale.”

Each periodical payment of rent is termed a “gale,” from “*gavel*,” a rent or duty, and each “gale” is a distinct debt (*s*).

“Team Work.”

In a lease of a farm, the clause “the tenant to perform each year for the landlord at the rate of one day's team work with two horses and one proper person for every 50*l*. of rent when required (except at hay and corn harvest), without being paid for the same,” extends to other than agricultural work, such as hauling coals; but it does

(*n*) Gilb. Rents, 51; 2 Roll. Abr. 450.

(*o*) Id.

(*p*) Gilb. Rents, 49, 51; Hill v. Grange, Plow. 171.

(*q*) Hopkins v. Helmore, 8 A. & E. 463.

(*r*) Hutchins v. Scott, 2 M. & W. 809.

(*s*) Welby v. Phillips, 2 Vern. 129.

not oblige the tenant to find a cart, plough or other vehicle or machine necessary for the performance of the work (f). CH. X. SEC. 2.

*Reservations of
Rent (Con-
struction of).*

(c) *To whom Rent reserved.*

Rent must be reserved to the lessor himself, and not to a stranger, for it is something paid by way of retribution or compensation for the land, and ought to be made to him from whom the land passes; only the crown can make a reservation of rent to a stranger (u). If A., and B., his son, by lease reciting that B. is the heir apparent of A., let for years to commence after the death of A., rendering rent to B., it will be void; for a reservation to him by his proper name, and not to him as heir, is the same as if it were to a stranger (x). Where by a lease rent was reserved to a person *not a party* to the lease, and the lessees covenanted with him and the lessors to pay rent, &c., it was held, that he could not join with the lessors in an action of covenant for non-payment of the rent (y). Where there is any doubt as to the person to whom the reservation should be made, the clearest and safest way is to reserve the rent *generally, during the term (without saying to whom)*, and leave it to be distributed by the law in the mode pointed out in *Whitlock's case* (z): for if the reservation of rent be general, the law directs it to be paid according to the intent and the nature of the thing demised. In such case the rent goes to the person who would have succeeded in the estate if the lease had not been made (u).

Rent must be reserved to Lessor himself.

As rent is intended by law to follow the reversion, inaccuracies of expression, by which the reservation is made to other persons than the reversioner, have not the effect of severing it from the reversion: thus, if the reservation be made to the owner in fee, "his heirs, executors or assigns," the word "executors" will be rejected, and the rent will go with the reversion and belong to the heirs (b). In any case (except under a power) it is safe to make the reservation to the lessor, "his heirs, executors, administrators and assigns" (c). If a lessee for a term of years makes a lease for a less term of years, rendering rent to him "and his heirs during the term," it will go to his executors (d); but it seems to be otherwise when the words "during the term" are omitted (e). If a tenant in tail demise for years,

Effect of In-
accuracies of
Expression
as to Parties
in the Reser-
vation.

(f) *Duke of Marlborough v. Osborn*, 5 B. & S. 67; 33 L. J., Q. B. 148.

(u) Lit. s. 346; Co. Lit. 47 b; Id. 143 b; Gilb. Rents, 54.

(x) Com. Dig. tit. *Rent* (B. 5); *Oates v. Frith*, Hob. 130; Co. Lit. 47, 143 b; *Saunders v. Froggat*, 1 Vent. 161; 2 Saund. 370; Gilb. Rents, 59.

(y) *Id. Southampton v. Brown*, 6 B. & C. 718.

(z) 8 Co. R. 70, 141.

(a) Gilb. Rents, 64, 71.

(b) Id. 61; Cro. Car. 207; Co. Lit. 47 a; 1 Wms. Exors. 768 (6th ed.).

(c) *Dollen v. Batt*, 4 C. B., N. S. 768; *Whittome v. Lamb*, 12 M. & W. 813.

(d) Gilb. Rents, 66; 1 Vent. 162; 2 Wms. Saund. 371, n. (7).

(e) Gilb. Rents, 66; 1 Vent. 161.

CH. X. SEC. 2. *Reservations of Rent (to whom reserved).* rendering rent to himself and his heirs, this goes to the heir in tail (*f*), and not to the general heir. So if a tenant in tail to him and the heirs male of the body of his father, lets the land, rendering rent to him, "his heirs and assigns," the rent will go to the heir male of the body of his father, though he be not heir to the lessor (*g*).

Reservation by Tenant for Life.

Whitlock's case.

Reservation by Tenant in Fee to himself simpliciter.

If a tenant for life, having a power, demise, rendering rent to himself, his heirs and assigns, "it shall be adjudged to him in remainder" (*h*).

It appears that a simple reservation of rent to the lessor only, not mentioning his heirs, is good for the life of the lessor only (*i*); but that a reservation to the lessor or his heirs *during the term* is good for the whole of the term (*k*). Where the words "during the term" are omitted, and the reservation be either to the lessor *or* his executors or assigns (*l*), or to the lessor *or* his assigns (*m*), the reservation is good for the life of the lessor only.

(d) *Sums in Gross, quasi Rent.*

Where a Sum reserved may enure by way of Contract, though not as Rent.

A reservation of an annual sum of money to a third person in consideration of a demise, may be good by way of contract, though it is not a sufficient reservation of rent, but the grantee cannot distrain for it, because he has not the reversion (*n*). If a lessee simply covenant to pay such a sum yearly, without mentioning it as a consideration of the demise of the premises, it is not a rent, properly so called, but a sum in gross (*o*). So under a contract for a building lease, where sums in the nature of rent are from time to time to be paid before the lease is granted, such payments are sums in gross, and not rent (*p*). Where a landlord who had demised premises for a term of years at a certain rent, afterwards agreed to enlarge the buildings, the lessees agreeing to pay 10*l.* per cent. additional on the outlay; it was held, that this was a collateral agreement, and not a contract running with the land (*q*). So where a sum of money is made payable for goodwill, over and above the rent, this additional sum, though payable annually, is not to be considered as rent, but only as a sum in gross (*o*). Where a lease reserved a rent of 40*l.* per annum, and at the end of it, the words "the allowance of the road to the Six Bells' Yard to be made as usual" were added, and it appeared that it had been usual for the landlord to allow a payment of 5*l.* annually, which the lessee paid to

(*f*) Com. Dlg. tit. *Rent* (B. 5); *Sacheverell v. Froggat*, 1 Ventr. 161; 2 Wms. Saund. 371, n. (7); Sir T. Raym. 213.

(*g*) *Cotter v. Merrick*, Hardr. 91, 95; Gilb. Rents, 70.

(*h*) *Whitlock's case*, 8 Co. R. 70 b; Gilb. Rents, 70; 2 Wms. Saund. 371, n. (7); *Greenaway v. Hart*, 14 C. B. 340.

(*i*) Co. Litt. 47 a.

(*k*) *Sacheverell v. Froggat*, 1 Ventr. 161.

(*l*) Gilb. Rents, 62.

(*m*) Id. 65.

(*n*) *Oates v. Frith*, Hob. 130.

(*o*) *Smith v. Mapleback*, 1 T. R. 441.

(*p*) *Howlett v. Tarte*, 10 C. B., N. S. 813; 31 L. J., C. P. 146; *Marquis Camden v. Batterbury*, 7 C. B., N. S. 864.

(*q*) *Lambert v. Norris*, 2 M. & W. 333; *Hoby v. Roebuck*, 7 Taunt. 157; *Donellan v. Read*, 3 B. & Ad. 899.

a third person for the use of a road, it was held, that the clause in question was a mere covenant, and not an alteration of the rent, so as to support a plea of non tenuit in replevin (*r*). CH. X. SEC. 2.
Reservations of Rent (Sums in Gross).

(e) *In Lease under Power.*

The power of leasing commonly introduced into settlements of estates in England requires the best rent to be reserved, and expressly prohibits the taking of a fine (*s*). Formerly these powers required the ancient or usual rent to be reserved, but at the present day this practice is very properly exploded (*t*). General Restrictions in Powers as to Rent.

Where a lease is made under a leasing power, it must clearly appear by the instrument that the proper rent has been reserved (*u*); and although generally the lease must specify the rent reserved, yet in some cases the reservation may be made in the terms of the power generally (*x*), for, *Id certum est quod certum reddi potest*. What a sufficient Execution of a Power generally.

Although at common law rent can be reserved only to the lessor and his heirs who are privies in blood, and not to any who is privy in estate—as to him in reversion, remainder, &c. (*y*)—yet in the case of powers the reservation to a tenant for life and his heirs is good, and enures as rent to the remainderman, who may distrain for it (*z*). But where the lease did not recite the power, and was made by a tenant for life in remainder after a term of 500 years, and reserved the rent to him, his heirs and assigns, it was decided to be void, the rent not being made incident to the immediate reversion (*a*). To whom the Reservation may be made.

The terms “ancient and accustomed” rent in a power to lease are to be understood as applicable to rent which was reserved at the creation of the power, if a lease were *then* in being, or that which was last *before* reserved, if no lease were then in being (*b*); unless, indeed, the last preceding lease was an exception to the general practice, in which case the previous leases may be followed (*c*). Under a power to a tenant in possession to let all or any part of the premises, so as the usual rents be reserved, a lease of tithes, which had never been let before, was held void (*d*). A lease at a single rent of premises under Construction of the “ancient and accustomed Rent” as to Amount.

(*r*) *Jarvis v. Stacey*, 12 A. & E. 506.

(*s*) Sug. Pow. 779 (8th ed.).

(*t*) Id. 790.

(*u*) *Ker v. Duke of Roxburgh*, 2 Dow, 149; Sug. Pow. 792, pl. 36; Id. 802.

(*v*) *Powell on Powers*, 555; *Orby v. Mohun*, 3 Ch. Rep. 56; 3 Bro. P. C. 248; Gilb. Eq. R. 45; 2 Vern. 531, 542; 2 Freeman, 291; *Lewson v. Pigot*, cited 3 Ch. Rep. 61; Sug. Pow. 801.

(*y*) Ante, §55.

(*z*) *Anon.*, Anderson, 278; *Powell on Powers*, 572—574.

(*a*) *Yellouby v. Gower*, 11 Exch. 274, 291; *Bailey v. Tenant*, 11 Exch. 776.

(*b*) *Morrice v. Antrobus*, Hard. 325; *Orby v. Mohun*, 3 Ch. R. 56; 2 Vern. 531; Prec. Ch. 257; 2 Freem. 29; *Right v. Thomas*, 1 W. Blac. 446; 3 Burr. 1441; *Doe v. Creed*, 4 M. & S. 371; *Doe d. Douglas v. Lock*, 2 A. & E. 705; *Doe v. Stephens*, 6 Q. B. 208; Sug. Pow. 790 (8th ed.).

(*c*) *Doe d. Biddulph v. Hole*, 15 Q. B. 848.

(*d*) *Pomery v. Partington*, 3 T. R. 665; Sug. Pow. 731, pl. 12 (8th ed.).

CH. X. SEC. 2. a power, together with other premises to which the power does not extend, is bad (*e*); but the joining of different lands in one lease which are all under the power, though never before let by a single demise, the rent reserved being in proportion to the rents formerly reserved, is not objectionable (*f*). Sometimes a lease under a power may be sustained by an apportionment of the rent (*g*). Part of premises formerly demised jointly with others at one entire rent may be let under a power, at a distinct rent bearing the same proportion to the old rent that the premises demised by the lease bears to the whole premises formerly demised (*h*). Where there is a power to lease, reserving the ancient and accustomed heriots or more, and a lease is made varying from the ancient leases as to the reservation, the onus is on the lessee to show that the new reservation is as beneficial as the ancient one (*i*).

As to the
Manner of the
Reservation.

If a lease be made under a power requiring a reservation of the true and ancient rent, and the rent reserved be not conformable to that both in quantity and quality, and manner of reservation also, the lease, it is said, will be void (*k*). Heriots and the like need not be reserved in a lease made under a power restrained to the rendering the true and ancient rent; for they are casual and accidental services, and therefore fall not within the meaning of such restriction (*l*); but the omission to reserve a heriot, when a heriot has been accustomedly reserved, will vitiate the lease (*m*).

As to the Time
of Payment.

If there be a difference as to the time of the payment of the rent, so that it be not payable at the same periods as anciently, that will vitiate a lease under a power restricted to be made rendering the true and ancient rent: thus a reservation of the rent at two days, where the rent was formerly reserved and payable at four days, was held to make the lease void, because it was to the injury of the heirs in tail; for it was more beneficial to them to have it paid at four feasts than two, and all beneficial qualities of the rent ought to be reserved and observed (*n*). It has, however, been doubted whether a quarterly reservation of rent, which had been previously reserved half-yearly, will vitiate the lease (*o*). It has been held not to be a valid objection to a lease, that the rent was thereby made payable on the 25th

(*e*) *Doe d. Williams v. Mattheus*, 5 B. & Ad. 298; *Doe d. Earl of Egremont v. Stephens*, 6 Q. B. 208 (1st point); Sug. Pow. 799, 805; *Earl of Cardigan v. Montague*, Sug. Pow. 806, 918.

(*f*) *Doe d. Earl of Egremont v. Stephens*, 6 Q. B. 208 (3rd point); *Doe d. Earl of Egremont v. Williams*, 11 Q. B. 658 (1st point); Sug. Pow. 803.

(*g*) Sug. Pow. 807; Co Lit. 148 b; *Doe v. Meyler*, 2 M. & S. 276.

(*h*) *Doe d. Earl of Shrewsbury v. Wilson*, 5 B. & A. 363.

(*i*) *Doe d. Earl of Egremont v. Grazebrook*, 4 Q. B. 406.

(*k*) Powell on Powers, 552; *Booth v. A'Beckett*, 1 Moo. P. C. C. (N. S.) 201.

(*l*) *Baugh v. Haines*, Cro. Jac. 76; *Coventry v. Coventry*, 1 Com. 312; Sug. Pow. 790.

(*m*) *Doe d. Douglas v. Lock*, 2 A. & E. 705.

(*n*) *Mountjoy's case*, 5 Co. R. 3; Powell on Powers, 571.

(*o*) *Doe d. Douglas v. Lock*, 2 A. & E. 705; Sug. Pow. 793, 794 (8th ed.).

March and 29th September, (although the term commenced on the 6th January, and that, therefore, there was a fore-hand rent which might prejudice the remainderman,) inasmuch as the rent was made payable on the same days by a former lease, and therefore that this was the usual and accustomed rent (*p*); and also for the same reason that it was no objection to the lease that the rent was made payable by half-yearly payments, although the power required it to be payable yearly; the word *yearly* meaning the payment of rent in the year (*p*). But where a testator gave lands to trustees upon certain trusts, with a power to lease for the best yearly rent without fine or foregift; it was held that a lease for a fixed rent, with a proviso that the first five years' rent should be paid in advance, was not warranted by the power (*q*). The whole rent must be payable annually during the whole term, for the design of the donor is not answered unless a continual revenue be yearly payable by compulsion of law, and not in expectancy or in futuro (*r*); but under a power to make leases reserving the ancient yearly rent annually, if it were reserved upon a day before the year was up—as if the year ended at Christmas, and it was reserved at Michaelmas, it would be sufficiently in pursuance of the power (*s*). Where there was a power to lease, so that there were reserved and made payable during the continuance of the lease the best yearly rent; a lease from 11th October, making the rent payable by half-yearly payments on the 6th of April and the 11th of October, except the last half-year's rent, which was made payable on the 1st of August before the end of the term, was held a good execution of the power, it being more likely to benefit than to prejudice the remainderman (*t*). It seems clear that the rent cannot be reserved after the day appointed (*u*).

Whether the "best rent" is reserved is a question of fact to be decided by a jury (*x*). Improvements by the tenant, however valuable, will not authorize a lease at an undervalue (*y*). Where the lessor is bound to reserve the best rent which can be got, he must reserve the best rent which can be got at the time the lease is made, without any regard to a former lease in which a less rent might have been fairly reserved on account of money to be expended in improvements (*z*). Under a power to grant leases for twenty-one years, "so as upon

CH. X. SEC. 2.
*Reservations of
Rent (in Lease
under Power).*

Construction
of "best
Rent."

(*p*) *Doe* d. *Earl of Shrewsbury* v. *Wilson*, 5 B. & A. 363; *Doe* d. *Wilmot* v. *Giffard*, Id. 371; *Doe* d. *Harries* v. *Morse*, 2 Cr. & M. 247; *Fryer* v. *Coombs*, 11 A. & E. 403; *Doe* d. *Douglas* v. *Lock*, 2 A. & E. 705; Sug. Pow. 792.

(*q*) *Booth* v. *A'Beckett*, 1 Moo. P. C. C. (N. S.) 201; 9 L. T., N. S. 68.

(*r*) *Taylor* d. *Atkyns* v. *Horde*, 1 Burr. 121; 2 Smith L. C. 495 (6th ed.).

(*s*) *Reg. v. Weston*, 2 Ld. Raym. 1198;

Sug. Pow. 795.

(*t*) *Rutland* d. *Doe* v. *Wythe*, 2 M. & W. 661; 12 Id. 355; 10 Cl. & F. 419.

(*u*) *Luglow* v. *Beckwith*, Aley, 90; Sug. Pow. 795.

(*x*) *Wright* v. *Smith*, 5 Esp. 203; Sug. Pow. 779, 783.

(*y*) *Roe* v. *Archbp. of York*, 6 East, 86; Sug. Pow. 779.

(*z*) *Doe* d. *Griffith* v. *Lloyd*, 3 Esp. 78; *Doe* d. *Sutton* v. *Harvey*, 1 B. & C. 426.

CH. X. SEC. 2. every such lease there shall be reserved the best improved rent that can reasonably be had for the same," a lease by a tenant for life, Reservations of Rent (in Lease under Power). reserving a larger rent than had been paid to the deviser, but not the best rent which could have been fairly obtained, though there was no fraud or collusion, was determined to be void (a). It would seem that the best rent means the best rack-rent that can reasonably be required by the landlord, taking all the requisites of a good tenant for the permanent benefit of the estate into the account (b). A lease at 43*l.* a year, granted under a power directing the best rent to be reserved, cannot be impeached merely by showing that the lessor rejected at the time two specific offers, one at 50*l.* and another of from 50*l.* to 60*l.* from other tenants, though the responsibility of such other tenants could not be disproved; for in the exercise of such a power, where fairly intended, and no fine or other collateral consideration is received, or injurious partiality plainly manifested by the lessor, all other requisites of a good tenant are to be regarded as well as the mere amount of the rent offered, unless something extravagantly wrong in the bargain for rent be shown (b). In *Doe v. Harvey* a power was reserved to grant leases for a term not exceeding seven years, "so as there was reserved in such leases the best rent that could be gotten for the same, without taking any premium for the making thereof." The donee of the power granted a lease for seven years at a specified rent, which lease contained a covenant by the lessee to find board, lodging and wearing apparel, during the term, for three children of the donee (if they wished it), at 7*l.* a year each, and for the donee's son gratis. It was held by Parke and Patteson, JJ., that (assuming the power to require two conditions, first, that the rent reserved should be the best rent, and secondly, that there should be no fine or premium) it did not clearly appear on the face of the lease that either of those conditions had been broken, because the covenant to maintain the children was not necessarily beneficial to the lessor, and, therefore, parol evidence was admissible to show that the rent reserved was the best that could be obtained (c). The best rent must be reserved during the whole term, so as not to prejudice any remainderman or reversioner (d); nor even the tenant for life who demises (e).

As to Fines
or Premiums.
Isherwood v.
Oldknow.

A tenant for life under a settlement with power to lease at the "usual rent," may demise upon reserving the usual fines and rent, where the usual profit had previously been made by fines (f). Where

(a) *Wright v. Smith*, 5 Esp. 203; 5 Dow, 344; Sug. Pow. 780 (8th ed.).

(b) *Doe d. Louton v. Radcliffe*, 10 East, 278; *Dyas v. Cruise*, 2 Jon. & Lat. 460; Sug. Pow. 785.

(c) *Doe d. Rogers v. Rogers*, 5 B. & Ad. 755 (diss. Taunton, J.).

(d) *Doe d. Sutton v. Harvey*, 1 B. & C. 426.

(e) *Mountjoy's case*, 5 Co. R. 6 a, b; Sug. Pow. 792. Where the rent is reserved at a future day by mistake, see *Marquis of Donegal v. Grey*, 13 Ir. Eq. R. 12, 52, 53.

(f) *Right d. Bassett v. Thomas*, 3 Burr. 1446; *Doe d. Neuenham v. Creed*, 4 M. & S. 371.

there was a devise to the use of H. I. for life without impeachment of waste, &c., remainder to the use of plaintiff for life, with power to make leases for two or three lives, &c., or for the term of twenty-one years, so as there be reserved the best rent, without taking any sum or sums of money or other thing, for or in lieu of a fine; and H. I., by indenture of 15th October, leased for fourteen years, to be computed as to the meadow land from 13th February, the pasture from 25th March, and the messuage from 12th May previously, under a yearly rent, payable to the lessor and such other person as should be entitled to the freehold and inheritance, half-yearly, on the 11th November and 25th March, the first payment to be made on 11th November next ensuing; and the lessee covenanted with the lessor, his heirs and assigns, for payment to the lessor and such other person, &c., of the rent at the days and times, &c.; it was held, that the reservation of the first half-year's rent, payable at the end of twenty-seven days, was not taking a sum of money for a fine, being in consideration of a preceding occupation (*g*). Where a power was given to a tenant for life to make leases, with or without a fine, at such rent as he thought proper; it was held, that a lease, without any reservation of rent whatever, was good (*h*).

CH. X. SEC. 2.
*Reservations of
Rent (in Lease
under Power).*

Where a tenant for life entered and built a new house upon the land, and then made a lease for twenty-one years, reserving only the ancient rent, &c., the court would not suffer an objection to it to be argued (*i*).

Effect of Im-
provement of
the Estate.

SECT. 3.—*Penalty or Liquidated Damages.*

Sometimes the payment of rent and performance of covenants in a lease or agreement for a lease are secured by a bond or penalty, with or without sureties (*j*). The right to such penalty will pass with the reversion as an incident thereto, and may be enforced against an assignee of the term (*k*). If there be a penalty to secure the payment of rent, the lessor must demand the rent at the day fixed for the payment of it (*l*). It seems that such penalty, like any other forfeiture, may be waived by acceptance of the rent (*m*). Whenever a breach first occurs, for which an action is necessary, the lessor may sue either for the

Penalty in
Leases, &c.

(*g*) *Isherwood v. Oldknow*, 3 M. & S. 382; Sug. Pow. 792 (8th ed.).

(*h*) *Talbot v. Tipper*, Skin. 427; Sug. Pow. 433; *In re Molton*, 2 Ir. Com. L. R. 64; *Clarke v. Smith*, 9 Cl. & F. 126.

(*i*) *Road and Nash's case*, 1 Leon. 147; Sug. Pow. 799.

(*j*) *Andrews v. Wood*, Cro. Eliz. 332; *Chapman v. Chapman*, Cro. Car. 76; *Stancliffe, app.*, *Clarke, resp.*, 7 Exch. 439; 21

L. J., Ex. 129.

(*k*) Co. Lit. 61 b, 126; *Budloss v. Phillips*, Cro. Eliz. 896; *Thynn v. Cholmley*, Cro. Eliz. 383; *Egerton v. Sheaf*, Lutw. 1151; Gilb. Rents, 143.

(*l*) Bac. Abr. tit. *Condition* (O. 2); Id. tit. *Rent* (I.); *Grantham v. Thornborough*, Hob. 82, 133; Gilb. Rents, 74, 141; but see *Thynn v. Cholmley*, Cro. Eliz. 383.

(*m*) *Doe d. Cheney v. Batten*, Cowp. 247.

CH. X. SEC. 3.

*Penalty or
Liquidated
Damages.*Action for the
Penalty.

penalty or for general damages (*n*). Where he elects to sue for the penalty he must allege (inter alia) that the penalty has not been paid: otherwise there will be no sufficient breach, and only general damages can be recovered (*o*). The judgment will be for the penalty with costs: but execution may issue only for the damages as assessed by the jury and all costs (*p*). Such judgment will afterwards stand as a security for further breaches, which may be suggested from time to time when necessary (*q*). After obtaining judgment for the penalty the plaintiff cannot bring a fresh action for damages in respect of subsequent breaches, but must suggest them as above mentioned. On the other hand, if the lessor (or his assigns) elect to sue for damages for any breach, he cannot afterwards maintain an action for the penalty, but he may recover damages *toties quoties* to a greater amount than the penalty (*r*). Only such damages as the jury shall find that the plaintiff has actually sustained by the alleged breaches can be recovered (*s*).

Action for
Damages.Liquidated
Damages.

"Liquidated damages" are sums agreed to be paid, and *intended to be actually paid* (*t*), for the breach of any particular covenant or stipulation. Thus, where a tenant covenants or agrees not to plough up any of the ancient meadow or pasture ground, and that if he does so, he will pay an additional yearly rent of 5*l.* per acre; or that he will pay an additional specified rent per acre, and so in proportion, for every acre had in tillage beyond a certain quantity (*u*); or that he will not sow more than seventy acres with clover in one year, or if he does so, will pay an additional rent of 10*l.* for every acre above seventy for the residue of the term (*v*); or if the lease contain a stipulation that for every acre, and so in proportion for a less quantity, which the lessee should suffer to be occupied by any other person, without the consent of the landlord, an additional rent shall be paid (*x*); in these and similar cases the additional sums reserved become recoverable, when once the particular stipulation is broken, for the remainder of the term. Where a tenant held under a demise upon the terms not to sell any hay produced on the demised premises, off the said premises, "under the penalty of 2*s.* 6*d.* for each yard of the said hay so sold as aforesaid, to be recovered by distress as for rent in arrear: it was

(*n*) *Iceley v. Grew*, 6 N. & M. 467.

(*o*) *Hurst v. Hurst*, 4 Exch. 571; 5 Exch. 203; *Reindell v. Schell*, 4 C. B., N. S. 97.

(*p*) 1 Chit. Arch. 602 (11th ed.); 2 Id. 1002; Chit. Forms, 256, 702 (9th ed.).

(*q*) *Antley v. Weldon*, 2 Bos. & P. 353; *Joue v. Peers*, 4 Burr. 2228.

(*r*) *Loxe v. Peers*, 4 Burr. 2228; *Winter v. Trimmer*, 1 W. Blac. 395; *Harrison v. Wright*, 13 East, 343; *Mercer v. Irving*, L. B. & E. 563; 6 W. R. 661.

(*s*) See *Kemble v. Farren*, 6 Bing. 111.

(*t*) *Dimich v. Corlett*, 12 Moore, P. C. C. 199.

(*u*) *Rolfe v. Peterson*, 2 Bro. P. C. 436; *Bowers v. Nixon*, 12 Q. B. 546, 558; *Denton v. Richmond*, 1 Cr. & M. 734; *Birch v. Stephenson*, 3 Taunt. 469; *Howell v. Richards*, 11 East, 633; *Farrant v. Olmuis*, 3 B. & A. 692.

(*v*) *Jones v. Green*, 3 Y. & J. 298.

(*x*) *Grenslade v. Tapscott*, 1 C. M. & R. 55 (user of small portions of land for raising potato crop).

held, that although this was not strictly a rent, it was not a penalty, but an agreed sum recoverable by distress as for rent (*y*). CH. X. SEC. 3.

*Penalty or
Liquidated
Damages.*

Injunction.

Where an increased rent is reserved by way of liquidated damages, an injunction will not be granted to restrain the lessee from committing the breach of covenant in respect of which the increased rent becomes payable (*z*), but where there was a covenant by a lessor not to carry on the business of a saddler within ten miles of the demised premises, and to pay 100*l.* by way of liquidated damages if he did, an injunction was granted (*a*).

The difference between a penalty and liquidated damages is very great. Although judgment may be obtained, execution cannot issue to levy the amount of a penalty, but only the damages assessed by the jury, with costs; and the judgment will stand as a security for any subsequent breaches (*b*). But liquidated damages constitute a debt of fixed amount, which may be recovered upon proof of the contract and breach, without any evidence as to the amount of damages actually sustained (*c*). In such case the jury is bound to give their verdict for the whole sum stipulated to be paid (however disproportionably large), and not for what they find to be the actual amount of damage sustained: otherwise the court will set aside the verdict, and grant a new trial (*d*). But the court will not set aside the award of an arbitrator on this ground, unless the mistake appear on the face of his award (*e*). Increased rent, being in the nature of liquidated damages, may be distrained for (*f*), but a penalty cannot.

*Difference
between a
Penalty and
Liquidated
Damages.*

Notwithstanding the important differences between a penalty and liquidated damages, it is sometimes difficult to distinguish them: the numerous cases upon this point are somewhat conflicting. If expressly called a "penalty" in the contract, that is not conclusive (*g*); but if pleaded as a penalty, that is conclusive against the party so pleading (*h*). On the other hand, if expressly declared in the contract to be "liquidated and ascertained damages, and not a penalty or penal sum or in the nature thereof," it may be held to be a mere penalty (*i*). It not unfrequently happens that the same sum is called both a penalty and liquidated damages in the same sentence; or it is stated to be a penalty or forfeiture to be recovered as liquidated damages (*k*). There is no

*How distin-
guished.*

(*y*) *Pollitt v. Forrest*, 11 Q. B. 949; 1 C. & K. 560.

(*z*) *Woodward v. Giles*, 2 Vern. 119.

(*a*) *Jones v. Havens*, L. R., 4 Ch. D. 636; 25 W. R. 355.

(*b*) *Ante*, note (*q*).

(*c*) *Astley v. Weldon*, 2 Bos. & P. 351; *Rolfe v. Peterson*, 2 Bro. P. C. 436; *Green v. Price*, 13 M. & W. 695; 16 Id. 346; *Galsworthy v. Strutt*, 1 Exch. 659; *Atkins v. Kinnier*, 4 Exch. 776; *Saunter v. Ferguson*, 7 C. B. 716; *Reynolds v. Bridge*, 6 E. & B. 528; *Mercer v. Irving, E., B. & E.* 563.

(*d*) *Farrant v. Olmuns*, 3 B. & A. 692; *Mercer v. Irving, E., B. & E.* 563; *Fletcher v. Dyche*, 2 T. R. 37.

(*e*) *Fuller v. Fenwick*, 3 C. B. 705.

(*f*) *Pollitt v. Forrest*, 11 Q. B. 919; *Boyers v. Nixon*, 12 Q. B. 546, 558.

(*g*) *Saunter v. Ferguson*, 7 C. B. 716; *Hurst v. Hurst*, 4 Exch. 571; 6 Id. 203; *Legge v. Horlock*, 12 Q. B. 1015; *Cruz v. Alured*, 14 W. R. 656, C. P.

(*h*) *Pollitt v. Forrest*, 11 Q. B. 949, 966.

(*i*) *Kemble v. Farren*, 6 Bing. 141.

(*k*) *Davies v. Penton*, 6 B. & C. 216;

CH. X. SEC. 3. *Penalty or Liquidated Damages.* magic in words. A penalty is a penalty, although called liquidated damages, “the mere alteration of the term cannot alter the nature of the thing” (*l*). The courts are therefore bound, in compliance with the established rules of construction, to collect the meaning of a writing and *the real intention of the parties*, not from any single word or particular expression, but from the whole scope and tenor of the instrument (*m*). If it contains various stipulations for the performance or observance of several things of more or less importance to the parties, and the breach of any one of which gives rise to a *definite amount of damage*, and one large sum is stated at the end to be paid upon *any* omission, neglect or default, such sum must be considered as a penalty (*n*). But it is otherwise where the damage sustained is of an unliquidated nature, and *not of definite amount*: in such cases the full stipulated sum (however large and disproportionate) may generally be recovered (*o*). The law on the question of penalty or liquidated damages may now be considered, after a great number of decisions, not, perhaps, all of them strictly reconcilable with each other, to be at length satisfactorily settled: and the hinge on which the decision in every particular case turns is *the intention of the parties*, to be collected from the language they have used. The mere use of the term “penalty,” or the term “liquidated damages,” does not determine that intention; but, like any other question of construction, it is to be determined by the nature of the provisions and the language of the whole instrument. One circumstance, however, is of great importance towards arriving at a conclusion; if the instrument contains many stipulations of varying importance, or relating to objects of small value *calculable in money*, there is the strongest ground for supposing that a stipulation, applying generally to a breach of all or any of them, was intended to be a penalty, and not in the way of liquidated damages (*p*).

Forfeiture of
a Deposit.

Where a deposit is made to secure the due performance of a written contract, and it is to be *forfeited* in case of any breach, such forfeiture may be enforced, and is not considered as a penalty (*q*); or, instead thereof, the amount of damage actually sustained may be recovered (*r*).

Increased
Rent for
Tillage.

Where there is a reservation of 5*l.* per acre during the last twenty years of a term, for every acre of meadow which the tenant shall plough, or convert into tillage during the said last twenty years of

Crisdee v. Bolton, 3 C. & P. 240; 8 Moo. 252; *Horner v. Graves*, 7 Bing. 735; *Boys v. Ancell*, 5 Bing. N. C. 390; *Legge v. Horlock*, 12 Q. B. 1015.

(*l*) *Davies v. Penton*, 6 B. & C. 216; *Kemble v. Farren*, 6 Bing. 141; *Horner v. Flintoff*, 9 M. & W. 678.

(*m*) *Dimich v. Corlett*, 12 Moo. P. C. C. 199.

(*n*) *Astley v. Weldon*, 2 Bos. & P. 346; *Kemble v. Farren*, 6 Bing. 141; *Boys v. Ancell*, 5 Bing. N. C. 390; *Bethkham v. Drake*, 8 M. & W. 853.

(*o*) Ante, 363, note (*d*).

(*p*) Ante, note (*m*).

(*q*) *Hinton v. Sparkes*, L. R., 3 C. P. 161; 37 L. J., C. P. 81.

(*r*) *Iccley v. Greiv*, 6 N. & M. 467.

the term, and so after that rate for any greater or less quantity than an acre, or less time than a year, it is considered that the rent is due in the last twenty years, if the land is then ploughed, whether it was first ploughed within the last twenty years, or before; and the rent continues payable during the twenty years, though the land be again laid down to permanent grass (*s*). The right to additional rent for over tillage is not waived by the acceptance of the reserved rent with a knowledge of the breach (*t*).

CH. X. SEC. 3.
*Penalty or
Liquidated
Damages.*

The provision sometimes inserted in a publican's lease, that the lessee shall take all his beer from the lessor, or else pay an advanced rent, has been much censured by the courts; and, at all events, such a covenant is subject to an implied condition, and cannot be enforced unless the lessee be supplied with good beer (*u*).

Increased
Rent in Pub-
lican's Lease
for not taking
Lessor's Beer.

SECT. 4.—When Rent is due.

The rules of the common law with respect to the time when rent is due, and when it must be demanded, are very curious and precise. It seems that rent is *due* in the morning of the day appointed for payment, but it is not *in arrear* until after midnight (*x*).

Rent is due
in the Morn-
ing, must be
demanded at
Sunset, and is
in Arrear after
Midnight.

Just before and at sunset is the time appointed by law to make a proper demand of it (*y*), to take advantage of a condition of re-entry; the demand should be made such time before sunset as to allow sufficient light to count the money (*z*); the person making the demand must remain on the land till the sun has set; and the demand must be actually or constructively continued till that time (*a*). The court will not take judicial notice of the time of sunset on a particular day, that must be proved by evidence (*b*). A demand made on the proper day at one o'clock is clearly bad (*c*), although a tender by the tenant or his agent at any time before or after sunset would be sufficient to save the forfeiture (*d*).

*Duppa v.
Mayo.*

Where a lessor, tenant in fee, died after sunset and before midnight, it was held that the heir and not the executor was entitled to the rent (*e*); but payment to the lessor or his agent on the morning

Death of
Landlord on
Rent-day.
Clun's case.

(*s*) *Birch v. Stephenson*, 3 Taunt. 469; *Howell v. Richards*, 11 East, 633; Bac. Abr. tit. *Rent* (F.).

(*t*) *Denton v. Richmond*, 1 C. & M. 734.
(*u*) *Cooper v. Twibill*, 3 Camp. 286; *Holcombe v. Hewson*, 2 Camp. 391; *Stanchiffe, app., Clarke, resp.*, 7 Exch. 439; 21 L. J., Ex. 129.

(*x*) *Dibble v. Bowater*, 2 E. & B. 564; *Cutting v. Derby*, 2 W. Blac. 1077; *Leftley v. Mills*, 4 T. R. 173; Bac. Abr. tit. *Rent* (H.).

(*y*) *Duppa v. Mayo*, 1 Saund. 287; 2 Salk. 578; *Cole Ejec.* 413.

(*z*) Co. Lit. 202 a; *Maund's case*, 7 Co.

R. 28 b; *Tinckler v. Prentice*, 4 Taunt. 519.

(*a*) *Wood and Chirre's case*, 4 Leon. 179; *Acocks v. Phillips*, 5 H. & N. 183.

(*b*) *Collier v. Nokes*, 2 C. & K. 1012.

(*c*) *Doe d. Wheeldon v. Paul*, 3 C. & P. 613.

(*d*) Plow. 172 a; Co. Lit. 202 a; *Cropp v. Humberston*, Cro. Eliz. 48.

(*e*) *Duppa v. Mayo*, 2 Salk. 578; 1 Wms. Saund. 287; *Clun's case*, 10 Co. R. 127; *Id. Rockingham v. Penrice*, 1 P. Wms. 177; 1 Salk. 578; 1 Swanst. 345, note; *Re Clulow*, 3 Kay & J. 689; 26 L. J., Ch. 513.

CH. X. SEC. 4. of the rent-day, the lessor dying before noon, is valid as against the heir, though not against the crown (*f*). Where the rent was reserved payable on Michaelmas-day, and the lessor died on that day between three and four o'clock in the afternoon before sunset, and a question was raised whether the executor or the heir, or, which is the same, the jointress of the lessor, should have the rent, it was held that the rent should go to the heir or jointress (*g*).

Payment of
Rent in
Advance.

Payment before the day is voluntary and a payment of a sum in gross, and no satisfaction at law of the rent (*h*); but it seems it will be otherwise in equity, for payment of rent to the tenant in tail or for life, *on* or even *before* the day, where the tenant in tail lived to the rent-day (*i*), will discharge the lessee, though if the tenant in tail die on the same day, the remainderman is entitled to recover the rent so paid from his representatives. If a tenant make a payment in advance, and the landlord dies before the rent-day, the payment may be pleaded by way of an equitable defence, to an action by the landlord's executors for the rent (*k*). But a payment of rent in advance is not within 4 Ann. c. 16, s. 10, so as to discharge the tenant from his obligation to pay rent to the assignee of the reversion, in case he received notice of the assignment before the rent is due (*l*).

At what Days
in the Year
Rent is due.

Where rent is reserved generally, and no mention is made, as is usual, of half-yearly or quarterly payments, nothing is due until the end of the year (*m*): and where, after signing a written agreement which made no mention of the time when the rent was to be paid, the landlord asked the tenant how he would like to pay the rent, and the tenant replied quarterly, and the rent was accordingly paid quarterly, it was held that the rent was still due annually, and not quarterly (*n*). Where there is a general reservation of a yearly rent, a clause to put an end to the term, by notice expiring on any quarter day, will not make the rent payable quarterly (*o*). In a case where an agreement was dated the 21st of January, and a person thereby agreed to become tenant, "at the customary time of entry," at a certain rent to be "paid at the usual time," "as agreed upon;" and he entered at Lady-day, the usual time of entry being the 12th of May, the usual time of rent becoming payable, being once a year, at Michaelmas, and the rent-day, when it was paid, being the 8th January: it was held, that there was evidence that the rent was payable at Michael-

(*f*) *Clun's case*, 10 Co. R. 127 b.
(*g*) *Ld. Rockingham v. Penrice*, 1 P. Wms. 177; 1 Salk. 578; 1 Swanst. 345, note; Bac. Abr. tit. *Rent* (H.).

(*h*) *Clun's case*, 10 Co. R. 127 b; *Ld. Cromwell v. Andrews*, Cro. Eliz. 15.

(*i*) *Ld. Rockingham v. Penrice*, *supra*; Bac. Abr. tit. *Rent* (H.).

(*k*) See *Nash v. Gray*, 2 F. & F. 391.

(*l*) *De Nicolls v. Saunders*, 39 L. J., C. P. 297; *Cook v. Guerra*, 41 L. J., C. P. 89.

(*m*) *Cole v. Sury, Latch*, 264; Com. Dig. *Rent* (B.), 8; *Gray v. Chamberlain*, 4 C. & P. 260; *Coomer v. Howard*, 1 C. B. 440.

(*n*) *Turner v. Allday*, Tyr. & Gr. 819.

(*o*) *Collett v. Curling*, 10 Q. B. 785; 5 D. & L. 605.

mas, and that it was not necessarily payable at the end of the year, from the time of entry (*p*). When the rent is made payable on certain days in the year, it is due on the first of the days occurring in point of time, without regard to the local order of the words (*q*). If rent is intended to be made payable in advance, such intention should be clearly expressed (*r*). A covenant that a half-year's rent shall remain in the hands of the tenant till the last year, means the "current half-year" (*s*). Where rent was reserved quarterly, or *half-quarterly if required*, and the landlord received the rent quarterly for the first twelve months, it was held, that he could not, without notice, distrain for a half-quarter's rent (*t*).

CH. X. SEC. 4.
When Rent is due.

SECT. 5.—*Payment of Rent.*

Rent is considered as of a higher nature than even a debt due on an instrument under seal, as between the parties themselves. In the case of the death of the tenant, it was, prior to the act 32 & 33 Vict. c. 46, of equal degree with specialty debts, so as, in the distribution of the deceased's estate, to be payable with debts of that degree (*u*); but now, by virtue of that statute, all the creditors of a deceased person are treated as standing in equal degree. Rent in arrear is no part of the reversion; and therefore when rent becomes due after delivery to the sheriff of a writ of elegit against the lessor, but before inquisition taken thereon, it is not payable to the execution creditor (*x*).

Rent a Debt of high Nature.

Rent due and owing to a judgment debtor may be ordered by a divisional court, a judge, or a master, to be attached in the hands of his tenant, as a debt, under the Rules of the Supreme Court (Order XLV., Rule 2) (*y*). But accruing rent not due cannot be so attached (*z*). Rent which is overdue cannot be attached under a foreign attachment in London (*a*).

Attachment of Rent.

A payment of rent, by mistake or misrepresentation, to a person not entitled to demand it, does not preclude the tenant from showing that the person to whom it was paid was not entitled to it (*b*), but the onus of proof is shifted. Therefore, if A., who is a tenant for life subject to forfeiture, with remainder over to B., lease to C. for a term, and afterwards, apprehending that he has forfeited, acquiesce in

Payments by mistake to the wrong Person.

(*p*) *Gore v. Lloyd*, 12 M. & W. 463.

(*q*) *Hill v. Grange*, Plowd. 171.

(*r*) *Ante*, 348.

(*s*) — *v. Nicholls*, Loft, 393.

(*t*) *Mallam v. Arden*, 10 Bing. 299.

(*u*) *Thompson v. Thompson*, 9 Price, 471.

(*x*) *Sharp v. Key*, 8 M. & W. 370; 9 Dowl. 770.

(*y*) *Mitchell v. Lee*, 8 B. & S. 92; L. R.,

2 Q. B. 259; decided on s. 62 of the Common-Law Procedure Act, 1854, from which Order XLV., Rule 2, differs only in enlarging the discretion of the court.

(*z*) *Jones v. Thompson*, 27 L. J., Q. B. 234.

(*a*) Com. Dig, Attachment (D.), cited 8 B. & S. 95.

(*b*) *Rogers v. Pitcher*, 6 Taunt. 202.

CH. X. SEC. 5. *Payment of Rent.* B.'s claiming and receiving the rent from C.; his executor may, on showing that he acquiesced under a false apprehension, recover from C. the amount of the rent erroneously paid to B. (c). Where an old corporation, before the Municipal Reform Act, were trustees of a charity, and a tenant of the charity paid rent after the new corporation came into office to the secretary of the old corporation, who still continued as charity trustees, it was held that this was a good payment as against the new corporation (d).

Allowances
by mistake of
Deductions
from Rent.

An allowance by way of deduction from the rent, even though made by mistake, operates as payment of the rent, *pro tanto*: thus where a tenant paid rent regularly to the landlord's agent, deducting a sewer's rate, which by the terms of the agreement under which the tenant held he ought himself to have paid, it was held, that, in an action to recover the sums so deducted as arrears of rent, a plea of payment was supported by the facts (e).

Rent is payable on the Land, except in the Case of a Covenant.
Haldane v. Johnson.

Rent reserved, payable yearly, or otherwise, is to be paid *on the land*, because the land is the debtor, and that is the place of demand appointed by law: so if a man lease, rendering rent, and the lessee binds himself in a sum to perform the covenants, this does not alter the place of payment of the rent, for it may be tendered on the land without seeking the obligee, except where the condition is for the performance of homage or other corporeal service to the person of the lord (f). This, however, which is a rule of the common law, applies only to re-entry for non-payment of rent, and not to an action on the covenant to pay it. Such a covenant (if no particular place of payment be mentioned) is analogous to a covenant to pay a sum of money in gross on a day certain, in which case it is incumbent on the covenantor to seek out the person to be paid, and pay or tender him the money, for the simple reason that he has contracted so to do. So it was held in the considered case of *Haldane v. Johnson* (g), where the authorities for this somewhat harsh doctrine (which applies, if only the landlord be intra quatuor maria) will be found carefully examined. The lessee of the crown must pay his rent, without demand, at the Exchequer, wherever it may be; but if the crown grant the reversion, the rent must be demanded on the land before the grantee can enter as for a forfeiture on nonpayment (h).

Remittance of Rent through Post.

Like any other species of debt, rent is often paid by a remittance by the post. But remitting through the post is departing from the mode of payment marked out by law, and in the absence of a recog-

(c) *Williams v. Bartholomew*, 1 Bos. & P. 326; *Gregory v. Doidge*, 3 Bing. 474; *Claridge v. Mackenzie*, 4 M. & G. 143.

(d) *Mayor, &c. of Ludlow v. Charlton*, 9 C. & P. 242.

(e) *Waller v. Andrews*, 3 M. & W. 312; *Bramston v. Robins*, 4 Bing. 11.

(f) Co. Lit. 201 b; *Rowe v. Young*, 2 Brod. & B. 234; *Shep. Touch.* 378; *Crouch v. Pastolfe*, Sir T. Raym. 418; *Com. Dig. Pleader* (2 W. 49).

(g) 8 Exch. 689; 17 Jur. 937; 22 L. J., Ex. 264.

(h) *Bac. Abr. tit. Rent* (I.).

CH. X. SEC. 5.
Payment of Rent.

dition by the landlord of the use of the post, a loss by post would fall on the tenant. It has been held that if a tenant be directed by his landlord to remit money by the post, and it be lost, the latter must bear the loss (*i*); but even in this case, it is said, the tenant must show due caution (*k*), such as, in the present day, using a registered letter. It is probable that slight evidence of an implied recognition by the landlord of the use of the post would be held sufficient; but in every case it would be desirable to obtain an express recognition by the landlord, once for all, of the mode of payment. Where a creditor in the country directed his debtor to pay money into a London banking-house to his account, and had no account with the house but through a country banker; it was held, that a payment there to the credit of his account with the country banker was a discharge to the debtor (*l*). Generally, a creditor may insist upon payment being made either to himself or his agent; but having authorized payment to his agent, he cannot revoke that authority, if the debtor have given such a pledge to pay pursuant to the authority as would bind him in a court of law (*m*).

Payment by Bills or Notes.
Davis v. Gyle.

If the landlord take a security for rent in arrear—as if he take a bond, bill of exchange, or promissory note—his so doing will not of itself amount to a payment of the rent, nor bar him of his remedies peculiar to the recovery of rent. So it was held in *Davis v. Gyle* (*n*), it having been previously ruled at nisi prius, that where the tenant gave a note of hand for rent in arrear, and took a receipt, he could not sue the landlord in trespass for a distress, but that, notwithstanding the note, the landlord might distrain, as the note was no alteration of the debt till payment (*o*). In another case, a tenant being indebted for rent, his landlord's agent received from the tenant a bill of exchange for the amount, which he indorsed over, and paid the rent to the landlord, crediting it in his accounts as if the tenant had paid the money. The landlord having distrained for rent, it was held to be a question for the jury whether the transaction amounted to a discount of the bill by the agent for the tenant, or a mere advance of rent by the agent to the landlord, in which latter case he was entitled to distrain (*p*). Where to covenant for rent against three defendants, it was pleaded that 41*l.* of the rent was paid; that of the residue two of the defendants had paid their shares, and that the other had given the plaintiff a promissory note for his share payable at a banker's; that such note was dishonoured, whereupon the

(i) *Warwick v. Noakes*, Peake, 67.

(k) *Hawkins v. Rutt*, Peake, 186.

(l) *Breed v. Green*, Holt, 204.

(m) *Hodgson v. Anderson*, 3 B. & C. 842.

(n) 2 A. & E. 624; and see *Murray v. King*, 5 B. & A. 165; *Smith L. & T.*

169 (2nd ed.).

(o) *Harris v. Shipway and Ewer v. Lady Clifton*, Bull. N. P. 182; *Seven v. Mithel*, 1 Ld. Ken. 370.

(p) *Parrott v. Anderson*, 7 Exch. 93; *Griffiths v. Chichester*, Id. 95.

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Payment of
Rent.

plaintiff sued him and had judgment by default on the note, which judgment was still unsatisfied; it was held, that the judgment was no merger, being obtained on a collateral security, and not having produced actual satisfaction (*g*). In *Davis v. Gyde*, however, which was decided on demurrer, more than one member of the court pointed out that a special agreement, made at the time of the note, for suspending the distress, might have suspended the right to distrain. *Davis v. Gyde* has not been questioned, but it seems to bear very hardly on the tenant, and, although it is not likely to be overruled, it is submitted that it is incorrect, on the ground that the acceptance of a negotiable security constitutes an implied suspension of the right to distrain, and that the substitution of the simple remedy upon a note for the more cumbrous remedy is a good legal consideration. A similar remark will apply to *Skerry v. Preston* (*r*), in which it was held that an agreement to take interest did not postpone the right of distress.

Stamp Duty
on Receipts
for Rent.

Receipts or discharges given for the payment of rent require to be stamped with a penny stamp if the sum received amounts to 2*l*. or upwards (*s*).

Where a landlord fraudulently and improperly received various sums of money from several of his tenants, and the evidence of payments by them consisted of memoranda of accounts delivered to the tenants in which the items in question were set down, and to each of which the landlord wrote the word "paid;" it was held, that such memoranda were admissible in evidence without a stamp, when coupled with entries in the steward's books to the same effect (*t*). A paper signed by the lessor in this form—"Mr. J. (the lessee) having written off the sum of 72*l*. from his mortgage debt, being five quarters' rent of his house, I hereby discharge the same rent to the 24th day of July last"—requires a receipt stamp (*u*). A paper in form of a receipt, if it is not given in evidence as a receipt, does not require a stamp (*x*); and an unstamped receipt may be used by a witness who can prove the fact independently, to refresh his memory (*y*).

When Pay-
ment of
Ground-rent
operates as
Payment pro
tanto of the
Rent.

A payment of ground-rent by the tenant, in default of payment by his mesne landlord, may operate as payment pro tanto of the rent claimed by the latter (*z*); and growing rent may be discharged by such payments as well as rent actually due (*a*). Such payments are not the less compulsory because the ground landlord, on demanding the ground-rent, allows the occupier time to pay (*a*). Where a

(*g*) *Drake v. Mitchell*, 3 East, 251.

(*r*) 2 Chit. R. 245.

(*s*) Stamp Act, 1870 (33 & 34 Vict. c. 97), ss. 120—123, and Schedule, tit. *Receipt*.

(*t*) *Clarke v. Hougham*, 3 D. & R. 325.

(*u*) *Lucas v. Jones*, 5 Q. B. 949.

(*x*) *Brookes v. Davies*, 2 C. & P. 186; *Matheson v. Ross*, 2 H. L. Cas. 286.

(*y*) *Rambert v. Cohen*, 4 Esp. 213.

(*z*) *Doe v. Hare*, 2 C. & M. 145.

(*a*) *Carter v. Carter*, 5 Bing. 406; *Sapsford v. Fletcher*, 4 T. R. 511.

stranger received rent due to the testator in his lifetime, and, afterwards, by desire of the tenant in possession, paid the demand of ground-rent due at the same time for the said premises; it was held, that he might deduct such payment in an action by the executor for the rent, but not a payment of ground-rent arising after the death of the testator (*b*).

CH. X. SEC. 5.
*Payment of
Rent.*

A payment of property-tax operates as a payment pro tanto of the rent, notwithstanding any stipulation in the lease to the contrary (*c*). So a payment of land-tax, sewers-rate, rent-charge in lieu of tithes, and other charges of the like nature, may, in the absence of any express stipulation for their payment by the tenant, operate as a payment pro tanto of the rent, and be deducted accordingly on the next payment of rent (*c*).

Payment of
Taxes, Rates,
&c.

It has been said that wherever a tenant may be ousted from his occupation on default made of a payment by his landlord, he may pay in his discharge and for the redemption of the premises, and deduct such payment from his rent (*d*). Such payments, in event of the tenant being sued for the whole rent, would seem to fall within the scope of the Rules of the Supreme Court (Order XIX. Rule 2), by which "a defendant in an action may set off or set up by way of counter-claim against the claims of the plaintiff, any right or claim, whether such set-off or counter-claim sound in damages or not, and such set-off or counter-claim shall have the same effect as a statement of claim in a cross action." Even before the Judicature Acts, it was held that in an action for rent the tenant might avail himself of a part payment obtained from him under a distress or a judgment of the County Court for the same rent (*e*), and that where a landlord was bound to repair, and the tenant was obliged by sudden accident to make repairs, in order to prevent further mischief, the tenant might set off the money laid out in the repairs (*f*). It was, however, held that there could be no set-off where the tenant paid as rent a sum to prevent a person ejecting him from a portion of the land to which he claimed title from the lessor prior to the lease (*g*).

When other
Payments
may be de-
ducted from
the Rent.

SECT. 6.—*Apportionment of Rent.*

(a) *Apportionment in respect of Estate.*

Apportionment of rent in respect of estate takes place by act of law where lands demised at an entire rent become divided among

Apportion-
ment by Act
of Law.

(b) *Wilkinson v. Cawood*, 3 Anst. 905.

(c) Post, Chap. XV.

(d) *Smith v. Pearce*, MS., sittings at Guildhall, after M. T. 43 Geo. 3, Lord Ellenborough, C. J.

(e) *Harmer v. Bean*, 3 C. & K. 307.

(f) *Waters v. Weigall*, 2 Anst. 575.

(g) *Boodle v. Cambell*, 7 M. & G. 386; 2 D. & L. 66.

CH. X. SEC. 6. different persons; thus, if freehold and leasehold premises are let together at one rent, an apportionment takes place, at the death of the lessor, among the real and personal representatives.

By Alienation of the Lessor. Apportionment at common law may also be by act of the parties: thus, if the lessor dispose of the reversion in part of the lands, either by deed or will, the rent is apportionable (*h*); but the lessee's concurrence to the apportionment is necessary, unless it be settled by a

By Alienation of the Lessee. jury (*i*). When the lessee aliens part of the land, the alienee is liable for a proportional part of the rent if the landlord choose to proceed against him (*k*). Although the landlord has received rent from the assignee, the personal contract of the lessee still subsists, and renders

By a Surrender. him liable for the whole arrears in an action of covenant (*l*). When the lessee surrenders part of the land to the lessor, the rent for the remainder is apportioned. It would seem that the rent should be apportioned, not according to the quantity, but according to the value of each part as improved by buildings, &c. (*m*).

Eviction of Lessee. Where the lessee is evicted from part of the lands *by title paramount*, he will have to pay a rateable proportion for the remainder (*o*); but if he be evicted from part of the lands *by his landlord* (or his assigns), no apportionment, but a suspension of the whole rent, takes place (*p*). There is no suspension, however, if the eviction has followed upon some wrongful act of the lessee, such as a forfeiture or recovery of part of the lands in an action of waste (*q*).

Demise of more than Lessor entitled to. Where a person demised, at one entire rent, lands of which he was seised in fee, and lands of which he was tenant for life with power of leasing; and the lease was void as to the latter lands for want of conformity to the power; the court held, that though the lease as to lands comprised in the power was void, the rent might be apportioned for the remainder (*r*). Similarly, where a lessor professes to grant an exclusive right of sporting, and it turns out that he has no such privilege, an apportionment of rent will be made on that account (*s*).

Neale v. Mackenzie. In *Neale v. Mackenzie*, a lessee of 100 acres of land accepted the lease (which was *not under seal*) and entered upon the land; upon his entry he found eight acres in the possession of a person entitled under a prior lease from the lessor, and that person kept possession of the

(*h*) *West v. Lascelles*, Cro. Eliz. 851; *Collins and Harding's case*, 13 Co. R. 57 a; Cro. Eliz. 606, 622.

(*i*) *Bliss v. Collings*, 5 B. & A. 876.

(*k*) *Stevenson v. Lambard*, 2 East, 575.

(*l*) *Bachelour and Gage's case*, Cro. Car. 138; *Ipswich (Dailiff) v. Martin*, 1 Roll. Abr. 235, pl. 17; *Orgill v. Kemshead*, 4 Taunt. 642.

(*m*) *Smith v. Malings*, Cro. Jac. 160; *Anon.*, Moor, 114.

(*o*) *Gilb. Rents*, 147; *Smith v. Malings*, Cro. Jac. 160; 1 Roll. Abr. 235; *Stevenson*

v. Lambard, 2 East, 575; *Boodle v. Cambell*, 7 M. & G. 386; 2 D. & L. 66; *McLoughlin v. Craig*, 7 Ir. Com. L. R. 117.

(*p*) *Smith L. & T.* 287 (2nd ed.); but the tenant must perform all his covenants; as to repair, &c. *Newton v. Allin*, 1 Q. B. 517; *Morrison v. Chadwick*, 7 C. B. 283.

(*q*) *Walker's case*, 3 Co. R. 22; 1 Roll. Rep. 331; *Moor*, 203.

(*r*) *Doe d. Vaughan v. Meylor*, 2 M. & S. 276.

(*s*) *Tomlinson v. Day*, 2 Brod. & B. 680.

eight acres until half-a-year's rent became due, the lessee continuing in possession of the remainder; the prior lease was for a term extending beyond the duration of the latter lease: it was held, that the latter demise was wholly void as to the eight acres, and that the rent was not apportionable, the impediment to the lessee taking possession not being analogous to an eviction by title paramount (*t*). But where the second demise was under seal, it was held to operate as a grant of the reversion as to the part previously demised (*u*). Where the tenant cannot obtain possession of all the premises demised, an action of *covenant* by the lessor against the lessee for the rent cannot be maintained, as in such action the rent cannot be apportioned (*x*).

CH. X. SEC. 6.
Apportionment of Rent (in respect of Estate).

Where lands and goods are let at an entire rent, and the tenant is evicted from the lands, no apportionment can be made for the goods as the rent is held to issue from the land alone (*y*). Although the rent of furnished lodgings issues out of the realty only (*z*): yet where the mortgagor of a house let it furnished, and the tenant, after notice, paid the whole rent to the mortgagee, it was held, that the mortgagor might still recover for the use of the furniture (*a*). Where A. demised to B. certain mines for thirty years, with licence to use an adjoining railway in common with A., and during the term A. prevented B. from using the railway, it was held, that this created no suspension of the rent, because the rent issued out of the thing demised, i. e. the mines and minerals, and not out of the easement to use the railway (*b*).

Where Realty and Person-
ality are let
together.

The loss of land to the lessee by the overflowing of the sea appears to be another case in which the tenant may claim apportionment: but the loss must be total *pro tanto*, for if there be merely a partial irruption of water, the exclusive right of fishing, which the lessee would thereupon have, would be such a perception of the profits of the land as to annul his claim (*c*).

Where Land
is lost by
overflowing
of the Sea.

Where part of land on lease is taken for public purposes under the powers of the Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18), the 119th section of that act provides that "if any lands shall be comprised in a lease for a term of years unexpired, part only of which lands shall be required for the purposes of the special act, the rent payable in respect of the lands comprised in such lease shall be apportioned between the lands so required and the residue of such lands, and such apportionment may be settled by agreement between the

Apportion-
ment under
Lands Clauses
Act.

(*t*) *Neale v. Mackenzie* (in error), 1 M. & W. 747.

(*u*) *Ecc. Commrs. of Ireland v. O'Connor*, 9 Ir. Com. L. R. 242.

(*x*) *Holgate v. Kay*, 1 C. & K. 341, but see *Ecc. Commrs. of Ireland v. O'Connor*, *supra*.

(*y*) *Ernet v. Cole, Dyer*, 212 b, in marg.; *Collins v. Harding*, Cro. Eliz. 606: 13 Co.

R. 57; *Moor*, 514; *Cadogan v. Kennett*, Cowp. 432; Gilb. Rents, 175.

(*z*) *Neuman v. Anderton*, 2 Bos. & P. New R. 224.

(*a*) *Salmon v. Matthews*, 8 M. & W. 827.

(*b*) *Williams v. Hayward*, 1 E. & E. 1040; 28 L. J., Q. B. 374.

(*c*) 1 Roll. Abr. 236, l. 40.

CH. X. SEC. 6. lessor and lessee of such lands on the one part, and the promoters of the undertaking on the other part; and if such apportionment be not so settled by agreement between the parties, such apportionment shall be settled by two justices; and after such apportionment the lessee shall, as to all future accruing rent, be liable only as to so much of the rent as shall be so apportioned in respect of the lands not required for the purposes of the special acts; and, as to the lands not so required, and as against the lessee, the lessor shall have all the same rights and remedies for the recovery of such portion of rent, as previously to such apportionment he had for the recovery of the whole rent reserved by such lease; and all the covenants, conditions and agreements of such lease, except as to the amount of rent to be paid, shall remain in force with regard to that part of the land which shall not be required for the purposes of the special act, in the same manner as they would have done in case such part only of the land had been included in the lease.

Apportionment of Rent (in respect of Estate).

Under Lands Clauses Act—*contd.*

Apportionment under other Statutes.

Where part only of lands comprised in a lease for an unexpired term is conveyed, or agreed to be conveyed, for sites for schools for the education of the poor under the 4 & 5 Vict. c. 38, the rent and the fine upon renewal may, by 12 & 13 Vict. c. 49, s. 1, be apportioned between the parties interested. By the 17 & 18 Vict. c. 32, where parts of lands in lease are taken for the purposes of the Church Building Acts, rents and fines on leases and renewals may be apportioned. Under the 17 & 18 Vict. c. 97, for amending and extending the acts for the inclosure, exchange and improvement of land, rents and other certain payments may be apportioned. By 17 & 18 Vict. c. 116, to facilitate the management and improvement of episcopal and capitular estates in England, on the sale or exchange of part of lands comprised in any lease or copy of court roll, the rent must be apportioned.

(b) *Apportionment in respect of Time.*

At common law rent could not be apportioned in respect of time, and therefore when a tenant for life granted a lease for years, and died on any day not being rent-day, the whole rent from the last rent-day became lost, and the lessee retained the land without paying anything for it until the next rent-day (*d*). This injustice has been remedied by a series of statutes culminating in the Apportionment Act, 1870, and as that act does not repeal the preceding statutes, it will be well to con-

(*d*) *Clun's case*, 10 Rep. 127 b; and see *id.* Tudor's Real Property Cases, at p. 249, where the whole law of apportionment before the Act of 1870 is learnedly discussed. From the preamble to 11 Geo. 2,

c. 19, s. 15, it seems that although the executor of the tenant for life could recover nothing, the reversioner could recover in respect of use and occupation.

sider their effect shortly before setting out at length the provisions of the act which practically supersedes them.

CH. X. SEC. 6.
*Apportionment
of Rent (in re-
spect of Time).*

The first statute, 11 Geo. 2, c. 19, s. 15, enacted that where any tenant for life should die before or on the day on which any rent was payable upon any demise, *which determined on the death of such tenant for life*, his executors or administrators might, in an action on the case, recover from the subtenant, "if such tenant for life die on the day on which the same was made payable, the whole, or if before such day, then a proportion of such rent, according to the time such tenant for life lived, of the last year or quarter of a year, or other time in which the said rent was growing due, making all just allowances, or a proportionable part thereof respectively." It was held, under this statute, that no apportionment of rent took place as between the heir and personal representative of a tenant in fee (*c*). The courts, however, considered it as a beneficial statute, and put a liberal construction upon it, holding, for instance, that the representatives of a tenant in tail, who had demised the entailed estate by a lease which was void against the remainderman, were entitled to an apportionment of the rent, even when the entire amount had been previously paid to the remainderman (*f*).

11 Geo. 2,
c. 19, s. 15.

By 4 & 5 Will. 4, c. 22, s. 1, rents payable on any demise which determined on the death of the person making the same (although such person was not strictly tenant for life thereof), or on the death of the life or lives for which such person was entitled to such hereditaments, were brought within the operation of 11 Geo. 2, c. 19, s. 15.

4 & 5 Will. 4,
c. 22, s. 1.

By sect. 2 of the same act, it was enacted that all rents-service reserved on any lease by a tenant in fee or for any life interest, or by any lease (*g*) granted under any power, and all rents-charge and other rents, and all other payments of every description, in the United Kingdom coming due at fixed periods under any instrument executed after the passing of the act, or (being a will) coming into operation after the passing of the act, should be apportioned so that on the death of any person interested in any such rents, &c., or on the determination by any other means whatsoever of the interest of any such person he, or his executors, administrators or assigns, should be entitled to a proportion of such rents, &c., according to the time which should have elapsed from the commencement or last period of payment thereof respectively, including the day of the death of such person, or of the determination of his interest; and that every such

(e) *Re Chulow*, 3 Kay & J. 689; 26 L. J., Ch. 513.

(f) *Whitfield v. Pindar*, O. P. 1781, cited 8 Ves. 311. See also *Symons v. Symons*, Madd. & Geld. 207; *Clarkson v. Earl of Scarborough*, 1 Swanst. 354, n.; *Ex parte*

Smyth, 1 Swanst. 337; *Vernon v. Vernon*, 2 Bro. C. C. 659; *Hawkins v. Kelly*, 8 Ves. 308; *Ansley v. Wadsworth*, 2 V. & B. 331.

(g) Granted after the passing of the act, i. e. 16 June, 1834.

CH. X. SEC. 6. person, his executors, &c., should have the same remedies at law and in equity for recovering the apportioned parts of the said rents, &c., when the entire portion shall become due, as he would have had for recovering the entire rents, &c.

Apportionment of Rent (in respect of Time).

It was held that this act applied to rents and royalties payable periodically and reserved by leases granted after the passing of the act, in pursuance of a power created before or since the act (*h*); but not to rents reserved under *oral* demises (*i*); nor as between the heir-at-law and personal representatives of a tenant in fee (*k*); nor as between a mortgagee tenant for life, who had not entered, and remaindermen, so as to give the mortgagee a right to rents which he would not have had until entry if the tenant for life had lived (*l*), and it was said not to apply where the party entitled to the rent himself determined the lease during a current quarter (*m*). But it was held to apply where a lessee of mines, having power to determine the demise by a six months' notice expiring at any time, gave such notice to the lessor (*n*).

Apportionment Act, 1870.

The law of apportionment in respect of time has been extended and simplified in recent times by the Apportionment Act, 1870 (33 & 34 Vict. c. 35), which is retrospective (*o*). By this act, which recites that rents are not at common law apportionable, "and for remedy of *some* of the inconveniences divers statutes have been passed" (being 11 Geo. 2, c. 19, 4 & 5 Will. 4, c. 22, 6 & 7 Will. 4, c. 71, 14 & 15 Vict. c. 25, and 23 & 24 Vict. c. 154), and that "it is expedient to make provision for the remedy of *all* such mischiefs and inconveniences," it is enacted (sect. 1) that "all rents (*p*), annuities, dividends, and other periodical payments in the nature of income (whether reserved or made payable under an instrument in writing or otherwise) shall, like interest on money lent, be considered as accruing from day to day, and shall be apportionable in respect of time accordingly."

All Rents accrue from Day to Day.

Apportioned Part payable when whole due.

By sect. 2, "the apportioned part of any such rent," &c., "shall be payable or recoverable in the case of a continuing rent," &c., "when the entire portion of which such apportioned part shall form part shall become due and payable, and not before; and in the case of a rent," &c., "determined by re-entry, death, or otherwise, when the next entire portion of the same would have been payable if the same had not been so determined, and not before."

(*h*) *Plummer v. Whiteley*, 1 Johns. 585; 29 L. J., Ch. 247; *Knight v. Broughton*, 12 Beav. 312; *Wardroper v. Cutfield*, 33 L. J., Ch. 605; *Llewellyn v. Rous*, L. R., 2 Eq. 27; 35 Beav. 591.

(*i*) *Mills v. Trumper*, L. R., 4 Ch. 320.

(*k*) *Re Rogers' Trusts*, 30 L. J., Ch. 153.

(*l*) *Paget v. Marquis of Anglesea*, L. R., 17 Eq. 283; 43 L. J., Ch. 437.

(*m*) *Oldershaw v. Holt*, 12 A. & E. 590;

4 P. & D. 307.

(*n*) *Bridges v. Potts*, 17 C. B., N. S. 314; 33 L. J., C. P. 338.

(*o*) *Capron v. Capron*, L. R., 17 Eq. 288; and see note (*u*), post.

(*p*) By sect. 5 the word "rents" includes "rent-service, rent-charge and rent-work, and also tithes and all periodical payments or renderings in lieu of or in the nature of rent or tithe."

By sect. 4, "all persons and their respective heirs, executors, administrators and assigns, and also the executors, administrators and assigns respectively of persons whose interests determine with their own deaths, shall have such or the same remedies at law and in equity for recovering such apportioned parts as aforesaid when payable (allowing proportionate parts of all just allowances) as they respectively would have had for recovering such entire portions as aforesaid if entitled thereto respectively: provided (g) that such persons liable to pay rents reserved out of or charged on lands or other hereditaments of any tenure, and the same lands or other hereditaments, shall not be resorted to for any such apportioned part forming part of an entire or continuing rent as aforesaid specifically; but the entire or continuing rent, including such apportioned part, shall be recovered and received by the heir or other person who, if the rent had not been apportionable under this act, or otherwise, would have been entitled to such entire or continuing rent; and such apportioned part shall be recoverable from such heir or other person by the executors or other parties entitled under this act to the same."

CH. X. SEC. 6.
Apportionment of Rent (in respect of Time).

Remedies for recovering apportioned Part.

Tenant not to be resorted to.

By sect. 7, "the provisions of this act shall not extend to any case in which it is or shall be expressly stipulated that no apportionment shall take place" (r).

It has been held that this act applies to a specific devise of real estate (s), and, as between landlord and tenant, to rent under a lease assigned over by a trustee in bankruptcy (t); and it is indeed hard to see what is not included in its very comprehensive terms. It has been intimated that the act is not retrospective (u), but the preponderance of authority (x) points to an opposite conclusion, and to the application of the act to a will made before, but coming into operation after it.

Application of Apportionment Act, 1870.

The wide terms of the act seem to allow the recovery of rent pro rata in the ordinary case where rent is payable at fixed periods, and the tenancy is determined in the middle of a period. It is clear that such rent is not recoverable at common law (y), and it was said not to be recoverable under the act 4 & 5 Will. 4, c. 22, s. 2 (z). But the act of 1870, in sect. 3, speaks of a rent "determined by re-entry,"

As between Landlord and Tenant.

(g) This proviso substantially follows the corresponding proviso of 4 & 5 Will. 4, c. 22, s. 2.

(r) The words "it is" are new; otherwise the section corresponds with 4 & 5 Will. 4, c. 22, s. 3.

(s) *Hasluck v. Pedley*, L. R., 19 Eq. 271; 44 L. J., Ch. 143; 23 W. R. 155.

(t) *Swansea Bank v. Thomas*, L. R., 4 Ex. D. 94; 48 L. J., Ex. 344; 40 L. T. 558; 27 W. R. 491.

(u) In *Jones v. Ogle*, L. R., 8 Ch. 192; 42

L. J., Ch. 334, per Lord Selborne, C.

(x) *Capron v. Capron*, L. R., 17 Eq. 288; 43 L. J., Ch. 677; 29 L. T. 826; *Re Oline's estate*, L. R., 18 Eq. 213; 30 L. T. 249, per Malins, V.-C.; *Hasluck v. Pedley*, L. R., 19 Eq. 271; 44 L. J., Ch. 143; 23 W. R. 155, per Jessel, M. R.; *Constable v. Constable*, L. R., 11 Ch. D. 681; *Rosemgrave v. Burke*, 1 Ir. R. Eq. 186.

(y) See *Slack v. Sharpe*, 8 A. & E. 366; *Grimmin v. Legge*, 8 B. & C. 324.

(z) *Oldershaw v. Holt*, 12 A. & E. 590.

CH. X. SECT. 6. which seems intended to apply to a forfeiture, and the case is clearly *Apportionment of Rent (in respect of Time)* within the words of sect. 2. And although it might be argued that it is not within the purview of the act generally, this argument appears to be disposed of by *Sicantsea Bank v. Thomas (a)*, in which case the trustee in liquidation of the lessee, having assigned over during a current quarter, was held liable under the act to pay to the lessor a proportionate part of the quarter's rent up to the time of the assignment over.

SECT. 7.—Continuance of Lessee's Liability.

After assigning the Premises.

The lessee has both a privity of contract and of estate; and though he assign, and thereby destroy the privity of estate, the privity of contract continues, and he is liable, in an action of covenant, for the rent, notwithstanding the assignment (b).

After quitting Possession.

A tenant remains liable for rent, unless he deliver up complete possession of the premises, or the landlord accept of another in his room (c). But where a lessee quitted, in the middle of his term, apartments which he had taken for a year, and the lessor let them to another tenant, it was held, that she could not recover in an action for use and occupation against the lessee for a subsequent portion of the year, during which the apartments had been unoccupied (d): though if a tenant abandon premises without notice, the landlord may recover subsequent rent, notwithstanding he has put up a bill in the window, and otherwise endeavoured to obtain another tenant (e). Where a tenant from year to year, at a rent payable half-yearly, without giving any notice to the landlord, quitted the premises at the expiration of the current year; and before the next half-year expired the landlord let the premises to another tenant, who occupied the same; it was held, that the landlord was not entitled to recover rent from the first tenant from the expiration of the current year, when he quitted the premises, to the time when the landlord re-let the same to the second tenant (f). If the landlord of lodgings enter into and use the apartments whilst the tenant is in possession, he is deprived of his right to rent; but if the tenant have abandoned the possession during his tenancy, the landlord's lighting fires in the rooms, or even using the rooms, will not deprive him of his right to rent (g). Where

(a) L. R., 4 Ex. D. 94, and 377 (t), ante. See a form providing for payment pro rata in case of re-entry, *Dav. Prec.* vol. 5, pt. 1, p. 109 and note; post, Appendix B., Sect. 12.

(b) *Eaton v. Jacques*, 2 Doug. 455; *Auriol v. Mills*, 4 T. R. 94; ante, 241.

(c) *Harding v. Crethorne*, 1 Esp. 57;

Idbs v. Richardson, 9 A. & E. 849; and see *Henderson v. Squire*, L. R., 4 Q. B. 170; and Chap. XX., post.

(d) *Walls v. Atcheson*, 3 Bing. 462; 2 C. & P. 268.

(e) *Redpath v. Roberts*, 3 Esp. 225.

(f) *Hall v. Burgess*, 5 B. & C. 332.

(g) *Griffith v. Hodges*, 1 C. & P. 419.

the landlord forcibly turned out a man left in possession by the tenant, and who was personally offensive to the landlord, it was left to the jury to say whether such expulsion was a mere personal trespass, or done for the purpose of turning the tenant out of possession (*h*). Where, during a current quarter, some dispute arose between the lessor and lessee of a first and second floor of a house demised for a year, at a rent payable quarterly; and the lessee having told the lessor that she would quit immediately, the latter answered that she might go when she pleased; upon which the lessee did quit, and the lessor accepted possession of the apartments; it was held, that he could neither recover the rent which by virtue of the original contract would have become due at the expiration of the current quarter, nor rent pro rata for the actual occupation of the premises for any period short of the quarter (*i*).

CH. X. SEC. 7.
*Continuance of
Liability for
Rent.*

Where the lessee covenants to pay rent at stated periods (without any exception in case of fire), he is bound to pay it, though the house be burnt down; for the land remains, and he might have provided to the contrary by express stipulation, if both parties had so intended. And this rule applies, although the lessee's covenant to *repair* contain an exception (*j*) in case of fire (*k*). Where premises were destroyed by fire during a tenancy under a written agreement, and rendered no longer habitable, the landlord was held to be still entitled to recover rent, accruing due after the fire, in an action for use and occupation (*l*). So also a tenant from year to year of a second floor, under a parol agreement, has been held liable in the same form of action (*m*): and where the rent for similar lodgings was payable quarterly, he was held liable for rent up to the time of the fire at least (*n*). The tenant in such latter cases, to get rid of his liability, should give a regular notice to quit. The reason is, that when *the law* creates a duty, and the party is disabled to perform it without any default in him, and he has no remedy over, the law will excuse him: but when the party, *by his own contract*, creates a duty or charge upon himself he is bound to make it good, notwithstanding any accident by inevitable necessity, because he might have provided against it when making the contract. In some old cases the Court of Chancery relieved the lessee, and granted an injunction to restrain the landlord from bringing an action on the covenant for rent (*o*); but the modern practice was

Where the
Premises are
destroyed by
Fire.
*Belfour v.
Weston.*

(*h*) *Henderson v. Mears*, 1 F. & F. 636.

(*i*) *Grimman v. Legge*, 8 B. & C. 324.

(*j*) This exception has been held not "usual." *Sharp v. Milligan*, 23 Beav. 419. As to the construction of the exception in relation to *rent*, see *Bennet v. Ireland*, E. B. & E. 326; 28 L. J., Q. B. 48.

(*k*) *Monk v. Cooper*, 2 Stra. 763; 1 Ld. Raym. 1477; *Belfour v. Weston*, 1 T. R.

310. And see *Weigall v. Waters*, 6 T. R. 488; *Hare v. Groves*, 3 Anst. 687, and the cases *infra*.

(*l*) *Baker v. Holtzappel*, 4 Taunt. 45.

(*m*) *Izon v. Gorton*, 5 Bing. N. C. 501.

(*n*) *Packer v. Gibbins*, 1 Q. B. 421.

(*o*) *Brown v. Quiller*, Amb. 919; 2 Eden, 210; *Camden v. Morton*, Id. 219; cited 18 Ves. 118; *Steel v. Wright*, cited 1 T. R. 708.

CH. X. SEC. 7. clearly otherwise (*p*), so that no equitable defence could be raised by virtue of the Judicature Act. It has even been held that a tenant who has covenanted to rebuild, has no equity to compel his landlord to expend money received by the landlord from an insurance office, on the demised premises being burnt down (*q*). But it seems that the act 14 Geo. 3, c. 78, s. 83, which requires the governors of an insurance office, "upon the request of any person interested" (*r*), to cause insurance money to be laid out towards rebuilding, may be taken advantage of by tenants as well as by landlords. It is, however, always desirable to provide for the case of fire by special covenants, and this is frequently done (*s*).

After Eviction
by Lessor,
Rent is sus-
pended.

By an entry of the lessor, or any one claiming through him, into any part of the demised premises to take possession thereof, the rent is suspended (*t*): and therefore, as to subsequently (*u*) accruing rent the eviction will be a bar; but if the lessor enter by virtue of a power reserved, or even as a mere trespasser, if the lessee be not evicted, it will be no suspension of the rent (*v*). Where the lessor caused two messuages, let separately, which had been destroyed by fire during the term, to be rebuilt in such a manner as to destroy their identity; it was held, that such alterations in the subject-matter of the demises amounted to evictions, and that the tenants were not liable for subsequent rent (*x*). If a lessor serve a writ in ejectment under a clause that for any breach of covenant the lease shall determine and be void, he cannot maintain an action for rent subsequently accruing or for breaches of covenant (*y*). If a lessor has no title, and the lessee is evicted by title paramount, he may plead that as a defence to an action by the lessor for subsequent rent (*z*). If a party having a paramount legal right to evict a tenant, goes to him and claims his right, on which the tenant attorns to him, it seems to be equivalent to an expulsion (*a*). Where lands were demised by parol, and the lessee only entered on and had possession of part, in consequence of the lessor having previously demised the residue to a third person; it was held, that the want of possession was equivalent to an eviction by the tortious act of the lessor, and was not in the nature of an eviction by an elder title, and that therefore the rent was not apportionable, and could not be distrained for (*b*). But where the demise is by

(*p*) *Holtzappel v. Baker*, 18 Ves. 115.

(*q*) *Leeds v. Cheetham*, 1 Sim. 146; followed with approval in *Lofft v. Dennis*, 1 E. & E. 474; 28 L. J., Q. B. 168.

(*r*) Post, Chap. XVII.

(*s*) Post, Sect. 8.

(*t*) *Morrison v. Chadwick*, 7 C. B. 266; 6 D. & L. 567.

(*u*) *Boodle v. Campbell*, 7 M. & G. 386.

(*v*) Bull. N. P. 165, 177; *Hunt v. Cope*, Cowp. 243; *Newton v. Allin*, 1 Q. B. 518.

(*x*) *Upton v. Tournend and Upton v. Greenlees*, 17 C. B. 30.

(*y*) *Jones v. Carter*, 15 M. & W. 718.

(*z*) *Cuthbertson v. Irving*, 4 H. & N. 742; 6 Id. 135; 28 L. J., Ex. 306.

(*a*) *Mayor, &c. of Poole v. Whitt*, 15 M. & W. 571; *Emery v. Barnett*, 4 C. B., N. S. 423; but see *Delaney v. Fox*, 2 O. B., N. S. 768.

(*b*) *Nrals v. Mackenzie* (in error), 1 M. & W. 747; *Watson v. Waud*, 8 Exch. 335.

indenture it will operate as a grant of the reversion as to such of the lands as are in the possession of a previous tenant, and a demise of the residue of the lands (c).

CH. X. SEC. 7.
Continuance of Liability for Rent.

It is essentially necessary, in order to suspension of rent, that such eviction be not the effect of a mere trespass, for in such case the lessee is not excused from the payment of his rent: thus, where in an action of debt for rent the lessee pleaded, that Prince Rupert, an alien born, with an hostile army, had entered upon the lessee, and expelled him out of possession, the Court of King's Bench held, that he was still bound to pay his rent (d).

Eviction by mere Trespass does not suspend Rent.
Paradine v Jane.

SECT. 8.—*Stipulation for Abatement of Rent, in case of Fire, &c.*

Where there was a proviso that in case the demised premises or any part thereof "should be destroyed or damaged by fire, flood, storm, tempest, or other inevitable accident," the rent should cease or abate, &c., it was held that an exclusion of the tenant from the premises by the landlord executing repairs in pursuance of a covenant in the lease did not fall within the proviso (e).

(c) *Ecc. Commrs. of Ireland v. O'Connor*, 9 Ir. Com. L. R. 212.

(d) *Paradine v. Jane*, Aleyn, 26; Style, 47; and see *Tasker v. Bullman*, 3 Exch. 351.

(e) *Sauer v. Bilton*, 7 Ch. D. 815; 47 L. J., Ch. 267; 38 L. T. 281; 26 W. R. 394.

CHAPTER XI.

DISTRESS FOR RENT.

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SECT. 1.—*Definition of Distress.*

Definition of
a Distress.

A DISTRESS is one of the most ancient and effectual remedies for the recovery of rent. It is the taking, without legal process, cattle or goods *as a pledge* to compel the satisfaction of a demand, the performance of a duty, or the redress of an injury. The act of taking, the thing taken, and the remedy generally, having been called a distress; an inaccuracy which the older text-writers usually avoided (*a*).

Distress ori-
ginally a
Pledge, and
could not be
sold.

The power of distress appears to have been derived from the ancient feudal law, and to have been substituted for a forfeiture of the tenant's estate (*b*). Originally it was not so much a remedy as the means of obtaining one; for when it was made, the chattels distrained

(*a*) See Bullen on the Law of Distress,
A.D. 1842. The remedies for wrongful

distress are considered post, Chap. XII.
(*b*) Gilb. Rents, 5, 92.

remained only as a pledge in the hands of the distrainer, but could not be sold (c); and, as Blackstone observes, "although such a distress put the owner to inconvenience, and was therefore a punishment to him, yet if he continued obstinate, and would make no satisfaction, it was no remedy at all to the distrainer" (d). This power, however, became the means of great oppression in the hands of the barons (e), and continual enactments were passed up to 1 & 2 Philip & Mary, c. 12, for the protection of tenants (f); but the current of legislation afterwards took a turn, and was for a very long time wholly for the benefit of landlords rather than of tenants (g); a step in the favour of tenants, however, was taken, in 1871, by the act which protects the goods of lodgers from distress, and another step, in 1872, by the act which protects railway rolling stock.

CH. XI. SEC. 1.
Definition of Distress.

Distress is incident of common right to every *rent-service*, properly so called (h). It is also necessarily incident, by special reservation, to every *rent-charge* (h). But it was not incident to *rent-seck* (h) until the 4 Geo. 2, c. 28, s. 5 (i), extended the remedy of distress to rents-seck, rents of assize, and chief-rents, and thereby in effect abolished nearly all material distinction between them (j).

To what Rents Distress incident.

Distress for rent may, by agreement, be made upon other lands of the lessee than those out of which the rent issues. This was held by the Exchequer Chamber upon the construction of a mining lease (k).

On other lands than those demised.

The right of distress is not so inseparable an incident to rent-service that it cannot be postponed. Therefore a landlord may for good consideration undertake not to distrain for six months (l), a mesne landlord may contract not to distrain until after he has produced to his tenant a receipt for the rent for the time being due to the superior landlord (m), and a superior landlord may undertake not to distrain on the goods of an intended lodger of his tenant (n). From an agreement, to which the landlord of a farm is privy, for a sale by the tenant of some eatage of pasture to a third person, the amount produced by the sale to be paid to the landlord, a contract by him may be inferred not to distrain cattle put on the demised land to consume the eatage (o).

Right to distrain may be postponed.

(c) Preamble to 2 W. & M., sess. 1, c. 5; Smith L. & T. 232, 241.

(d) 3 Blac. Com. 14; Smith L. & T. 241 (2nd ed.).

(e) Barrington on Ancient Statutes, 14.
(f) 51 Hen. 3, c. 4; 52 Hen. 3 (Statute of Maresbridge), cc. 1, 2, 4, 15, 21; 3 Edw. 1 (Stat. of Westminster), cc. 16, 17, 23; 13 Edw. 1 (Stat. of Westminster II.), cc. 36, 37; 1 & 2 Ph. & M. c. 12.

(g) 17 Car. 2, c. 7; 2 W. & M., sess. 1, c. 5; 8 Ann. c. 14; 4 Geo. 2, c. 28; 11 Geo. 2, c. 19; 56 Geo. 3, c. 50; 3 & 4 Will. 4, c. 42, s. 38; 14 & 15 Vict. c. 25; Bankruptcy Act, 1869, sect. 34, ante, 257.

(h) Ante, 347.

(i) Ante, 347; *Johnson v. Faulkner*, 2 Q. B. 925.

(j) 2 Blac. Com. 6; Com. Dig. tit. *Distress* (A. 1).

(k) *Daniel v. Stepney*, L. R., 9 Ex. 185, reversing decision below, L. R., 7 Ex. 327; 41 L. J., Ex. 208.

(l) *Oxenham v. Collins*, 2 F. & F. 172.

(m) *Giles v. Spencer*, 3 C. B., N. S. 244; 26 L. J., C. P. 237.

(n) *Horsford v. Webster*, 1 C., M. & R. 696. The Lodgers' Goods Protection Act (see post, Sect. 7 (f)) renders such undertaking now generally unnecessary.

(o) *Horsford v. Webster*, supra.

CH. XI. SEC. 1.

Definition of Distress.

Rent under Agreement for Lease cannot be distrained for.

Rent reserved in an Assignment of a Term.

Fee Farm Rents.

Rent of Incorporeal Hereditaments.

Furnished Apartments.

Liquidated Damages.

Double Rent.

Although a distress may be taken for any kind of rent (properly so called), including that due from tenants at will (*p*), it cannot be made for the rent mentioned in a mere agreement for a lease, not amounting to an actual demise, where no tenancy at an agreed rent has been created expressly or impliedly by the payment of rent or otherwise (*q*). Where a tenant holds over on sufferance only, as there is then no "agreed rent," a distress cannot lawfully be made, but the remedy is by an action for use and occupation (*r*). If a mere termor affect to grant a lease for a term exceeding his own in duration, and to reserve an annual rent, that would operate as an assignment of his term (*s*), and the stat. 4 Geo. 2, c. 28, s. 5 (*t*), does not give power to distrain for such a rent (*u*). With respect to fee farm rents, it has been held that a distress is not incident to them, unless the case be brought within the 4 Geo. 2, c. 28, s. 5 (*x*).

A distress cannot generally be made for a rent reserved upon a letting of incorporeal hereditaments, as tithes, commons or tolls (*y*); but a power of distress may be expressly reserved in such lease in like manner as in the grant of a rent-charge.

A distress may be made for the whole rent reserved on a letting of furnished apartments, because in contemplation of law the rent issues out of the realty only, and not out of the furniture (*z*). But where the owner of a factory lets standings therein for looms, and supplies the power of working them at so much per week (there being no demise of the room), he cannot distrain for the weekly payments as for rent (*a*). It is otherwise where a definite part of the room is demised, with the use of steam-power for working machines, &c. (*b*).

Liquidated damages or forfeitures for breaking up pasture or meadow land, or for carrying hay, straw, &c. off the demised premises, at certain fixed sums in proportion to the extent of the breach, "to be recovered by distress as for rent in arrear," may be distrained for, though the lease is not under seal (*c*).

Double rent payable under 11 Geo. 2, c. 19, s. 18, may be distrained for (*d*); and the exception, once said to obtain in the case

(*p*) Lit. s. 72; *Doe d. Davies v. Thomas*, 6 Exch. 858; *Doe d. Dixie v. Davies*, 7 Exch. 91; *Turner v. Barnes*, 2 B. & S. 435; 31 L. J., Q. B. 170; 8 & 9 Ann. c. 4, ss. 6, 7; 3 & 4 Will. 4, c. 42, s. 37.

(*q*) *Dunk v. Hunter*, 5 B. & A. 322.

(*r*) *Alford v. Vickery*, Car. & M. 280; *Jenner v. Clogg*, 1 Moo. & R. 213; *Williams v. Stiven*, 9 Q. B. 14.

(*s*) Ante, 244.

(*t*) Ante, 348.

(*u*) *Langford v. Selmes*, 3 K. & J. 220; 3 Jur., N. S. 859.

(*x*) *Bradbury v. Wright*, 2 Doug. 624; *Muggrave v. Emmerson*, 10 Q. B. 326; *Smith L. & T.* 189 (2nd ed.).

(*y*) Co. Lit. 47a; *Jewel's case*, 5 Co. R. 3; *Smith L. & T.* 116 (2nd ed.).

(*z*) *Newman v. Anderton*, 2 Bos. & P. New R. 224.

(*a*) *Hancock v. Austin*, 14 C. B., N. S. 634; 32 L. J., C. P. 252; and see *Edmondson v. Nuttall*, 17 C. B., N. S. 280.

(*b*) *Selby v. Greaves*, L. R., 3 C. P. 594; 37 L. J., C. P. 251.

(*c*) *Pollitt v. Forrest*, 1 C. & K. 560; 11 Q. B. 949.

(*d*) *Johnstone v. Hudlestone*, 4 B. & O. 922. As to "double rent," see post, Chap. XX., Sect. 2 (*c*).

of a weekly tenant (*e*), appears to have been founded on a mistake (*f*).

A distress may be made where the tenant holds by the service of cleaning the parish church, or of ringing the church bell at stated times, or by other manual services (*g*); but in such case the distress cannot be sold.

CH. XI. SEC. 1.
Definition of Distress.

Manual Services.

SECT. 2.—Conditions precedent to Distress.

By 3 & 4 Will. 4, c. 27, s. 42, "no arrears of rent shall be recovered by any distress, but within six years" next after it shall have become due, "or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto, or his agent, signed by the person by whom the same was payable, or his agent."

Only 6 Years' Arrears may be distrained for.

Where the right to distrain exists, nothing but payment, or something equivalent to payment, such as a tender of the arrears, or a release under seal, will be sufficient to take it away: even attending upon the land on the proper day to pay the rent will not destroy the right to distrain unless a tender be actually made (*h*). But where a landlord's receiver allowed the tenant to make a deduction of payments for land tax every year for seventeen years, greater than the landlord was liable to pay, the landlord knowing or having the means of knowing all the facts; it was held, that he could not distrain for the amount erroneously allowed, for such allowance *operated as payments*, though the receipt given every year showed the amount paid and the amount deducted (*i*). We have already seen that it has been held that neither taking a security for rent (*k*), nor an agreement to take interest (*l*), nor a set-off to an equal or greater amount than the rent in arrear (*m*), can take away the landlord's right to distrain.

Right to distrain until Payment.

Allowance of Deductions operates as Payment.

Taking Security.

Davis v. Gyde.

Agreement to take Interest. Set-off.

A distress cannot lawfully be made after the full amount of rent really due has been tendered to the landlord, or to his agent having authority to receive the rent (*n*). If the landlord or his agent sign a distress warrant and deliver it to the broker, but before he can effect an entrance to distrain, the tenant or his agent tenders the

Tender before Distress.

(*e*) *Sullivan v. Bishop*, 2 C. & P. 369.

(*f*) Bullen on Distress, 116, note; 2 Chit. Pl. 344, note (*e*), (7th ed.).

(*g*) Doe d. Edney v. Benham, 7 Q. B. 976.

(*h*) *Horne v. Lewin*, 1 Ld. Raym. 639; 1 Salk. 583; 12 Mod. 352.

(*i*) *Bramston v. Robins*, 4 Bing. 11; *Waller v. Andrews*, 3 M. & W. 312.

(*k*) *Davis v. Gyde*, 2 A. & E. 623; ante, 369.

(*l*) *Skerry v. Preston*, 2 Chit. R. 245.

(*m*) *Absalom v. King*, Bull. N. P. 181; Barnes, 450; *Andrew v. Hancock*, 1 Brod. & B. 46; 47; *Stubbs v. Parsons*, 3 B. & A. 521; *Wilson v. Davenport*, 5 C. & P. 531; and see *Pratt v. Keith*, 33 L. J., Ch. 528; 10 Jur., N. S. 305.

(*n*) *Branscomb v. Bridges*, 1 B. & C. 145; 3 Stark. R. 171; *Holland v. Bird*, 10 Bing. 15; *Bennett v. Bayes*, 5 H. & N. 391; 29 L. J., Ex. 391.

CH. XI. SEC. 2. rent *without expenses* to the landlord or his agent, it will be illegal afterwards to execute the distress warrant, and all parties concerned therein will be liable to an action of trespass (o) or trover (p). After the distress has been made, but *before it is impounded*, the tenant may tender to the landlord or his agent the amount of the rent, together with a sufficient sum for the costs of the distress (q); after which it will be illegal to proceed further with the distress (r). But a tender of the rent with expenses *after the impounding* is too late to enable the tenant to maintain an action of trespass, trover, detinue or replevin; because the cattle or goods are then in the custody of the law, and not of the landlord or his agent (s). The subsequent detention is considered as the act of the law, and not of the distrainer who has neither any property nor even a constructive possession of the cattle or goods distrained (t); and although they might be released with his consent, he is not legally bound to give such consent. However, if such tender be made within the five days allowed to the tenant to replevy (although after the impounding), a special action on the case, founded on the equity of the stat. 2 W. & M. sess. 1, c. 5, s. 2, may be maintained if the landlord afterwards proceed to sell the distress (u). To avoid this the landlord should, after such a tender, abstain from selling (which he may lawfully do) and merely keep the distress impounded as a pledge, according to the common law, until the arrears of rent, with expenses, are actually satisfied, or the tenant incurs the trouble and expense of a replevin, the costs of which will fall upon him.

What
amounts to an
Impounding.

Whether the distress was "impounded" before the tender was made is sometimes a question of considerable nicety and importance. In one case the landlord's agent had delivered to the tenant a notice of distress, wherein it was stated that the cattle distrained, of which an inventory had been given, were *impounded on the premises*; it was held, that the impounding was complete so as to make a subsequent tender unavailing (x). In another case, a landlord's agent went upon the tenant's premises, and walked round them, and gave a written notice that he had distrained certain goods lying there for an arrear of rent, *all which goods he had left on the said demised premises*, and that unless the rent was paid, or the goods

(o) *Bennett v. Boyes*, 5 H. & N. 391; 29 L. J., Ex. 391.

(p) *Hatch v. Hale*, 15 Q. B. 10.

(q) Post, Sect. 8 (e).

(r) *Fortue v. Beasley*, 1 Moo. & R. 21; *Evans v. Elliott*, 5 A. & E. 142; *Ladd v. Thomas*, 12 A. & E. 117.

(s) *Six Carpenters' case*, 8 Co. R. 432; 1 Smith L. C. 133 (7th ed.); *Firth v. Purvis*, 5 T. R. 432; *Thomas v. Harries*, 1 M. & G. 695; *Ladd v. Thomas*, 12 A.

& E. 117; *Ellis v. Taylor*, 8 M. & W. 415; *Tennant v. Field*, 8 E. & B. 336; *Smith L. & T.* 238 (2nd ed.).

(t) *Rex v. Cotton, Parker*, 121; *Turner v. Ford*, 15 M. & W. 212; *Wilbraham v. Snow*, 2 Wms. Saund. 47 a.

(u) *Johnson v. Upham*, 2 E. & E. 260; 28 L. J., Q. B. 252; overruling *Ellis v. Taylor*, 8 M. & W. 415.

(x) *Thomas v. Harries*, 1 M. & G. 695.

replevied within five days, they would be appraised and sold according to law, and then went away without leaving any person in possession. It was held, that there was a sufficient distress and impounding on the premises pursuant to 11 Geo. 2, c. 19, s. 10 (y). In a third case, a landlord entered upon a dwelling-house to distrain, but, to prevent inconvenience to the tenant, the landlord, with the tenant's assent, instead of removing the articles of furniture upon which he proposed to distrain, made up from a list given to him by the tenant an inventory of the furniture in the house, put a man into possession, and handed to the tenant a notice of distress referring to the inventory, which was also then handed to the tenant. The landlord did not go into the several rooms in which the articles were, and the notice of distress did not state that the articles were impounded. It was held, that this constituted a distraining of the articles mentioned in the inventory, and an impounding them upon the premises, and that a tender subsequently was too late (z).

CH. XI. SECT. 2.
Conditions pre-
cedent to Dis-
tress.

A tender may be made to the landlord himself, notwithstanding he has instructed a broker to distrain and left the matter in his hands (a). So it may be made to any agent of the landlord who has express or implied authority to receive rent on his behalf (b). Where a landlord gives a warrant to distrain for rent in the usual form, he thereby in effect authorizes the bailiff to receive the rent, if tendered: and it seems that in such case he could not prohibit the bailiff from accepting such tender, so as to render a tender to him invalid: at all events, the bailiff cannot refuse a tender on the ground that he was forbidden by the landlord's solicitor to receive the money (c). A tender to the landlord's agent, who signed the distress warrant on his behalf, is sufficient (d). But a tender to the broker's man, who is merely left in possession under the distress, and has no actual authority to receive the money, is bad (e), and so is a tender to a servant (f). Where it appeared that the distrainer's wife had been in the usual habit of acting as his agent in such matters, and had in his absence made a distress for damage feasant; it was held, that a tender to her of amends was sufficient (g).

To whom a
Tender may
be made.

The tenant must, at his peril, tender the full amount of the rent in arrear, without any deductions, except in respect of actual or con-

Tender must
be in full, with
Expenses.

(y) *Swann v. Earl of Falmouth*, 8 B. & C. 456.

(z) *Tennant v. Field*, 8 E. & B. 336. Where sheep are distrained for damage feasant, a tender of amends after the sheep have been put into a private pound, but before they have been sent (as intended) to the public pound, is not too late. *Browne v. Powell*, 4 Bing. 230.

(a) *Smith v. Goodwin*, 4 B. & Adol. 413.

(b) *Bennett v. Bayes*, 5 H. & N. 391; 29 L. J., Ex. 391.

(c) *Hatch v. Hale*, 15 Q. B. 10.

(d) *Bennett v. Bayes*, supra.

(e) *Boulton v. Reynolds*, 2 E. & E. 369; 29 L. J., Q. B. 11.

(f) *Pilkington v. Hastings*, Cro. Eliz. 813.

(g) *Browne v. Powell*, 4 Bing. 230.

CH. XI. SEC. 2. *Conditions precedent to Distress.* structure payments (*h*) on account thereof (not items of set-off (*h*)). He must also tender, at his peril, a sufficient sum for the lawful expenses of the distress (*i*), unless indeed the tender be made before any entry to distrain (*k*). The tender should be made *unconditionally*, so that the party may accept it without prejudice to his right (if any) to recover more. And although where the amount owing is not disputed, the demand of a receipt and refusal to part with the rent without one, would seem, under the present Stamp Act, not to vitiate the tender (*l*), a tender of one quarter's rent, coupled with a demand of a receipt up to a particular day, there being a dispute whether one or two quarters' rent was then due, is not valid (*m*); but sending a certain sum "to settle one year's rent," does not impose a condition (*n*), nor does a tender "under protest" (*o*).

Detention of Distress after Payment.

A landlord, who has accepted the rent in arrear and the expenses of the distress after the impounding, cannot be treated as a trespasser merely because he *retains possession* of the goods distrained; although his refusal to deliver them up to the tenant may amount to a conversion so as to render him liable in trover (*p*). Notwithstanding a distress, the property in the cattle or goods distrained (whether impounded or not) remains vested in the tenant or owner thereof, until they are *sold* under the distress (*q*); and he may sell or otherwise dispose of them subject to the distress; or whenever the distress is determined (without any sale) he may recover them back (*q*). So a purchaser from him may recover them in trover, where the landlord has not *sold* the goods, but taken them himself at a valuation, which he had no legal right to do (*r*). The landlord or person distraining has no property in the cattle or goods distrained, nor even the possession thereof; therefore, if they are rescued, or unlawfully taken out of the pound, he cannot maintain trover (*s*), but only a special action for rescue or pound breach (*t*).

Property in Cattle or Goods distrained.

A landlord has no right to distrain unless there be an *actual* demise at a *fixed* rent (*u*). A licence to get all the copperas stone which

There must be an actual Demise at a fixed Rent.

(*h*) Ante, 371.

(*i*) Post, Sect. 8.

(*k*) *Bennett v. Hayes*, 5 H. & N. 391; 29 L. J., Ex. 391; ante, 385.

(*l*) See *Richardson v. Jackson*, 8 M. & W. 298. The prior enactments on the subject, 43 Geo. 3, c. 126, ss. 4, 5 (see *Laing v. Meader*, 1 C. & P. 257); 55 Geo. 3, c. 184, Sch. tit. *Receipt*, are repealed by 33 & 34 Vict. c. 99, and the law is now governed by the Stamp Act, 1870, s. 123, which see, Appendix A., Sect. 7.

(*m*) *Finch v. Miller*, 5 C. B. 428.

(*n*) *Brown v. Owen*, 11 Q. B. 130; *Bull v. Parker*, 2 Dowl., N. S. 345.

(*o*) *Manning v. Lunn*, 2 C. & K. 13.

(*p*) *West v. Nibbs*, 4 C. B. 172.

(*q*) *Turner v. Ford*, 15 M. & W. 212; *King v. England*, 4 B. & S. 782; 33 L. J., Q. B. 145.

(*r*) *King v. England*, *supra*.

(*s*) *Rex v. Cotton, Parker*, 121; *Wilbraham v. Snow*, 2 Saund. 47 a.

(*t*) *Riddell v. Stovey*, 2 Moo. & R. 358; *Turner v. Ford*, 15 M. & W. 213; *Bullen on Distress*, Chap. VII.; post, Sect. 10.

(*u*) *Dunk v. Hunter*, 5 B. & A. 322; *Hegan v. Johnson*, 2 Taunt. 148; *Regnant v. Porter*, 7 Bing. 461; *Watson v. Waud*, 8 Exch. 335; *Hancock v. Austin*, 14 C. B., N. S. 634; *Ward v. Day*, 4 B. & S. 337; 5 Id. 359; 33 L. J., Q. B. 3, 254; *Smith L. & T.* 188, 189 (2nd ed.).

may be found in part of a manor, for twenty-one years, at the yearly rent of 25*l.*, is not a demise, and will not support a distress for the agreed rent (*x*). Where a tenant holds over on sufferance only, as there is then no "agreed rent" or actual tenancy, a distress cannot lawfully be made, but the remedy is by action for use and occupation (*y*). Where a lease of tithes and land was granted at an entire rent, and it was void as to the tithes, because it was not under seal; it was held, that a distress for an arrear of rent was altogether unlawful, because there was no distinct rent due for the land (*z*). Where a lease was made *by parol* of 100 acres of land at a certain rent, and the lessee accepted the lease and entered upon the land, but afterwards found that eight acres had been previously demised by his lessor to another person who was in possession; it was held, that the demise was altogether void as to the eight acres, and that the rent could not be apportioned, and therefore could not be distrained for (*a*): but it would have been otherwise if the demise had been under seal, because that would have operated as a grant of the reversion and its incidents, as to the eight acres, and no apportionment of the rent would have been necessary (*b*). A rent of a certain sum per cube yard of marl dug, and a certain sum per thousand of bricks made from clay dug from land, is a rent which may be ascertained with certainty, and which therefore may be distrained for (*c*). Where the demise was subject to certain rents, provisions, conditions, and stipulations, and amongst others that the lessee should not sell hay off the premises, under the penalty of 2*s.* 6*d.* per yard of the hay sold, to be recovered by distress as for rent in arrear; it was held, that this was recoverable by distress as for rent, but was not a rent (*d*).

CH. XI. SEC. 2.
Conditions precedent to Distresses.

Where a person is in possession under a mere agreement for a lease, not amounting to an actual demise, and no other circumstances exist from which a tenancy at a fixed rent can be implied and found by a jury; as no rent (properly so called) is due for the occupation, but only a compensation in the nature of rent, the owner cannot distrain for non-payment (*e*). But if the agreement goes on to say, that until the lease shall be executed, the rent, covenants and agreements to be therein contained shall be paid and observed, and the several rights and remedies shall be enforced in the same manner as if the same had been actually executed; that will, on entry, create a tenancy at a

Agreement for Lease.

(*x*) *Ward v. Day*, 33 L. J., Q. B. 3, 254.

(*y*) *Alford v. Vickery*, Car. & M. 280; *Jenner v. Clegg*, 1 Moo. & R. 213; *Williams v. Steven*, 9 Q. B. 14.

(*z*) *Gardiner v. Williamson*, 2 B. & Adol. 337; see also *Meggison v. Lady Glamis and Sells v. Same*, 7 Exch. 685.

(*a*) *Neale v. Mackenzie* (in error), 1 M. &

W. 747; *Holgate v. Kay*, 1 C. & K. 341.

(*b*) *Erel. Commrs. of Ireland v. O'Connor*, 9 Ir. Com. L. R. 242; *Lake v. Dian*, 28 Beav. 607.

(*c*) *Daniel v. Gracie*, 6 Q. B. 145.

(*d*) *Pollitt v. Forrest*, 11 Q. B. 949; 1 C. & K. 560; ante, 349.

(*e*) *Dunk v. Hunter*, 5 B. & A. 322; *Hegan v. Johnson*, 2 Taunt. 148.

CH. XI. SEC. 2. fixed rent, for which the landlord may distress when due, although
Conditions pre-
cedent to Dis-
tress.
 no rent has been paid under the agreement (*f*). So where an intended purchaser, by the contract of sale, admits himself to be tenant from week to week to the vendor, at a rent of 80*l.* per week payable in advance or otherwise, such rent may be distrained for (*g*).

Implied
 Tenancy at
 fixed Rent.

An actual tenancy at a fixed rent may be implied from very slight circumstances (*h*); thus where a tenant, who had entered on premises under an agreement for a lease, admitted a charge of half-a-year's rent in an account between him and his landlord; it was held, that this was equivalent to payment, and constituted him a tenant from year to year, and made him liable to a distress (*i*). Where the plaintiff took possession of premises under an agreement for a lease to him for seven years, at a yearly rent payable half-yearly, but no lease was executed, nor was the quantum of rent to be paid ascertained; and the plaintiff occupied under the agreement for three years, and *paid rent* for two; it was held, that this created a tenancy from year to year, and entitled the landlord to distress for the arrears due at the rate previously paid (*k*). But where a tenant entered under an agreement containing stipulations for a lease at 25*l.* per year, and an engagement by the landlord to complete certain erections, which were never completed, nor any rent paid, and the tenant, on being called on after some years' occupation, said he was ready to pay upon the erections being completed and an allowance made to him for some repairs; it was held, that a demise at a certain rent could not be implied so as to entitle the landlord to distress (*l*). So where a person let a furnished house at a certain rent from a future day, and agreed that he would furnish it suitably for a school; it was held, that such furnishing was a condition precedent to the right to demand the rent, and therefore that the lessor, not having furnished it, could not distress (*m*). Where a person entered upon premises subject to the approbation of the landlord, who afterwards did not approve, but upon his agreeing to pay an advanced rent, as well for the time he had been in possession as for the future, allowed him to continue in possession; it was held, that the landlord might distress for the advanced rent accrued before the agreement as well as for what accrued afterwards—such agreement giving him the same power by relation to his tenant's first entry into possession, as it did to recover his rent in future (*n*). An acknow-

Acknowledg-
 ment.

(*f*) *Anderson v. Midland R. Co.*, 3 E. & E. 614; 30 L. J., Q. B. 94; *Pinero v. Judson*, 6 Bing. 206; *Rollason v. Leon*, 7 H. & N. 73; 31 L. J., Ex. 96.

(*g*) *Yeoman v. Ellison*, L. R., 2 C. P. 681; 36 L. J., C. P. 326.

(*h*) *Ante*, 118, 206.

(*i*) *Cox v. Bent*, 5 Bing. 185; *Vincent v. Godson*, 24 L. J., Ch. 122; *Smith L. & T.* 27 (2nd ed.).

(*k*) *Knight v. Bennett*, 3 Bing. 361.

(*l*) *Regnart v. Porter*, 7 Bing. 451.

(*m*) *Mechelen v. Wallace*, 7 A. & E. 49; *Vaughan v. Hancock*, 3 C. B. 766.

(*n*) *M'Leish v. Tate*, Cowp. 781.

ledgment of an antecedent tenancy at a specified rent, with an agreement to go on on certain terms, is sufficient to authorize a distress (o). If a tenancy has existed, a surrender of the term must be complete (p), or the landlord's right to distrain will continue (q). If a tenant is evicted by title paramount, but remains in possession under a new agreement with the person who had evicted him, his original landlord cannot distrain on him for rent (r). If a lessor exercise his option that a lease shall be void for breach of covenant, he cannot distrain for subsequent rent (s). Where the landlord has given a notice to quit and the tenant holds over, but nothing is done to show that a new tenancy is created, the landlord cannot distrain for rent accruing due after the time when the notice expired (t). In a previous case a distress for rent accruing after the expiration of a notice to quit was considered to operate merely as a waiver of the notice (u). It should, however, be borne in mind that a notice to quit cannot be waived without the express or implied consent of both parties, and that it differs in this respect from a forfeiture (x).

CH. XI. SECT. 2.
Conditions precedent to Distress.

Surrender.
Eviction.

Notice to quit.

Where it appeared that by the custom of the country the tenant was to have the use of the barns, gate-houses, &c., of the farm for a certain period after the end of the term, for the purpose of thrashing out corn and foddering cattle; and the tenancy was determined at Michaelmas, and the landlord in January following distrained a corn-rick for rent due at Michaelmas, he having in the meantime obtained an injunction to restrain the tenant from carrying off the premises corn in the straw; it was held, that the holding by the tenant under the custom, though involuntary, was a *prolongation of the original term*, and that the landlord was entitled to distrain (y).

Prolongation of Term by Custom of the Country.

SECT. 3.—*Restraining Distress by Injunction.*

Before the Judicature Acts a distress could not be restrained by injunction (z). But section 25, subs. 8, of the Judicature Act, 1875, which enacts, that "an injunction may be granted by an interlocutory order of the court in all cases in which it shall appear to the court to be just or convenient," extends to authorize an injunction, and such an

Injunction against Distress.

Shaw v. Jersey.

(o) *Eagleton v. Gutteridge*, 11 M. & W. 465; 2 Dowl., N. S. 1053; *Gladman v. Plumer*, 15 L. J., Q. B. 79; 10 Jur. 109.

(p) *Ante*, 273.

(q) *Cuppland v. Maynard*, 12 East, 134.

(r) *Hopcraft v. Keys*, 9 Bing. 613.

(s) *Jones v. Carter*, 15 M. & W. 718; *Franklin v. Carter*, 1 C. B. 760; 3 D. & L. 213; *Bridges v. Smyth*, 5 Bing. 410; *Cole Ejec.* 82, 408.

(t) *Alford v. Fickery*, 1 C. & M. 280;

Jenner v. Clegg, 1 Moo. & R. 213; *Williams v. Stiven*, 9 Q. B. 14.

(u) *Zouch d. Ward v. Willingale*, 1 H. Blac. 311.

(x) *Blyth v. Dennett*, 13 C. B. 178, 180; *ante*, 328.

(y) *Knight v. Bennett*, 3 Bing. 361; *Beavan v. Delahay*, 1 H. Blac. 5; *Nuttall v. Staunton*, 4 B. & C. 51.

(z) *Shaw v. Jersey (Earl of)*, L. R., 4 C. P. D. at p. 261, per Cotton, L. J.

CH. XI. SEC. 3. *Restraining Distress by Injunction.* injunction was granted in *Shaw v. Earl of Jersey (a)*. In that case the plaintiffs, who were assignees of a mining lease, under which the defendant claimed to be entitled to a certain additional rent. The defendant had distrained twice, and the plaintiffs had sued for unlawful distress. A special case had been stated to determine the construction of the lease. The defendant was restrained from distraining until the determination of this case, by an injunction granted for a fortnight, and to be continued only if the rent should in the meantime be paid into court. It may be observed that such a *conditional* injunction is more favourable for the landlord than the action of replevin, in which the tenant is *compellable* to give security only, although he may if he please make a deposit instead. (See post, Chap. XII.)

SECT. 4.—*Who may distrain.*

(a) *Reversioners.*

Distress incident to the Reversion.

The person legally entitled to the immediate reversion on a lease, when any of the rent thereby reserved becomes due, may distrain for such rent by virtue of the common law (*b*). But if he afterwards assign the reversion either absolutely or by way of mortgage, the remedy *by distress* for such arrears will be lost (*c*). So the right to distrain for previous arrears of rent may be lost by a severance of the reversion: thus where the plaintiff was tenant to six joint tenants, four of whom conveyed their shares to a third party; it was held, that the six were not entitled to distrain for the arrears of rent due to them before the conveyance (*d*). But a second lease to commence on the expiration of the previous one, creates only an interesse termini during the continuance of the first lease, and does not amount to an assignment of the reversion (*e*). If a lessee for years *assign* his term, reserving a rent, but without an express power of distress, he cannot distrain for it when in arrear, because he has no reversion: his remedy is by an action on the contract (*f*). If a lessee sub-let for a term shorter than his own by one day or more, he has a rever-

(a) L. R., 4 C. P. D. 359—C. A., affirming decision below; L. R., 4 C. P. D. 120; 48 L. J., C. P. 308; 27 W. R. 787.

(b) Ante, 382.

(c) Bullen, 26, 74; *Thér v. Barton*, Moore, 94; *Dixon v. Harrison*, Vaughan, 52; *Brown v. Metropolitan Counties Life Insurance Society*, 1 E. & E. 832; 28 L. J., Q. B. 236; *Smith v. Torr*, 3 F. & F. 505; *Smith L. & T.* 189 (2nd ed.).

(d) *Stareley v. Alcock*, 16 Q. B. 636; 20 L. J., Q. B. 320.

(e) *Smith v. Day*, 2 M. & W. 684; *Blachford*, app., *Cole*, resp., 5 C. B., N. S. 514; *Doe v. Walker*, 5 B. & C. 111.

(f) — *v. Cooper*, 2 Wilson, 375; *Smith v. Mapleback*, 1 T. R. 441; *Talentine v. Denton*, Cro. Jac. 111; *Parmenter v. Webber*, 8 Taunt. 593; *Preece v. Corrie*, 5 Bing. 24; *Pascoe v. Pascoe*, 3 Bing. N. C. 898; Bullen, 54.

sion and consequently a right to distrain, which will pass to his executors (*g*); and so has a tenant from year to year, sub-letting from year to year (*h*). A termor after his term has expired, and a demand of possession by the lessor, cannot distrain upon his sub-tenant continuing in possession (*i*). If a termor surrender his term to the reversioner, reserving to himself a rent, but without an express power of distress, he cannot distrain for the rent when in arrear, because he has no reversion. But if a surrender be made, and a new lease granted, the right to distrain on previous sub-tenants is preserved by the 4 Geo. 2, c. 28, s. 6, and 8 & 9 Vict. c. 106, s. 9 (*k*).

CH. XI. SECT. 4.
*Who may dis-
train (Rever-
sioners).*

One joint tenant may distrain alone; but he must avow or justify such distress in his own right, and as bailiff of the others (*l*). A distress for rent may be authorized by one of several joint tenants (*m*). He may sign a distress warrant, and thereby appoint a bailiff to distrain for rent due to all, if the others do not forbid him; and if when applied to they merely decline to act, that will not prevent him from proceeding (*n*). If some of the joint tenants assign their shares, the right of all the joint tenants to distrain for previous arrears of rent is at an end (*o*). A surviving joint tenant may distrain for arrears accrued in the lifetime of his deceased companion (*p*). Where two or more executors or other joint tenants demise to their co-executor or co-tenant their shares at a fixed rent, it seems they may distrain for such rent when in arrear (*q*).

Joint
Tenants.

Tenants in common are obliged to avow separately (*r*), and should make several distresses, each for his own share (*s*); thus, where land was demised by four persons (whose original title did not appear) at one entire rent, to be divided and paid separately in equal portions; and one of the four distrained upon the tenant for her own share of the rent; it was held, that the distress was regular, for whatever might have been the interest of the landlords as between themselves, as between them and the terre-tenant they were tenants in common, and entitled each to a separate distress (*t*). It seems they may all join in one distress; but in justifying such distress they must avow or justify separately for their respective shares (*u*). It has been held that the survivor of two tenants in common may sue in covenant for

Tenants in
Common.

(*g*) *Wade v. Marsh*, Latch. 211; Bullen, 54.

(*h*) *Curtis v. Wheeler*, Moo. & M. 493; *Oxley v. James*, 13 M. & W. 209.

(*i*) *Burne v. Richardson*, 4 Taunt. 720.

(*k*) Ante, Chap. IX., Sect. 5.

(*l*) *Pullen v. Palmer*, 3 Salk. 207; Carth. 328; 6 Mod. 73.

(*m*) Per Jervis, C. J., in *Morgan v. Parry*, 17 C. B. 342.

(*n*) *Robinson v. Hoffman*, 4 Bing. 562;

3 C. & P. 234.

(*o*) *Staveley v. Alcock*, 16 Q. B. 636;

20 L. J., Q. B. 320.

(*p*) Bullen, 47; 2 Roll. Abr. 86.

(*q*) *Cowper v. Fletcher*, 6 B. & S. 464;

34 L. J., Q. B. 187.

(*r*) *Pullen v. Palmer*, 3 Salk. 207.

(*s*) Bradby, 41.

(*t*) *Whitley v. Roberts*, M'Clel. & Y. 107.

(*u*) Bullen, 48.

CH. XI. SEC. 4. the whole rent due upon a lease made by them, although the reservation was to both according to their respective interests (*x*). If a rent-charge has been divided by will, or by deed operating under the Statute of Uses, amongst several persons as tenants in common, there may be several distresses without attornment (*y*). After a devise of a reversion to two tenants in common, one of them may distrain for his share of the rent upon the lessee of the devisor, where such lessee has paid the whole rent to the other tenant in common after notice not so to pay (*z*). Where a tenant in common demises his share to his co-tenant, he may distrain for the rent reserved (*a*).

Heirs in Gavelkind. One of several coheirs in gavelkind may distrain for rent due to himself and his coheirs without express authority from them (*b*).

Coparceners. Coparceners are considered in law but as one heir, and therefore before partition must join in making a distress (*c*): or one coparcener may distrain alone for the whole rent, each having an estate in every part of it (*d*). No consent from the other coparceners need be previously obtained in order to authorize one coparcener to distrain alone, or alone to appoint a bailiff to distrain for the whole rent (*d*). In the event of a replevin, however, the avowry must be, according to the nature of the estate, joint; or the party distraining alone must avow in her own right for her own share, and make cognizance as bailiff of the other coparceners (*d*). After a partition, coparceners may of common right make several distresses, and their grantees also have the same power (*e*). And even a rent-charge, although entire in its nature, may be divided between coparceners; and thus by act of law the tenant of the land may become subject to several distresses (*f*). But coparceners after they have parted with their estate cannot distrain for previous arrears (*g*).

Tenants in Tail. Although a tenant in tail make leases not conformable to any enabling act (*h*), such leases are good as against himself, and therefore as a reversioner he may distrain even at common law for the rent reserved thereby (*i*).

Tenants by the Curtesy. A tenant by the curtesy may distrain of common right (*k*); but a husband, unless he be tenant by the curtesy, cannot distrain for rent

(*x*) *Wallace v. M'Larn*, 1 Man. & R. 516; *Thompson v. Hakevill*, 19 C. B., N. S. 713; 35 L. J., C. P. 18.

(*y*) *Rivis v. Watson*, 5 M. & W. 255.

(*z*) *Harrison v. Barnby*, 5 T. R. 246; *Powis v. Smith*, 5 B. & A. 850; *Doe d. Pritchitt v. Mitchell*, 1 Brod. & B. 11; Bullen, 49.

(*a*) *Brennam v. Hood*, 4 Ir. Com. L. R. 332, Q. B.

(*b*) *Leigh v. Shepherd*, 2 Brod. & B. 465; Bullen, 46.

(*c*) *Stedman v. Page*, 1 Salk. 390; *Stedman v. Bates*, 1 Ld. Raym. 64.

(*d*) *Leigh v. Shepherd*, 2 Brod. & B. 465; Bullen, 44.

(*e*) *Butler and Baker's case*, 3 Co. R. 22 b; Co. Lit. 164 b; 169 b; Bullen, 45.

(*f*) Co. Lit. 164 b; *Rivis v. Watson*, 5 M. & W. 255.

(*g*) *Dixon v. Harrison*, Vaughan, 52; and see *Staveley v. Alcock*, 16 Q. B. 636.

(*h*) Ante, 3.

(*i*) 1 Swanst. 346, note; Bullen, 50.

(*k*) *Bradby*, 46; Bullen, 51.

which becomes due after the death of his wife under leases of her freehold made by both of them, or by him on her behalf (*m*).

CH. XI. SEC. 4.
*Who may dis-
train (Rever-
sioners).*

A widow to whom dowry has been duly assigned by metes and bounds, may distrain for the subsequent rent of that part (*n*). If a rent be assigned to a widow instead of her dower, she may distrain for it, although she has no reversion, and the rent was granted without deed; for such rent is in its nature distrainable of common right (*o*).

Tenants in
Dower.

An entry under an execution, either by elegit, statute merchant or statute staple, gives so far an estate in the rent of land as to confer the power of distress, although there is but an uncertain interest in the reversion (*p*), and a tenant by elegit may distrain without attornment (*q*).

Tenants
under Exe-
cution.

A lord of a manor may of common right distrain for his copyhold rents (*r*), and by 4 Geo. 2, c. 28, s. 5, he has the same right as if the rent was reserved upon lease. But copyhold rents are not within 32 Hen. 8, c. 37, giving a remedy by distress for arrears of rent to executors and administrators (*s*). Where two commoners agreed, to their mutual advantage, not to exercise their respective rights for a certain term; it was held that one might distrain the other's cattle damage feasant during that time (*t*). In case of a common absolutely stinted in point of number, one commoner may distrain the supernumerary cattle of another; but not if an admeasurement be necessary; or where the stint has relation to the quantity of common land; and a commoner cannot distrain where the owner of cattle has any colour of right to put them on the land, as that would be taking to himself jurisdiction as to the competency of such right; but if there be no pretence or shadow of right, as in the case of the cattle of a stranger, the commoner may always resort to distress (*u*).

Lords of Ma-
nors and
Commoners.

A mortgagee, after giving notice of the mortgage to the tenant in possession under a lease or tenancy created *prior* to the mortgage, may distrain for the rent in arrear and unpaid at the time of the notice, as well as for rent which may accrue after such notice, although he was not in the actual seisin of the premises, nor in the receipt of the rents and profits thereof at the time the rent became due (*x*); but he may not distrain for rent due upon a lease made by the mortgagor alone *after* the mortgage, unless he has accepted rent from the

Mortgagees.
*Moss v. Galli-
more.*

(*m*) *Ante*, 39.

(*n*) Co. Lit. 29 a, 34 b, 144 b; *Stoughton v. Leigh*, 1 Taunt. 410; Bullen, 52.

(*o*) Co. Lit. 34 b, 169 b; Bullen, 31, 52; Gilb. Rents, 20.

(*p*) Bro. Abr. *Distresses*, pl. 72; *Cubitt's case*, 4 Co. R. 7.

(*q*) *Lloyd v. Davies*, 2 Exch. 103.

(*r*) *Laugher v. Humphrey*, Cro. Eliz.

524; Bullen, 57, 58.

(*s*) *Appleton v. Doily*, Yelv. 135; Bull. N. P. 57; *Sands v. Hempton*, 2 Leon. 142.

(*t*) *Whitman v. King*, 2 H. Blac. 4.

(*u*) *Hall v. Harding*, 4 Burr. 2432; 1 W. Blac. 673.

(*x*) *Moss v. Gallimore*, 1 Doug. 279; 1 Smith L. C. 629 (7th ed.); *Pope v. Biggs*, 9 B. & C. 245.

CH. XI. SEC. 4. *Who may distrain (Reversioners).* tenant, or has given him notice to pay rent, and the tenant has acquiesced, so as to create a new tenancy (express or implied) as between the mortgagee and the tenant (*y*). Payment of rent by the tenant under a distress does not constitute an acquiescence by relation back to the period when notice was given (*z*). But the tenant may expressly attorn to the mortgagee as from a previous day, at a specified rent, which may accordingly be distrained for (*a*).

A mortgagee may distrain on the mortgagor for rent reserved upon an attornment in the mortgage deed, whether such rent be payable in advance or not, and even where the mortgagee has not executed the deed, if the tenancy be at will only, or for a term not exceeding three years (*b*).

Mortgagors. A mortgagor may distrain, under a lease granted by himself after the mortgage (*c*): but he cannot distrain for arrears of rent due on a lease made before the mortgage; for by the act of mortgaging the privity of estate is destroyed (*d*). But if a lessor, after mortgaging his reversion, is permitted by the mortgagee to continue in the receipt of the rents incident to that reversion, he, during such permission, is presumptione juris authorized, if it should become necessary, to realize the rent by distress, and to distrain for it in the mortgagee's name, as his bailiff: and he may so justify the distress, although it was taken in his own name as for rent due to himself (*e*). So where a mortgage by demise has been paid off by the assignee of the equity of redemption, who takes from the mortgagee an undertaking to execute a transfer of the mortgage, there is an implied authority to the assignee of the equity of redemption to distrain in the name of the mortgagee (*f*).

Annuityants. A mere annuity may be distrained for where the deed creating it expressly confers a power to distrain (*g*); but not generally in other cases (*h*). If an annuity be granted out of an estate, and the grantor, to secure the payment, vests the estate in trustees for a term, to the use of the annuitant, and subject thereto continues in possession, the annuitant may distrain for the arrears; for supposing the term to have given him the reversion, the grantor is to be considered as his subtenant, upon whom he might as reversioner distrain at common law (*i*).

Guardians. Such guardians as may make leases of the infant's lands in their

(*y*) *Rogers v. Humphreys*, 4 A. & E. 299; *Partington v. Woodcock*, 6 A. & E. 690, ante.

(*z*) *Evans v. Elliott*, 9 A. & E. 342; *Brown v. Storey*, 1 M. & G. 117.

(*a*) *Gladman v. Plumer*, 15 L. J., Q. B. 80; 10 Jur. 109.

(*b*) *Morton v. Woods*, L. R., 3 Q. B. 658; 37 L. J., Q. B. 242.

(*c*) *Bradby*, 99; *Alchorne v. Gomme*, 2 Bing. 64.

(*d*) *Bullen*, 74.

(*e*) *Trent v. Hunt*, 9 Exch. 14.

(*f*) *Snell v. Finch*, 13 C. B., N. S. 651; 32 L. J., C. P. 117.

(*g*) *Chapman v. Deecham*, 3 Q. B. 723.

(*h*) *Co. Lit.* 32 a; 144 b; *Bullen*, 61, note (9).

(*i*) *Fairfax v. Gray*, 2 W. Blac. 1326.

own names (*k*), may, during the minority of their wards, distrain in their own names for arrears of rent reserved by such leases (*l*).

CH. XI. SEC. 3.
*Who may dis-
train (Rever-
sioners).*

(b) *Persons not having the Reversion.*

Although a person who has never had the reversion, or has parted with it, cannot generally distrain (*m*), yet in some particular cases the power of distress is held to be of common right, even without the reversion. Thus a rent granted upon an exchange may be distrained for without any reversion or express power (*n*), and so may a rent granted by one coparcener to another for equality of partition (*o*). In such cases the grantee of the rent may distrain for it without any express power in the deed: but if such grantee assign over, neither he nor the assignee can distrain for arrears due before the assignment (*p*).

On Ex-
changes and
Partitions.

A woman endowed of a rent by way of jointure in lieu of dower may distrain for it, whether it be rent-service, rent-charge or rent-seck, with or without deed (*q*). Although she have not the reversion, she may distrain for such rent of common right (*r*).

Jointures.

The grantee or owner of a rent-charge, although he has no reversion, may distrain for the arrears by virtue of the express power in the deed or will creating the rent-charge (*s*). So may the grantee or owner of a rent-seck, by virtue of 4 Geo. 2, c. 28, s. 5 (*t*).

The rents paid by copyholders, as tenants of the manor, to the lord, have always been considered as rent-service, fealty being necessarily incident to this species of tenure, and therefore they are distrainable of common right (*u*).

Lords of
Manors.

(c) *Tenants pur autre Vie.*

By 32 Hen. 8, c. 37, s. 4, tenants pur autre vie may sue or distrain for arrears due during the life, and unpaid after the death of the cestui que vie, in like manner as at common law they might have done during his life.

(*k*) See Chap. I., Sect. 20, ante, 37.

(*l*) *Shapland v. Ryoler*, Cro. Jac. 55, 98; *Bedell v. Constable*, Vaugh. 179; Bullen, 72.

(*m*) *Smith v. Mapleback*, 1 T. R. 441; *Purmenter v. Webber*, 8 Taunt. 593; *Preece v. Corrie*, 5 Bing. 24; *Thorn v. Woolcombe*, 3 B. & Adol. 586; *Pascoe v. Pascoe*, 3 Bing. N. C. 898; *Langford v. Selmes*, 3 Kay & J. 220.

(*n*) Lit. ss. 252, 253; Co. Lit. 169 a; Id. 153 a, note (1); Bullen, 31.

(*o*) Lit. ss. 252, 253; Co. Lit. 153 a,

note (1); Id. 169 b; *Butler and Baker's case*, 3 Co. R. 22 b; *Stukeley v. Butler*, Hob. 172; Gilb. Rents, 19; Bullen, 31, 45.

(*p*) Ante, Chap. VII.

(*q*) *Coll v. Bishop of Coventry*, Hob. 140, 153.

(*r*) Co. Lit. 169 b; Id. 34 b; Gilb. Rents, 20; Bullen, 31, 52.

(*s*) Ante, 347.

(*t*) Ante, 347.

(*u*) *Laugher v. Humphrey*, Cro. Eliz. 524; ante, 348.

CH. XI. SEC. 3.

Who may distrain (Executors and Administrators).

32 Hen. 8,
c. 37, s. 1.

(d) *Executors and Administrators.*

By the common law, executors or administrators could not distrain for arrears incurred in the lifetime of the owner of a rent (*x*); but by 32 Hen. 8, c. 37, s. 1, the executors and administrators of tenants in fee, fee-tail, or for term of life, of rent-services, rent-charges, rent-seck and fee-farm rents, were empowered to distrain upon the lands chargeable with the payment thereof, so long as such lands remain in the possession of the tenant who ought to have paid them, or of any other person claiming under him by purchase, gift or descent. This statute has been considered a remedial law, extending to all executors of tenants for life, as well those who before the statute were entitled to an action of debt, as those who had no remedy whatever (*y*). By 3 & 4 Will. 4, c. 42, s. 37, "the executors or administrators of *any* lessor or landlord may distrain upon the lands *demised for any term, or at will*, for the arrears of rent due to such lessor or landlord in his lifetime, in like manner as such lessor or landlord might have done in his lifetime;" and by sect. 38, "such arrears may be distrained for after the end or determination of such term or lease at will, in the same manner as if such term or lease had not been ended or determined; provided that such distress be made within the space of six calendar months after the determination of such term or lease, and during the continuance of the possession of the tenant from whom such arrears became due; provided also, that all and every the powers and provisions in the several statutes made relating to distresses for rent shall be applicable to the distresses so made." Where the lessee of lands dies before the expiration of the term, and his administrator continues in possession during the remainder and after the expiration of it, a distress may be taken for all the arrears (*z*), not exceeding six years (*a*). But it is otherwise where a mere tenant at will dies and his widow continues in possession (*b*). Where several executors demise to their co-executor at a fixed rent, it seems they may distrain for such rent when in arrear (*c*). An executor may distrain before probate, and may ratify a distress made by a bailiff in the name of the testator immediately after his death (*d*).

(e) *Husbands.*

Husbands in Right of their Wives.

Arrears of rent, arising out of land in which the wife has only a chattel interest, whether accruing before or during the marriage,

(*x*) Co. Lit. 162 a.

(*y*) *Hool v. Bell*, 1 Ld. Raym. 172; 3 Salk. 136.

(*z*) *Braithwaite v. Cooksey*, 1 H. Blac. 465.

(*a*) 3 & 4 Will. 4, c. 42, s. 42; Cole Ejec. 27.

(*b*) *Turner v. Barnes*, 2 B. & S. 435; 31 L. J., Q. B. 170.

(*c*) *Cowper v. Fletcher*, 6 B. & S. 464; 34 L. J., Q. B. 187.

(*d*) *H'whitehead v. Taylor*, 10 A. & E. 210.

might always by the common law be distrained for by the husband ; and by 32 Hen. 8, c. 37, s. 3, the husband may distrain for arrears accrued before or during the marriage in respect of the wife's freeholds (e), but not for subsequently accruing rent, unless he be tenant by the curtesy (f). After the death of the wife, the husband may distrain alone for all the rent due in right of the wife in her lifetime, even if it accrue to her in autre droit, as executrix or administratrix (g) ; though the wife may generally join with her husband, in no case whatever can she distrain alone (h).

CH. XI. SEC. 3.
Who may distrain (Executors and Administrators).

(f) *Corporations.*

If a lease be made by or on behalf of a corporation aggregate, not under their common seal, although it be invalid as a lease, yet if the tenant hold under it and pay part of the agreed rent to the corporation or their bailiff or agent, that is sufficient to create a tenancy from year to year at a fixed rent, and to entitle the corporation to distrain for such rent (i).

Under implied Tenancies from Year to Year.
Wood v. Tate.

By 4 Geo. 2, c. 28, s. 5 (k), bodies politic and corporate are placed on the same footing as other persons with respect to the recovery of rent-seck, chief rents, and rents of assize.

⁴ Geo. 2, c. 28, s. 5.

Corporations sole may sue or distrain in like manner as other lessors.

Any one of the churchwardens and overseers of a parish holding property under 59 Geo. 3, c. 12, s. 12 (l), may, on behalf of himself and the others, distrain for rent due in respect of the property (m).

Churchwardens and Overseers.

(g) *Persons having special Powers.*

It is of the very essence of a rent-charge that a power of distress should be given by the deed or will creating the charge (n), and a distress may be made accordingly when any of such rent is in arrear. So the assignee of a rent-charge may distrain for arrears thereof which become due after the assignment (o), but not for previous arrears (p).

Rent-charge.

The grantor or owner of a rent-seck may distrain for arrears by virtue of 4 Geo. 2, c. 28, s. 5 (q). So a devisee may distrain for rent devised to him out of land, whether the land be expressly charged

Rent-seck.

(e) Bullen, 56, 57 ; *Oguel's case*, 4 Co. R. 51 a.

(k) Ante, 348.

(f) *Howe v. Scarrott*, 4 H. & N. 723 ; 28 L. J., Ex. 325 ; ante, Chap. VII., Sect. 8.

(i) Ante, 30..

(g) *Osborne v. Wickenden*, 2 Saund. 195 ; *Ankerstein v. Clarke*, 4 T. R. 617 ; *Parry v. Hindle*, 2 Taunt. 181.

(m) *Gouldsworth v. Knights*, 11 M. & W. 337.

(n) Ante, 347.

(h) Bullen, 54.

(o) *Maund's case*, 7 Co. R. 28.

(i) *Wood v. Tate*, 2 B. & P., New R. 247.

(p) *Brown v. Metropolitan Counties Life Insurance Society*, 1 E. & E. 832 ; 28 L. J., Q. B. 236.

(q) Ante, 348.

CH. XI. SEC. 3. with a distress or not (*r*). If a lessee for years assign his term, reserving a rent *with no clause of distress*, he cannot distrain for the rent, either by the common law or by the statute (*s*). A person who has possession of land, though he has not the legal estate, may by agreement grant another a power of distress (*t*). A covenant that the grantor of a rent should not replevy the goods distrained until the rent be paid, is void (*u*). Where by an inclosure act a yearly *corn-rent* was substituted in lieu of tithes, and a power of distress was given for the recovery thereof; it was held, that the goods of a tenant, coming in under the owner of land which had remained for several years untenanted, and wholly unprofitable, were liable to be distrained for such corn-rent in arrear (*x*).

(h) *Receivers and Agents.*

By Private
Receiver.
Jolly v.
Arbuthnot.

A private receiver cannot generally distrain without an express power for that purpose (*y*). In *Jolly v. Arbuthnot*, by a receivership deed executed contemporaneously with a mortgage in fee, which it recited, the mortgagor and mortgagee appointed a receiver, and constituted him their agent and attorney to receive the rents of the mortgaged property, and to use such remedies by way of entry and distress as should be requisite for that purpose. By the same deed the mortgagor attorned as tenant from year to year to the receiver, and there was a proviso that if default should be made in payment of the mortgage money or interest at the times appointed, the mortgagee might enter and avoid the tenancy created by the attornment. There was also a proviso that nothing therein contained should lessen the rights, powers or remedies of the mortgagee under the mortgage (*z*). On the mortgagor being found bankrupt, it was held, that the relation of landlord and tenant had been created between the receiver and mortgagor by the receivership deed, and that the receiver was entitled to distrain, and take the goods which had belonged to the mortgagor on the mortgage promises (*a*).

Receivers ap-
pointed by
Order of
Court.

Receivers appointed by the High Court have a power, where they consider it necessary, to distrain, and need not apply first to the Court for a particular order for that purpose (*b*), because, as the

(*r*) *Shop. Touch*, 429; *Buttery v. Robinson*, 3 Bing. 392; *Sallory v. Leaver*, L. R., 9 Eq. 22.

(*s*) ——— *v. Cooper*, 2 Wils. 375; *Parmenter v. Webber*, 8 Taunt. 593; *Smith v. Mapleback*, 1 T. R. 441; *Preece v. Corrie*, 5 Bing. 24; *Pascoe v. Pascoe*, 3 Bing. N. C. 898; *Langford v. Selmes*, 3 Kay & J. 220; 3 Jur., N. S. 859.

(*t*) *Chapman v. Beecham*, 3 Q. B. 723; *Pollitt v. Forrest*, 11 Q. B. 961.

(*u*) 1 Inst. 145 b.

(*x*) *Neuling v. Pearce*, 1 B. & C. 437;

Bendyshe v. Pearce, 4 Moo. 99.

(*y*) *Bullen*, 72; *Ward v. Shew*, 9 Bing. 608; 9 Exch. 19.

(*z*) The real object of this was to enable the mortgagee to obtain all the advantages, without subjecting himself to the liabilities, of a mortgagee in possession.

(*a*) *Jolly v. Arbuthnot*, 4 Do G. & J. 224; 28 L. J., Ch. 547; see ante, 47.

(*b*) *Pitt v. Snowden*, 3 Atk. 750; *Dancer v. Hastings*, 4 Bing. 2; *Bennett v. Robins*, 5 C. & P. 379; *Brandon v. Brandon*, 5 Madd. 473.

court never makes an immediate order, but appoints a future day for a tenant to pay, it might be an injury to the estate to wait till that time, as it would give the tenant an opportunity to convey his goods off the premises in the meantime. If, however, there is any doubt who has the legal right to the rent, then the receiver should make an application to that court for an order, as he must distrain in the name of the person who has that right (*c*); unless indeed the tenant has attorned for him, and so created a tenancy as between them (*d*), in which case he should of course distrain in his own name (*e*).

An authority to tenants to pay rent to a third person, whose receipt shall be a discharge, does not entitle that person to distrain, although he receives the rents for his own benefit (*f*). If a person having express or implied authority to distrain for rent due to another, says at the time that he distrains for rent due to himself, he may nevertheless justify as bailiff of the other (*g*).

CH. XI. SEC. 3.
Who may distrain (Receivers and Agents).

Agents.

(i) *Sequestrators.*

By the 12 & 13 Vict. c. 67, a sequestrator is empowered to levy any distress in his own name for the recovery of tithes, tithe rent-charge or rent, &c., payable to the incumbent of the sequestrated benefice. Sequestrators appointed by the High Court appear to stand on the same footing as receivers (*h*).

By Sequestrators.

SECT. 4.—*Distress in Case of Bankruptcy.*

The landlord's right to distrain for rent, when the tenant becomes bankrupt, is limited to one year's rent due prior to the adjudication (*i*). If any more arrears be then due, they may be proved for (*k*). For any subsequent rent a distress may be made so long as the term or tenancy continues (*l*). The goods of a third person are not protected from a distress for more than a year's rent due before the bankruptcy: nor even the goods of the bankrupt which have been mortgaged for more than their full value (*m*). The landlord may avow for a return of goods of a third person seized as a distress for rent due before the bankruptcy (*n*). Where the landlord distrained

Landlord may distrain for one Year's Rent.

(*c*) *Hughes v. Hughes*, 3 Bro. C. C. 87; P. 117.
1 Ves. jun. 161.

(*d*) *Evans v. Mathias*, 7 E. & B. 590, 601; 26 L. J., Q. B. 309; *White v. Smale*, 22 Beav. 72; 26 Id. 191; *Barton v. Rock*, 22 Id. 81.

(*e*) *Jolly v. Arbuthnot*, 4 De G. & J. 224; 28 L. J., Ch. 547. As to attornment generally, see ante, 246.

(*f*) *Ward v. Shew*, 9 Bing. 608.

(*g*) *Trent v. Hunt*, 9 Exch. 14; *Snell v. Finch*, 13 C. B., N. S. 651; 32 L. J., C.

(*h*) Ante, 400.

(*i*) Bankruptcy Act, 1869, s. 34.

(*k*) Id.; and sect. 35; see ante, 257.

(*l*) *Ex parte Plummer*, 1 Atk. 103, 104; *Buckley v. Taylor*, 2 T. R. 600; *Briggs v. Sowry*, 8 M. & W. 729.

(*m*) *Brocklehurst v. Lowe*, 7 E. & B. 176; 26 L. J., Q. B. 107.

(*n*) *Newton v. Scott*, 9 M. & W. 434; 10 M. & W. 471; *Phillips v. Shervill*, 6 Q. B. 944; *Brocklehurst v. Lowe*, supra.

CH. XI. SEC. 4.
*Distress in Case
 of Bankruptcy.*

for rent before the bankruptcy of his tenant, and when the goods were appraised left them on the premises for the use of the bankrupt's wife, the bankrupt himself being in prison, and after the bankruptcy distrained again for the same amount of rent; it was held, that the second distress was void (o). Where a landlord who had distrained for rent, on being served with notice of proceedings in bankruptcy against his tenant, with a threat of legal proceedings against himself, withdrew the distress, instead of treating such notice with contempt, it was held, that he could not lawfully distrain a second time for the same (p).

A landlord distrained for more than two years' rent, the goods being in the hands of a trustee for the tenant's creditors; the trustee then agreed to pay the rent and expenses, the landlord giving up one quarter's rent; the goods were then appraised and condemned at the sum agreed on, and the amount was paid over to the landlord; it was held that the excess of that amount above one year's rent was not money received to the use of the assignees of the tenant (q). If a constable become a bankrupt when possessed of goods which he has levied under a distress for rent due to the landlord, it seems that the landlord has a lien upon such goods; but if they are sold and converted into money, it seems that he has no lien upon them, but must come in as a creditor pro ratâ (r).

Consequences
 of Landlord's
 Neglect to
 distrain.

A landlord has no lien in the case of bankruptcy, after the goods are removed from the premises; therefore, if he neglect to distrain, and suffer the goods to be sold by the trustees, and removed from off the premises, he can only prove and take dividends with the rest of the creditors (s). Payment of rent after an act of bankruptcy, to the landlord who threatens a distress, is valid, and cannot be impeached by the trustee in bankruptcy; and where an execution levied was overreached by an act of bankruptcy, the creditor was allowed to set off a payment he had made to the landlord under a distress for rent (t). An undertaking given by the solicitor of the trustee of a bankrupt tenant will frequently make such solicitor personally liable: thus, where a distress had been put in upon the lands of a bankrupt tenant by the landlord, and the solicitor to the assignees undertook to pay the landlord his rent, provided it did not exceed the value of the effects distrained, he was held liable (u).

(o) *Ex parte Bradley*, 1 Dea. & Chit. 223.
 (p) *Bagge*, app., *Mawby*, resp., 8 Exch. 641.

(q) *Lackington v. Elliott*, 7 M. & G. 538; *Paull v. Best*, 3 B. & S. 537; 32 L. J., Q. B. 96.

(r) *Ex parte Dobson*, 7 Vin. Abr. 74.

(o) *Ex parte Plummer*, 1 Atk. 102; *Bradyll v. Ball*, 1 Bro. C. C. 427; *Gethin v. Wilks*, 2 Dowl. 189; *Cole Ejec.* 541.

(t) *Ex parte Elliott*, 3 Deac. 343; 3 Mon. & Ayr. 664; *Stevenson v. Wood*, 5 Esp. 200; *Mavor v. Croome*, 1 Bing. 261; *Darnton v. Pignam*, Peake, Ad. Ca. 111.

(u) *Burrell v. Jones*, 3 B. & A. 47.

SECT. 5.—*Distress upon Company in Liquidation.*

Distress upon a joint stock company's goods is restricted by the Joint Stock Companies' Acts. By sect. 87 of the Joint Stock Companies' Act, 1862 (25 & 26 Vict. c. 89), it is enacted, that "where an order has been made for winding-up a company under this act no suit, action, or *other proceeding* shall be proceeded with or commenced against the company except with leave of the court, and subject to such terms as the court may impose;" and by sect. 163, that "where any company is being wound up by the court, any attachment, sequestration, distress, or execution put in force against the estate or effects of the company after the commencement of the winding-up shall be void to all intents." These two sections are to be read together, and the enactment of sect. 163 that a distress shall be "void" means that it shall be void unless leave be given under sect. 87 (x); but it is clearly settled that leave will not be given to distrain for rent accrued due from the company before the winding-up order (y); and that the 10th section of the Judicature Act, 1875, which assimilates the rules in bankruptcy to the rules in winding-up as to rights of secured creditors does not so far assimilate them as to allow the landlord to distrain for such rent (z). For rent due before the winding-up order the landlord must prove, with the other creditors, in the winding-up.

As to rent accrued due after the winding-up order, "if the company for its own purposes, and with a view to the realization of the property to better advantage, remains in possession of the estate, which the lessor is not therefore able to obtain possession of, common sense and ordinary justice require the court to see that the landlord receive the full value of his property" (a) and to give the leave to distrain; nor is the existence of a power of re-entry in the lease any reason for refusing such leave (b).

It has been twice held by the Court of Appeal, however (c), that the landlord's common law right of distress is not restricted by the Companies' Act in cases where he is a "stranger" to the company—that is, in cases where the company is not his tenant, but the goods of the company are found upon the premises of a person who is. These

CH. XI. SECT. 5.

Distress upon Company in Liquidation.

Restriction of right to distrain, by Companies Act, 1862.

Distress where Landlord "Stranger" to Company.

(x) *Re Erhall Coal Mining Co. (Limited)*, 33 L. J., Ch. 595; 10 Jur., N. S. 576; 4 De G., J. & S. 37; 13 W. R. 219; and see *Eyton v. Denbigh, &c. R. Co.*, L. R., 6 Eq. 14; *Rickman v. Johns*, Id. 488; *Lundy Granite Co., In re, Heaven, Ex parte*, L. R., 6 Ch. 482; 40 L. J., Ch. 588; 24 L. T. 922; 19 W. R. 609.

(y) *Re Progress Assurance Co.*, L. R., 9 Eq. 370; *Traders' North Staffordshire R. Co.*, L. R., 19 Eq. 60.

(z) *Coal Consumers' Association, In re*,

L. R., 4 Ch. D. 625.

(a) Per James, L. J., in *Lundy Granite Co., In re*, L. R., 6 Ch. 466, cited with approval by Hall, V.-C., in *North Yorkshire Iron Co., In re*, L. R., 7 Ch. D. 664.

(b) *North Yorkshire Iron Co., In re*, ubi supra.

(c) *In re Lundy Granite Co.*, ubi supra (exhaustively explained by Jessel, M. R., in *Traders' North Staffordshire Co., In re*, ubi supra); *Regent United Service Stores, In re*, L. R., 8 Ch. D. 616.

CH. XI. SEC. 5. decisions proceed upon the ground that in such cases the landlord has no right of proof in the winding-up, not being a creditor of the company.

Distress upon Company in Liquidation.

Further Rights of Landlord.

It may be added here, that a landlord who has demised a mine to a company for a term of years, has a right, if, before the expiration of the term, the company is ordered to be wound up, to enter a claim against the company in respect of the contingent liability to the future non-payment of rent by the assignee of the lease (*c*). Where a company who were assignees of land granted for a feu duty, came to be wound up, the grantor was held entitled to prove for arrears of feu duties, and also to enter a claim for the capitalized value of future feu duties (*d*).

SECT. 6.—*The Subject-matters of Distress.*

(a) *General Rules and Exemptions.*

Distress is of the Nature of a Pledge.

Simpson v. Hartopp.

A distress being anciently considered merely as a pledge in the hands of the lord to compel the tenant to perform the service or duty required, could not at common law be sold; but was to be restored in the same plight to the owner, when such service or duty was performed; and therefore nothing could be distrained unless it could be returned in specie and undamaged (*e*), and in the same state as when taken (*f*). This is why tenants' fixtures and the flesh of animals lately slaughtered cannot be distrained (*g*). The right to sell the distress was first given by 2 W. & M. c. 5, but that statute did not, except with respect to sheaves of corn, which were not at common law distrainable, do away with the exceptions founded on the common law rule. Subsequent statutes have further altered the law.

List of Things exempted from Distress.

The present exceptions, of which the more important will be considered in detail presently, may here be briefly stated as follows:—

Things absolutely privileged—

Fixtures (*h*):

Animals *feræ naturæ* (*i*):

Goods delivered to a person in the way of his trade (*k*):

Things in actual use (*l*):

Things in the custody of the law (*m*):

(*c*) *Re Haytor Granite Co.*, L. R., 1 Ch. Ap. 77; 35 L. J., Ch. 154; *Re London and Colonial Co. (Horsey's claim)*, L. R., 5 Eq. 561.

(*d*) *Gartness Iron Co.*, *In re*, L. R., 10 Eq. 412; 39 L. J., Ch. 814; 23 L. T. 389; 18 W. R. 1103, where see the cases explained by Bacon, V.-C.

(*e*) Gilb. Distr. 34, 48; Co. Lit. 47 b; *Pitt v. Shew*, 4 B. & A. 207; *Darby v. Harris*, 1 Q. B. 895; *Dalton v. Whittem*, 3 Q. B. 961; *Thompson v. Pettitt*, 10 Q. B. 101; *Smith L. & T.* 196 (2nd ed.).

(*f*) *Simpson v. Hartopp*, Willes, 515; 1 Smith L. C. 439 (7th ed.).

(*g*) *Morley v. Pincombe*, 2 Exch. 101; *Brown v. Shevill*, 2 A. & E. 138.

(*h*) *Hellawell v. Eastwood*, 6 Ex. 295, and 407, post.

(*i*) Co. Lit. 47, and 409, post.

(*k*) *Swire v. Leach*, 34 L. J., C. P. 150, and 409, post.

(*l*) *Simpson v. Hartopp*, 1 Smith L. C. 439 (7th ed.), and 411, post.

(*m*) Page 412, post.

The goods of an ambassador (*n*) :

The goods of a lodger (*o*) :

Frames, looms, or machines used in the woollen, cotton, or silk manufactures (*p*) :

Gas-meters, being the property of a gas company incorporated by act of parliament (*q*) :

Railway rolling stock in any works not belonging to the tenant of the works (*r*).

CIV. XI. SEC. 6.

Subject-matters of Distress (Rules and Exemptions.)

Things privileged sub modo or conditionally, i.e. privileged only if there be other sufficient distress on the premises—

Beasts of the plough and sheep (*s*) :

Tools of trade (*t*).

Subject to the above exceptions, all cattle, goods and chattels which are found upon the demised premises may be distrained for rent, whether they be the effects of a tenant or of a stranger (*u*), the reason being that the landlord has a lien on them in respect of the place in which they are found, and not in respect of the person to whom they belong. The property must be upon the premises, except in the case of a fraudulent removal (*x*), or cattle feeding or depasturing upon any common appendant or appurtenant to the demised premises (*y*), and except in the case of distresses by the crown (*z*). The property must not be in such a situation that the attempt to distrain it would probably lead to a breach of the peace: thus it has been held that a horse cannot be distrained whilst a person is actually riding it (*a*).

Where a mortgage was made by two partners of a freehold of which they were tenants in common, and each attorned tenant to the mortgagees of one moiety at a separate rent, it was held by Bacon, C. J., who pointed out that his decision was "directly against the common sense and justice of the case," that, under separate distresses for rent in respect of each moiety, the mortgagees could not seize the partnership assets, but only such goods as each partner was separately entitled to (*b*).

Partnership Property.
Parke, Ex parte.

Corn and Growing Crops.

By the common law cocks and sheaves of corn and other farm produce and growing crops could not be distrained, but were abso-

Distress of Corn and Growing Crops.

(*n*) 7 Ann. c. 12, s. 3.

(*o*) 34 & 35 Vict. c. 79, and 414, post.

(*p*) 6 & 7 Vict. c. 40, ss. 18, 19.

(*q*) Gasworks Clauses Act, 1847 (10 Vict. c. 15), s. 14.

(*r*) 35 & 36 Vict. c. 50, s. 3, post, 416.

(*s*) *Keen v. Priest*, 4 H. & N. 236, and 417, post.

(*t*) *Gorton v. Falkner*, 4 T. R. 565, and 419, post.

(*u*) Gilb. Distr. 33; 3 Blac. Com. 7;

Smith L. & T. 194 (2nd ed.).

(*x*) Post, p. 433.

(*y*) 11 Geo. 2, c. 19, s. 8, post, 424.

(*z*) Bullen, 76.

(*a*) *Storey v. Robinson*, 6 T. R. 138.

(*b*) *Parke, Ex parte, Potter, In re*, L. R., 18 Eq. 381; 30 L. T. 618; 22 W. R. 768. A distress for the whole rent, however, may be made on the goods of any tenants holding under a joint demise, or a demise in common. See Bullen, 80.

CH. XI. SEC. 6. *Subject-matters of Distress (Corn, &c.).* lutely privileged from distress for rent, although there were no other goods on the premises (c). But by 2 W. & M. sess. 1, c. 5, s. 3, "any person having rent in arrear and due upon any demise, lease or contract may seize and secure any sheaves or cocks of corn, or corn loose or in the straw, or hay lying or being in any barn or granary, or upon any hovel, stack or rick, or otherwise upon any part of the land or ground charged with such rent, and lock up or detain the same in the place where the same shall be found, for or in the nature of a distress, until the same shall be replevied or sold: but the same must not be removed from such place to the damage of the owner." Under this statute it seems that the landlord *must* sell at the expiration of five days, if the corn be not replevied (d).

11 Geo. 2, c. 19, ss. 8, 9.
Grass, Hops, Roots, Fruits, &c. may be distrained.

By 11 Geo. 2, c. 19, ss. 8, 9, the landlord may take and seize, as a distress for arrears of rent, all sorts of corn and grass, hops, roots, fruits, pulse or other product (e) whatsoever growing upon any part of the estate demised, as a distress for arrears of rent; and the same may cut, gather, make, cure, carry and lay up, *when ripe*, in the barns or other proper place on the premises; and if there should be no barn or proper place on the premises, then in any other barn or proper place which he shall hire or otherwise procure for that purpose, and as near as may be to the premises; and in convenient time appraise, sell, or otherwise dispose of the same, towards satisfaction of the rent, and of the charges of such distress, appraisement and sale; the appraisement thereof to be taken when cut, gathered, cured and made, and not before; provided that notice (f) of the place where such distress shall be lodged, shall within the space of one week after the lodging or depositing thereof in such place, be given to the tenant, or left at the last place of his abode; and if the tenant shall pay or tender the arrears of rent and costs of the distress before the corn, &c. be cut, the distress shall cease, and the corn, &c. be delivered up.

One Week's Notice to Tenant of Place of Distress.

56 Geo. 3, c. 50, s. 6.

By 56 Geo. 3, c. 50, s. 6, entitled "An Act to regulate the Sale of Farming Stock taken into Execution," landlords are not to distrain for rent "on any corn, hay, straw or other produce," which have been seized in execution and sold by the sheriff or other officer according to provisions of that act, under the contract of the tenant not to take the straw, &c. off the premises, and which at the time of the sale have been severed, "nor on any turnips whether drawn or growing," if sold according to the provisions of the act. By 14 & 15 Vict. c. 25, s. 2 (g), growing crops seized and sold under an execution are liable for accruing or subsequent rent.

Turnips.

(c) *Simpson v. Hartopp*, Willes, 512; 1 Smith L. C. 439 (7th ed.).

(d) *Piggott v. Birtles*, 1 M. & W. 448.

(e) These words do not include young trees growing in a nursery ground, but only other things *cujusdem generis* to those

enumerated; *Clark v. Gaskarth*, 8 Taunt. 431; Smith L. & T. 208 (2nd ed.).

(f) See Form of such Notice, Appendix D., Sect. 5.

(g) This act is set out verbatim in Appendix A., Sect. 4.

The grantee of a rent-charge, with power to distrain in the same manner as the law directs in case of rent in arrear, may under such power, and the 2 W. & M. sess. 1, c. 5, and 4 Geo. 2, c. 28, s. 5, distrain oats and hay in stacks or trusses (*i*). Trees, shrubs and plants growing in lands which the defendants had demised to the plaintiffs for a term, and which they had converted into nursery ground, and planted subsequently to the demise, are not distrainable by the landlord under the 11 Geo. 2, c. 19, as it applies only to corn and other products of the land which may become ripe, and are capable of being cut and laid up (*k*). Growing crops cannot be sold before they are ripe (*l*), but where the jury find that no damage has been sustained by the premature sale, the tenant is not entitled to a verdict even for nominal damages (*m*). A tenant's growing crops, taken in execution and sold, and remaining on the premises for the purpose of being reaped, are distrainable by the landlord for rent become due after the taking into execution (*n*). A custom that a tenant may leave his away-going crop in the barns, &c. of the farm for a certain time after the lease has expired, operates as a prolongation of the term; and the landlord may distrain the corn so left, for rent in arrear, before six months have expired from the determination of the term (*o*). Corn sown by a tenant at will (who died before harvest), and purchased by another person, cannot be distrained by the landlord for rent due from a subsequent tenant (*p*).

CH. XI. SEC. 6.
Subject-matters of Distress (Corn, &c.).

Cases decided upon the Subject.

SECT. 7.—*The Exemptions from Distress.*

(a) *Fixtures.*

Things annexed to the freehold, such as buildings and fixtures, constitute, for the time being, part of the freehold, and are absolutely exempt from distress, although there are no other goods on the premises. Therefore furnaces, millstones, chimney-pieces and the like cannot be distrained, because they cannot be taken away without doing damage to the freehold, which the law will not allow (*q*); and because those things only can be distrained for rent which the land-

Fixtures are absolutely exempt from Distress.

(*i*) *Johnson v. Faulkner*, 2 Q. B. 925; *Smith L. & T.* 207 (2nd ed.). But see *Miller v. Green*, 2 C. & J. 143; 8 Bing. 92.

(*k*) *Clarke v. Gaskarth*, 8 Taunt. 431, 742; *Clarke v. Calvert*, 3 Moo. 114; *Amos & F.* 319 (2nd ed.).

(*l*) *Owen v. Leigh*, 3 B. & A. 470; *Proudlove v. Twemlow*, 1 Cr. & M. 328.

(*m*) *Rodgers v. Parker*, 18 C. B. 112; 25 L. J., C. P. 220; and see *Lucas v. Tarleton*, 3 H. & N. 116.

(*n*) 14 & 15 Vict. c. 25, s. 2; post, Appendix A., Sect. 4, where this act is set out verbatim. As to the previous law, see *Wharton v. Naylor*, 12 Q. B. 673; 6 D. & L. 136.

(*o*) *Behvan v. Delahay*, 1 H. Blao. 5; *Lewis v. Harris*, Id. 7, n.; *Knight v. Bennett*, 3 Bing. 364.

(*p*) *Eaton v. Southby*, Willes, 131.

(*q*) *Simpson v. Hartopp*, 1 Smith L. C. 439 (7th ed.); *Amos & F.* 314—318 (2nd ed.).

CH. XI. SEC. 7. lord can afterwards restore in the plight in which they were before the distress, and without injury thereto by the removal (*r*). So also kitchen ranges, stoves, coppers, grates and other fixtures of the like nature put up by the tenant for the more convenient or profitable use of the demised premises, and which he is entitled to sever and remove during the term, are not distrainable for rent (although they may be seized and sold by the sheriff under an execution against the goods of the tenant) (*t*), unless the tenant has by his lease or agreement renounced his right to disannex and remove them during the term (*u*).

Exemptions from Distress (Fixtures).

Railway. A railway is not distrainable (*x*). Machinery fixed to the freehold not for the improvement or profitable use of the land, but only for the purpose of being more conveniently used as machinery; for instance, a mule used for spinning cotton, though sunk into a stone floor, and secured by molten lead, retains its chattel character, and may be distrained for rent (*y*). A mere temporary removal of fixtures for purposes of necessity is not sufficient to destroy the privilege (*z*); thus a smith's anvil on which he works is not distrainable; for it is accounted part of the forge, though it be not actually fixed by nails to the shop (*a*); so a millstone is not distrainable, though it be removed out of its proper place in order to be picked; because such removal is of necessity, and the stone still continues to be part of the mill (*a*); nor a lime-kiln, which is considered not to be a personal chattel, but part of the freehold (*b*). In like manner keys (*c*), windows, and charters concerning the realty, being by construction of law parcel of the freehold, are not liable to be distrained (*d*). If a landlord, under a distress for rent, seizes fixtures from the freehold and disposes of them, he is liable in trover; the articles may be described in the statement of claim as goods and chattels; and the plaintiff does not thereby waive his right of maintaining that the distress is illegal because fixtures cannot be distrained for rent in arrear (*e*). In such action their value as chattels only (not as fixtures) can be recovered (*f*). But it seems otherwise in an action of trespass (*g*). No action can be maintained for a mere constructive seizure of fixtures as a

Keys.

(*r*) Co. Lit. 47 b; *Pitt v. Shew*, 4 B. & A. 207; *Darby v. Harris*, 1 Q. B. 895; *Dalton v. Whitem*, 3 Q. B. 961; *Thompson v. Pettitt*, 10 Q. B. 101; *Moore v. Drinkwater*, 1 F. & F. 134; *Smith L. & T.* 198 (2nd ed.); *Bullen*, 92.

(*t*) *Poole's case*, 1 Salk. 368; *Place v. Fagg*, 4 M. & R. 277; *Bates v. Duke of Beaufort*, 8 Jur., N. S. 270, L. J.; *Amos & F.* 321 (2nd ed.); *Smith L. & T.* 195 (2nd ed.).

(*u*) *Dunneque v. Rumsey*, 2 H. & C. 777; 33 L. J., Ex. 88.

(*x*) *Turner v. Cameron*, L. R., 5 Q. B. 306; 39 L. J., Q. B. 125.

(*y*) *Hellawell v. Eastwood*, 6 Exch. 295; 1 *Smith L. C.* 391 (6th ed.).

(*z*) *Gorton v. Falkner*, 4 T. R. 567.

(*a*) Bro. Abr. tit. *Distress*, pl. 23; *Amos & F.* 317 (2nd ed.).

(*b*) *Niblet v. Smith*, 4 T. R. 504.

(*c*) 11 Co. R. 50; 6 Exch. 311.

(*d*) *Gilb. Distr.* 34, 48; *Hellawell v. Eastwood*, 6 Exch. 295.

(*e*) *Dalton v. Whitem*, 3 Q. B. 961; *Smith L. & T.* 199 (2nd ed.).

(*f*) *Clarke v. Holford*, 2 C. & K. 540.

(*g*) *Thompson v. Pettitt*, 10 Q. B. 101; *Moore v. Drinkwater*, 1 F. & F. 134.

distress, but without any actual seizure or severance or removal thereof (*h*). CH. XI. SEC. 7.

(b) *Animals Feræ Naturæ.*

*Exemptions
from Distress
(Animals Feræ
Naturæ).*

Those things wherein no man can have an absolute and valuable property, such as oats, wild rabbits and animals feræ naturæ, cannot be distrained (*i*); but if deer, which are feræ naturæ, are kept in a private inclosure (not being a park) for the purpose of sale or profit, this so far changes their nature, by reducing them to a kind of stock or merchandise, that they may be distrained for rent (*k*). And deer in a park when reclaimed become personal chattels, and cease to be parcel of the inheritance (*l*), so that it seems they also may be distrained for rent (*m*), as likewise may birds kept in cages, as parrots or canaries, and even pheasants and partridges in coops before they can fly, inasmuch as they may be the subject of larceny (*n*). As for dogs, they are not indeed the subject of larceny; and Lord Coke (*o*) thought them not to be distrainable, but the better opinion seems to be that they are (*p*).

When Ani-
mals Feræ
Naturæ may
be distrained.

Dogs

(c) *Goods delivered to a Person in the way of his Trade.*

Things delivered to a person exercising a public trade, to be carried, wrought, worked up or managed in the way of his trade or employ, are absolutely exempt from distress, although there are no other goods on the premises (*q*). Thus a horse standing in a smith's shop to be shod, materials sent to a weaver, or cloth to a tailor to be made up, and the like, are privileged for the sake of trade and commerce, which could not be carried on if such things under these circumstances could be distrained for rent due from the person in whose custody they are (*r*). But although materials delivered by a manufacturer to a weaver, to be by him manufactured at his own house, are privileged from distress for rent due from the weaver to his landlord, yet a frame or other machinery delivered by the manufacturer to the weaver along with the materials, for the purpose of being used in the weaver's house in the manufacture of such materials, is not privileged, unless there are other goods upon the premises sufficient to satisfy the rent due (*s*).

Exemption
for the Benefit
of Trade.

(*h*) *Beck v. Denbigh*, 29 L. J., C. P. 273.

(*i*) Co. Lit. 47; Bullen, 90; *infra*, note (*p*).

(*k*) *Davies v. Powell*, Willes, 46.

(*l*) *Ford v. Tynte*, 2 J. & H. 150; 31 L. J., Ch. 177.

(*m*) *Morgan v. Earl of Abergavenny*, 7 C. B. 768; Bullen, 90.

(*n*) *Reg. v. Cory*, 10 Cox, C. C. 23; *Reg. v. Shickle*, L. R., 1 C. C. R. 158; 38 L. J., M. C. 21.

(*o*) Co. Lit. 47 a.

(*p*) *Davies v. Powell*, Willes, 48; *Bunch v. Kennington*, 1 Q. B. 679; Smith L. & T. 203 (2nd ed.); Bullen, 90. And see the question discussed in the notes to *Simpson v. Hartopp*, 1 Smith L. C. 439 (7th ed.).

(*q*) *Simpson v. Hartopp*, Willes, 512; 1 Smith L. C. 439 (7th ed.); Bullen, 95; Smith L. & T. 200 (2nd ed.).

(*r*) Co. Lit. 47 a; *Gisbourn v. Hurst*, 1 Salk. 249; *Gibson v. Ireson*, 3 Q. B. 39; Smith L. & T. 200 (2nd ed.).

(*s*) *Wood v. Clarke*, 1 C. & J. 484; *Gibson v. Ireson*, 3 Q. B. 39.

CH. XI. SEC. 7.

*Exemptions
from Distress
(Goods sent to
Trader).*

The result of the cases has been said to be, that if articles are sent to a place to remain there, they are distrainable, but that if sent for a particular object, and the remaining at the place be an incident necessary for the completion of that object, they are not (*t*). But this rule will not account for all the decisions, and the exemption seems rather to arise solely for the benefit of trade (*u*). Goods pledged with a pawnbroker are not distrainable for rent due from him, notwithstanding they have remained in his possession above one year without any interest being paid (*x*). Horses and carriages standing at livery may be distrained (*y*), but a carriage sent to a coachmaker and commission agent for sale may not (*z*), nor may goods warehoused in the ordinary course of business at a furniture depository (*a*). The privilege has been held not to attach to a boat sent by the owner to salt works, and left a reasonable time in a canal on the premises, for the purpose of being loaded with salt (*b*), nor to brewers' casks sent to a public-house with beer, and left there until the beer is consumed (*c*). But where a butcher had sent a beast to the shop of another butcher to be slaughtered, and after it had been slaughtered the carcass remained in the shop for some time (but how long did not appear), it was held that the carcass was privileged (*d*).

Goods in the
Hands of a
Factor or
Agent.

Goods of a principal in the hands of a factor for sale are privileged from distress for rent due from such factor to his landlord, on the ground that the rule of public convenience, out of which the privilege arises, is within the exemption of a landlord's general right to distrain (*e*). On the same principle goods landed at a wharf and consigned to a broker as agent of the consignor, for sale, and placed by the broker in the wharfinger's warehouse over the wharf for safe custody until an opportunity for selling them should occur, were held not distrainable for rent due in respect of the wharf and warehouse (*f*). Similarly, corn sent to a factor for sale, and deposited by him in the warehouse of a granary-keeper, he not having any warehouse of his own, is under the same protection against a distress for rent as if it were deposited in a warehouse belonging to the factor himself (*g*).

Auctioneer

Goods sent to an auctioneer to be sold on premises occupied by him, or in an open yard belonging to premises in his occupation, are privi-

(*t*) *Parsons v. Gingell*, 4 C. B. 545; 16 L. J., C. P. 227.

(*u*) See *Lyons v. Elliott*, note (*l*) *infra*.

(*x*) *Swire v. Leach*, 18 C. B., N. S. 479; 34 L. J., C. P. 150.

(*y*) *Francis v. Wyatt*, 1 W. Bl. 483; 3 Burr. 1498; *Parsons v. Gingell*, *supra*.

(*z*) *Findon v. M'Laren*, 6 Q. B. 891.

(*a*) *Miles v. Furber*, L. R., 8 Q. B. 77; 42 L. J., Q. B. 41; 27 L. T. 756; 21 W. R. 262.

(*b*) *Muspratt v. Gregory*, 1 M. & W. 633; *S. C.* (in error), 3 M. & W. 677.

(*c*) *Joule v. Jackson*, 7 M. & W. 450.

(*d*) *Brown v. Shevill*, 2 A. & E. 138.

(*e*) *Gilman v. Elton*, 3 Brod. & B. 75.

(*f*) *Thompson v. Mashiter*, 1 Bing. 283.

(*g*) *Matthias v. Menard*, 2 C. & P. 363. But wine sent to a warehouse merely to be matured has been held not exempt. *Ex parte Russell*, 18 W. R. 753.

leged (*h*), although the place of sale is merely hired for the occasion, or the occupation has been acquired by the auctioneer by an act of trespass (*i*). But there must be a *de facto* occupation by the auctioneer, otherwise the privilege is lost. Therefore where an auction was held on the tenant's premises of the tenant's goods, and the goods of the plaintiff were for convenience being sold along with them, it was held, both on authority (*k*) and principle, that, as the auctioneer was in no sense the occupier of the premises, the goods of the plaintiff might be distrained along with the goods of the tenant (*l*).

CH. XI. SECT. 7.
*Exemptions
from Distress
(Goods sent to
Trader).*

The cattle and goods of guests at an inn, so long as they remain on the premises, are exempt from a distress for rent due from the innkeeper (*m*). But they must be actually within the premises of the inn itself, and not in any place to which the innkeeper may have removed them for his convenience: thus, where a racehorse was distrained for rent at a stable half a mile distant from the inn, the distress was determined to be a good one, and that the plaintiff had no remedy but against the innkeeper (*n*). It was once held that the consent of the landlord to the goods being upon the premises would not avail to prevent his power of distress; but if such consent were fraudulently given for the purpose of obtaining a distress, equity would relieve upon the ground of fraud: thus, where the servants of a grazier driving a flock of sheep to London, were encouraged by an innkeeper to put the sheep into pasture grounds belonging to the inn, and the landlord, seeing the sheep, consented that they should stay there for one night, and then distrained them for rent, the grazier was relieved against the distress (*o*).

Goods at an
Inn.

(d) *Things in actual Use.*

Things in actual use are absolutely privileged from distress for rent, or even for damage feasant, because of the danger to the public peace (*p*). Therefore a horse, whilst a man is riding upon him, or an axe in a man's hand cutting wood, or the like, cannot be distrained (*q*). But a dog used for sporting purposes, or permitted to run into the woods, and not led by a string, is not exempt from a distress for

Things in use
may not be
distrained.

(*h*) *Adams v. Grane*, 1 Cr. & M. 380; *Brown v. Arundell*, 10 C. B. 54; *Williams v. Holmes*, 8 Exch. 861.

(*i*) *Brown v. Arundell*, *supra*.

(*k*) *Crosier v. Tomkinson*, *infra*.

(*l*) *Lyons v. Elliott*, L. R., 1 Q. B. D. 210; 45 L. J., Q. B. 159; 33 L. T. 806; 24 W. R. 296. This decision has been not a little criticised (see Redman and Lyon, L. & T., 2nd ed., p. 164); but it seems that, as the goods of third parties have never been exempted generally, the burden of proof is upon each third party

to bring himself within the benefit of the exemption he sets up.

(*m*) Bac. Abr. *Inns and Innkeepers* (B.); *Crosier v. Tomkinson*, 2 Ld. Ken. 439; Smith L. & T. 204 (2nd ed.).

(*n*) *Crosier v. Tomkinson*, 2 Ld. Ken. 439.

(*o*) *Fowkes v. Joyce*, 2 Vern. 129; 3 Lev. 260; 2 Wms. Saund. 290, n. (7).

(*p*) Smith L. & T. 202 (2nd ed.).

(*q*) Co. Lit. 47 a; *Storey v. Robinson*, 6 T. R. 138; *Field v. Adams*, 12 A. & E. 649.

CH. XI. SEC. 7. *Exemptions from Distress (Things in actual Use).* damage feasant (*r*). Horses, whilst drawing a cart, and the harness thereon, are exempt from a distress, even for damage feasant (*s*). Yarn being carried on a man's shoulders to be weighed cannot be distrained any more than a net in a man's hand, or a horse on which a man is riding (*t*). It seems that wearing apparel, though taken off for natural repose only, is liable to distress, but that clothes actually in wear are exempt (*u*).

Wearing
Apparel.

(e) *Goods in the Custody of the Law.*

Goods in the
Custody of the
Law cannot be
taken under a
Distress.

8 Ann. c. 14,
s. 1.

Goods in the custody of the law are not distrainable for rent; for it would be repugnant that it should be lawful to take goods out of the custody of the law (*x*). Therefore cattle or goods already taken damage feasant, or by the sheriff under an execution, attachment or extent, cannot be distrained for rent whilst in such custody (*y*). But by 8 Ann. c. 14, s. 1, no goods taken on any lands leased for life, years, at will, or otherwise, shall be *taken in execution*, unless the party at whose suit execution issued, before removal of the goods, pay to the landlord the arrears of rent, if not exceeding one year's rent; and if more, then the amount of one year's rent, due at the time of the execution (*z*). There are similar enactments, with variations, in the acts relating to the County Courts (*a*), and the Court of Admiralty (*b*).

Fraudulent
and Irregular
Executions
will not pre-
vent a Dis-
tress.

If the sale of goods under an execution be fraudulent, as where a fictitious bill of sale is made, and the goods remain on the premises, they may be distrained for rent (*c*). And where the execution was irregular, as where a sheriff's officer executed a writ of fieri facias by going to the house and informing the debtor he came to levy on his goods, and laying his hand on a table, said, "I take this table," and then locked up the warrant in the table-drawer, took the key and went away, without leaving any person in possession—and after the writ was returnable the landlord distrained; it was held, that it was a lawful distress (*d*). The goods may be distrained if the execution has been waived (*e*). Where a sheriff's officer, being in possession of a tenant's effects under an outlawry, made a distress on them for rent, and on the request of the landlord sold the goods distrained, and afterwards the outlawry was reversed, the officer was held liable

(*r*) *Bunch v. Kennington*, 1 Q. B. 679.

(*s*) *Field v. Adames*, 12 A. & E. 649.

(*t*) *Read's case*, Cro. Eliz. 594.

(*u*) *Bissett v. Caldwell*, Peake, 50; *Baynes v. Smith*, 1 Esp. 206.

(*x*) Co. Lit. 47 a; Gilb. Distr. 44; *Rez v. Cotton*, Parker, 120; *Eaton v. Southby*, Willes, 131; Bullen, 84; *Smith L. & T.* 204 (2nd ed.).

(*y*) *Peacock v. Purvis*, 2 Brod. & B. 362; *Wright v. Dewes*, 1 A. & E. 641; *Wharton*

v. Naylor, 12 Q. B. 673; 6 D. & L. 136; *Smith L. & T.* 204 (2nd ed.).

(*z*) See post, Sect. 11 (a).

(*a*) 19 & 20 Vict. c. 108, s. 75; post, Sect. 11 (b).

(*b*) 24 Vict. c. 10, s. 16; post, Sect. 11 (c).

(*c*) *Smith v. Russell*, 3 Taunt. 400.

(*d*) *Blades v. Arundale*, 1 M. & S. 711.

(*e*) *Seven v. Mihil*, 1 Ld. Ken. 370.

to pay the produce of the goods to the landlord, for they were not in custodia legis, the judgment being mere waste paper (*f*).

Goods seized by a messenger under a bankruptcy have been held not to be privileged as being in the custody of the law (*g*).

In *Sutton v. Rees*, a receiver in a legatees' suit advertised furniture in a leasehold house for sale. The superior landlord claimed rent, but took no other steps, and the furniture was sold. It was held, that the landlord had no lien on the proceeds of the sale, but must come in with the other creditors, and it was said that he should have distrained, first obtaining leave of the court so to do (*h*).

A distinction has been taken between proceedings at the suit and for the benefit of the Crown, and an outlawry in a civil suit (*i*). An immediate extent against a Crown debtor tested after a distress taken for rent justly due to the landlord with notice of the tenant being the Crown debtor, and appraisement of the goods and chattels, but before sale, prevails against the distress (*k*): so where a man was outlawed and an extent issued thereupon, and his goods were seized, although the landlord distrained three days before the extent, it was held that he was not entitled to any part of the rent due, under 8 Ann. c. 14 (*l*). Where an officer entered under an extent, and improperly continued on the premises for a longer period than he ought, the court would not permit the rent accruing subsequently to the seizure to be paid out of the proceeds; but left the landlord to his action against either the tenant for use and occupation, or the officer for wrongfully continuing on the premises (*m*). The landlord of premises on which goods have been seized under an extent in aid is not entitled, under 8 Ann. c. 14, s. 1, to call on the sheriff to pay a year's rent due before the teste of the writ (*n*).

Formerly, where a tenant's growing corn was seized and sold under a fi. fa. pursuant to 2 W. & M. c. 5, s. 3 (*o*), and the vendee permitted it to remain till it was ripe, and then cut it, the landlord could not distrain on it for rent before the expiration of a reasonable time for the vendee to remove and carry it away; such corn, whilst in the possession of the sheriff's vendee, being considered as in the custody of the law (*p*). So the landlord could not distrain for rent on any corn, hay, straw or other agricultural produce, sold by the sheriff under an execution, subject to a special agreement with the purchaser

CH. XI. SECT. 7.

Exemptions
from Distress
(Goods in Custody of Law).

Messenger in
Bankruptcy.
Receiver.

In Cases of
Extents.

Growing Corn
seized and sold
under a Fi. fa.

(*f*) *St. John's College, Oxford v. Murcott*, 7 T. R. 259.

(*g*) *Briggs v. Sowry*, 8 M. & W. 729; *Newton v. Scott*, 9 M. & W. 434; 10 Id. 471; *Phillips v. Shervill*, 6 Q. B. 944.

(*h*) *In re Sutton and Sutton v. Rees*, 32 L. J., Ch. 437; 9 Jur., N. S. 456.

(*i*) *Imp. Sheriff*, 171; *St. John's College, Oxford v. Murcott*, 7 T. R. 259.

(*k*) *Rex v. Cotton, Parker*, 112.

(*l*) *Rex v. Sotherby*, Bunb. 5.

(*m*) *Rex v. Hill*, 6 Price, 19; *Lane v. Crockett*, 7 Id. 566; *Harrison v. Barry*, 7 Id. 690.

(*n*) *Rex v. Decaux*, 2 Price, 17.

(*o*) *Ante*, 406.

(*p*) *Wharton v. Naylor*, 12 Q. B. 673; 6 D. & L. 136; *Peacock v. Purvis*, 2 Brod. & B. 362; *Wright v. Dewes*, 1 A. & E. 641.

CH. XI. SEC. 7. for him to use and consume the same on the demised premises according to the terms of the lease or agreement, or the custom of the country (*g*). Now, by 14 & 15 Vict. c. 25, s. 2, "in case all or any part of the growing crops of the tenant of any farm or lands shall be seized and sold by any sheriff or other officer by virtue of any writ of fieri facias, or other writ of execution, such crops, so long as the same shall remain on the farms or lands, shall, in default of sufficient distress of the goods and chattels of the tenant, be liable to the rent which may accrue and become due to the landlord *after* any such seizure and sale, and to the remedies by distress for recovery of such rent; and that notwithstanding any bargain and sale or assignment which may have been made or executed of such growing crops by any such sheriff or other officer." In consequence of this enactment, which was passed in order to reverse the law as laid down in *Wharton v. Naylor* (*r*), the tenant's crops can only be sold under an execution for their value *minus the rent* to which they may become liable, and the costs of a distress; but the landlord may afterwards abstain from distraining, and so in effect benefit the purchaser pro tanto at the tenant's expense; after which he may sue the tenant for such rent, or distrain upon his other goods for the amount.

Exemptions from Distress (Goods in Custody of Law).

14 & 15 Vict. c. 25, s. 2.
Crops sold under Fi. fa. liable, so long as on the Farm, to Distress for Rent due after Sale.

(f) *The Goods of Lodgers.*

At common law, as we have seen, the goods of third persons are liable to be distrained for rent, subject to the exceptions in the case of goods delivered to a person in the way of his trade, and other cases. An important statutory exception has been made in favour of lodgers by an act passed in 1871, 34 & 35 Vict. c. 79. By this act, which does not extend to Scotland (*s*), after reciting that "lodgers are subjected to great loss and injustice by the exercise of the powers possessed by the superior landlord to levy a distress on their furniture, goods and chattels, for arrears of rent due to such superior landlord by his immediate lessee or tenant," it is enacted (sect. 1), that "if any superior landlord shall levy or authorize to be levied a distress on any furniture, goods, or chattels of any lodger for arrears of rent due to such superior landlord by his immediate tenant, such lodger may serve such superior landlord, or the bailiff or other person employed by him to levy such distress, with a declaration in writing (*t*) made by such lodger, setting forth that such immediate tenant has no right of property or beneficial interest in the furniture, goods, or chattels so distrained or threatened to be distrained upon, and that such furniture, goods, or chattels are the

Lodgers' Goods Protection Act, 1871.

Lodger may serve Declaration that Tenant does not own Goods,

(*g*) 56 Geo. 3, c. 50; ante, Chap. XI., Sect. 6 (*b*). This act does not apply to sales under distresses for rent; *Ridgway v. Ld. Stafford*, 6 Exch. 404.

(*r*) 12 Q. B. 673.

(*s*) Sect. 4.

(*t*) See Form of Declaration, Appendix D., No. 12.

property or in the lawful possession of such lodger; and also setting forth whether any and what rent is due and for what period from such lodger to his immediate landlord; and such lodger may pay to the superior landlord, or to the bailiff or other person employed by him as aforesaid, the rent, if any, so due at last aforesaid, or so much thereof as shall be sufficient to discharge the claim of such superior landlord (u). And to such declaration shall be annexed a correct inventory, subscribed by the lodger, of the furniture, goods, and chattels referred to in the declaration; and if any lodger shall make or subscribe such declaration and inventory, knowing the same or either of them to be untrue in any material particular, he shall be deemed guilty of a misdemeanor.”

CH. XI. SECT. 7.
*Exemptions
from Distress
(Goods of
Lodgers).*

and may pay
Rent to supe-
rior Landlord.
Inventory.

By sect. 2, “if any superior landlord, or any bailiff or other person employed by him, shall, after being served with the before-mentioned declaration and inventory, and after the lodger shall have paid or tendered to such superior landlord, bailiff, or other person, the rent, if any, which by the last preceding section such lodger is authorized to pay, shall levy or proceed with a distress on the furniture, goods, or chattels of the lodger, such superior landlord, bailiff, or other person shall be deemed guilty of an illegal distress, and the lodger may apply to a justice of the peace for an order for the restoration to him of such goods; and such application shall be heard before a stipendiary magistrate, or before two justices in places where there is no stipendiary magistrate, and such magistrate or justices shall inquire into the truth of such declaration and inventory, and shall make such order for the recovery of the goods or otherwise as to him or them may seem just, and the superior landlord shall also be liable to an action at law at the suit of the lodger, in which action the truth of the declaration and inventory may likewise be inquired into.”

If Distress
proceeded
with, Justices
may order
Goods to be
restored to
Lodger.

Landlord also
liable to
Action.

It is clear that “lodger” in this act cannot mean “sub-tenant.” On the other hand, every lodger is to some extent a “tenant,” and a person occupying by far the greater part of a house under a contract in writing was held to be a “lodger” within the act in *Phillips v. Henson* (x), where the only rooms retained by the mesne landlord were “a housekeeper’s room on the basement and two or three empty attics and a stable.” It would be hard to find a case more practically hard upon a superior landlord, and yet the case seems good in law, on the ground that the mesne landlord occupied in fact. Any occupation in fact by the mesne landlord, however small, would seem to constitute the sub-tenant a lodger within the act, and it does not seem to

Who is a
“Lodger.”
*Phillips v.
Henson.*

(u) By sect. 3, “any payment made by any lodger pursuant to the first section of this act shall be deemed a valid payment of any rent due from him to his immediate landlord.”

(x) L. R., 3 C. P. D. 26; 47 L. J.,

C. P. 273; 26 W. R. 214, per Grove and Lindley, JJ.; the latter learned judge is reported as observing that “probably the act would not apply to an under-tenant who has the exclusive possession of the whole house.”

CH. XI. SEC. 7. make any difference whether such lodger has an exclusive possession of his rooms or not.

*Exemptions
from Distress
(Railway Rolling
Stock).*

(g) *Railway Rolling Stock.*

Railway Rolling Stock, marked with Owner's Name and not being Property of Tenant, exempt from Distress.

Upon a principle similar to that of the Lodgers' Goods Protection Act, 1871, railway rolling stock is protected from distress, in cases where it is not the actual property of the tenant, by the Railway Rolling Stock Protection Act, 1872 (35 & 36 Vict. c. 50). By sect. 3 of this act, "rolling stock (*y*) being in a work (*z*) shall not be liable to distress for rent (*a*) payable by a tenant (*b*) of the work, if such rolling stock is not the actual property of such tenant, and has upon it a distinguishing metal plate affixed to a conspicuous part thereof, or a distinguishing brand or other mark conspicuously impressed or made thereon, sufficiently indicating the actual owner thereof."

Restoration by Order of Justices.

By sect. 4, "where any such rolling stock as aforesaid is distrained, a court of summary jurisdiction (*c*) may make against the landlord such summary order for restoration of the rolling stock, or for payment of the real value thereof, and respecting costs or otherwise, and may make against the person distraining such order in the matter and respecting costs as to the court seems just."

Tenant's Interest is not protected.

By sect. 5, "this act shall not extend to protect from distress the interest which any tenant may have in any rolling stock otherwise protected under this act, but such interest may be distrained upon by the landlord, and disposed of in the same manner as the whole interest of such tenant, if he had possessed the same; and, in case of disagreement between the landlord and the parties claiming such rolling stock as to the mode of disposing of such interest, the same shall be settled by the court of summary jurisdiction; and the court shall, on the application of either party, make such order therein as to the court shall seem fit."

Appeal to Quarter Ses-

By sect. 6, "if any party thinks himself aggrieved by any order or adjudication of a court of summary jurisdiction under this act, or by dismissal of his complaint by any such court, he may appeal therefrom, subject to the conditions and regulations following; that is to say:—

(1) The appeal shall be made to some court of general or quarter

(*y*) By sect. 2, this "includes wagons, trucks, carriages of all kinds, and locomotive engines used on railways."

(*z*) By sect. 2, this "includes any colliery, quarry, mine, manufactory, warehouse, wharf, pier, or jetty in or on which is any railway siding."

(*a*) By sect. 2, this "includes royalty or other reservation in the nature of rent."

(*b*) By sect. 2, this "includes a lessee, sublessee, or other person having an interest in a work under a lease or agree-

ment, or by use and occupation, or being otherwise liable to pay rent in respect of a work.

(*c*) By sect. 2, this "means any justices of the peace, metropolitan police magistrate, stipendiary magistrate, sheriff, sheriff substitute, or other magistrate or officer, by whatever name called, who is capable of exercising jurisdiction in summary proceedings for the recovery of penalties."

sessions for the county or place in which the cause of appeal arises, holden not less than fifteen days and (unless adjourned by the Court of Appeal) not more than four months after the decision of the court of summary jurisdiction :

CH. XI. SEC. 7.
*Exemptions
from Distress
(Railway Rolling
Stock).*

- (2) The appellant shall, within seven days after the cause of appeal has arisen, give notice to the other party and to the court of summary jurisdiction of his intention to appeal, and the ground thereof :
- (3) The appellant shall, immediately after such notice, enter into a recognizance before a justice of the peace, with two sufficient sureties conditioned personally to try such appeal, and to abide the judgment of the court thereon, and to pay such costs as may be awarded by the court, or give such other security by deposit of money or otherwise, as the justice thinks fit to allow."

By sect. 7, "no order or conviction of a court of summary jurisdiction under this act shall be quashed for want of form, or be removed by certiorari or otherwise (at the instance either of the Crown or of any private party) into any superior court."

Exclusion of
Certiorari.

✶ (h) *Cattle, Beasts of the Plough, and Sheep.*

By 51 Hen. 3, stat. 4, no man "shall be distrained by his beasts that gain his land, nor by his sheep, while there is another sufficient distress to be found (except for damage feasant)" (*d*). This is in affirmance of the common law (*e*). Cart colts and young steers, not broken in or used for harness or the plough, are not privileged from distress as beasts which gain the land (*f*). Beasts of the plough may be distrained if the only other subject of distress is growing crops, because the landlord is entitled to distrain whatever is immediately available, and to hold the growing crops for the residue (*g*). If a landlord distrain, inter alia, his tenant's cattle and beasts of the plough for rent in arrear, and it appear after the sale that there would have been sufficient to satisfy the arrears and expenses without taking or selling such cattle, such distress is not thereby proved to be an illegal distress, contrary to the above statute, if there were reasonable grounds for supposing (as from the appraisalment of proper and competent persons at the time of the taking) that without the taking of the beasts of the plough there would not have been a sufficient distress (*h*); and where beasts of the plough are lawfully taken on a distress, the sale of them need not be postponed to that of other goods (*h*).

51 Hen. 3,
stat. 4.
Sheep privileged
conditionally.

(*d*) *Davies v. Aston*, 1 C. B. 746; 3 D. L. J., Ex. 157.
& L. 188.

(*g*) *Piggott v. Birtles*, 1 M. & W. 441.

(*e*) 2 Inst. 132.

(*f*) *Keen v. Priest*, 4 II. & N. 236; 28 G Price, 5.

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*Exemptions
from Distress
(Beasts, Sheep).*

Sheep of a
Sub-tenant
privileged.
Keen v. Priest.

The sheep of a *subtenant* are privileged from distress for rent if there are other goods on the premises sufficient to satisfy the rent, whether belonging to such subtenant or to any other person (*i*). The owner of sheep seized and sold under a distress for rent, which was unlawful because there were other goods on the premises belonging to him which might have been distrained for the same rent, is entitled to recover from the distrainer, not merely nominal damages, but the full value of the sheep so seized (*i*).

When Cattle
may be dis-
trained.

Cattle which are upon land by way of *agisting* may be distrained for rent (*k*): and where a stranger put in his beasts to graze for a night, by the consent of the lessor and licence of the lessee, it was held, that the lessor might distrain them for rent due out of those lands which he consented that the beasts should graze on; because such consent was no waiver of his right to distrain, unless it had been expressly agreed to; and being but a *parol* agreement, it could not alter the original contract between the lessor and lessee, from which the power to distrain arises (*l*). It seems to have been held in one case, that cattle which are being driven to a market or fair, and are put into pasture on the way for one night, are privileged from distress (*m*). If the landlord come to distrain, and the tenant, seeing him, drive cattle off the land, the landlord may follow the beasts and distrain them out of the premises, if he had once a view of the cattle on his land; but if the beasts go off the land of themselves before he observes them, he cannot distrain them afterwards (*n*); though if the distrainer once enter the premises to distrain the cattle, it seems that they cannot afterwards be driven off to prevent a distress (*o*).

Defects of
Fences.

Where beasts escape, and come upon land by the negligence or default of their owner, and are trespassers there, they may be distrained immediately by the landlord for rent in arrear (*p*); but where they come upon land by the insufficiency of fences, which the tenant or his landlord ought to repair, the lessor cannot distrain such beasts till they have been *levant and couchant*; that is, they must be lying down and rising up on the premises for a night and a day without pursuit made by the owner of them,—and after actual notice has been given to the owner that they are there, and he has neglected to remove them (*q*). Where cattle passing along a public highway stray into an adjoining field through defect of fences, the owner of the cattle is bound to remove them within a reasonable time, until the

(*i*) *Keen v. Priest*, 4 H. & N. 236; 28 L. J., Ex. 157.

(*k*) Roll. Abr. 669.

(*l*) *Fawkes v. Joyce*, 3 Lev. 260; 2 Vent. 50; 2 Wms. Saund. 290, n. 7.

(*m*) *Tate v. Glead*, 2 Wms. Saund. 290, n. (*f*).

(*n*) Co. Lit. 161 a.

(*o*) *Clement v. Milner*, 3 Esp. 95.

(*p*) Gilb. Distr. 45; Co. Lit. 47 a, note (301); *Kemp v. Cruwies*, 2 Lutw. 1577; 1 Ld. Raym. 168; Bullen, 103.

(*q*) *Poole v. Longueville*, 2 Saund. 289; Smith L. & T. 204 (2nd ed.).

expiration of which they cannot lawfully be distrained for damage feasant (*r*). What is a reasonable time is a question for the jury with reference to all the surrounding circumstances (*r*). In *Singleton v. Williamson*, the plaintiff was owner of close A., and the defendant was owner of closes B. and C. Between A. and B. there was a fence which, as against the owner of A., the owner of B. was bound to keep in repair, but which he had neglected to do. Between B. and C. there was a sufficient fence. The cattle of the plaintiff strayed from A. through a gap into B., and there breaking down the fence between B. and C., were distrained by the defendant as, he alleged, damage feasant in C. It was held, in trover to recover the cattle, that the defendant had no right to distrain the cattle, as the first wrongful act had been committed by himself in leaving the fence between B. and A. insufficiently repaired, the natural result of which wrongful act was the damage complained of; and that the jury were properly directed that the state of the fence between B. and C., and whether or not the cattle were damage feasant, was immaterial (*s*).

CH. XI. SEC. 7.
*Exemptions
 from Distress
 (Beasts, Sheep).*
*Singleton v.
 Williamson.*

It may be added here that by 11 Geo. 2, c. 19, s. 8, every landlord may take and seize, as a distress for arrears of rent, any cattle or stock of his tenant feeding or depasturing upon any common appendant or appurtenant, or any ways belonging to any part of the premises demised; and that by 56 Geo. 3, c. 50, s. 6, cattle feeding on crops sold under the provisions of that act cannot be distrained (*t*).

(i) *The Tools of Trade.*

The tools and implements of a man's trade are absolutely privileged from distress for rent, if they be in actual use at the time (*u*). If they be not in actual use, they are only privileged, in case there be no other distress upon the premises (*r*). But the distrainer is a trespasser ab initio only as to those particular goods which were not distrainable; the distress may be valid as to the residue, and a satisfaction pro tanto of the rent (*y*). Ledgers, day-books, vouchers and other business papers seem not to be distrainable. In one case the plaintiff recovered 40*s.* damages in trespass against the landlord and his broker for an illegal seizure thereof under a distress (*z*). In commenting upon the dictum of Lord Coke, that the books of a scholar would be privileged from distress, Mr. Smith expresses an opinion that this exemption would include a lawyer's books also (*a*).

Tools of
 Trade.

Books.

(*r*) *Goodwin v. Cheveley*, 4 H. & N. 631; 28 L. J., Ex. 298.

(*s*) *Singleton v. Williamson*, 7 H. & N. 410; 31 L. J., Ex. 17.

(*t*) *Ante*, 406.

(*u*) *Simpson v. Hartopp*, Willes, 512; 1 Smith L. C. 439 (7th ed.); *Gorton v. Falkner*, 4 T. R. 565.

(*x*) *Nargett v. Nias*, 1 E. & E. 439; 28 L. J., Q. B. 143.

(*y*) *Harvey v. Pocock*, 11 M. & W. 710; *Davies v. Aston*, 1 C. B. 746; 3 D. & L. 188.

(*z*) *Gauntlett v. King*, 3 C. B., N. S. 59.

(*a*) *Smith L. & T.* 205 (2nd ed.).

CH. XI. SEC. 7.

*Exemptions
from Distress
(Tools of
Trade).*

Threshing
Machine.

A threshing machine, which is not a fixture, is liable to a distress, unless in actual use at the time, or there be other sufficient distress (*b*). If a man has two mill-stones, and one only is in use, and the other lies by not used, it may be distrained for rent (*c*).

SECT. 8.—*Proceedings in Distress.*

(a) *When to be made.*

Distress must
be between
Sunrise and
Sunset.
*Tutton v
Darke.*

A distress for rent cannot be made after sunset and before sunrise, however light it may be (*d*)—because the tenant would not have any notice to make a tender of his rent, which possibly he might do in order to prevent the distress (*e*). It seems doubtful whether, for the purposes of a distress, sunrise commences with the first beams of the sun above the horizon, or when the middle of the sun is upon the horizon, or when the sun has completely emerged; “persons who distrain should bear in mind that a distress is to be made in the day-time, and they ought not to go so near the limits as to raise any doubt on the subject” (*f*). An almanack is not evidence of the time of sunrise or sunset on a particular day, nor will the court take judicial notice of such time (*g*). It was ruled in one case, where rent being due to the defendant from the plaintiff, who was about to remove her goods, the defendant entered the house after sunset, and for some hours prevented her from so doing, and locked some of the doors, that the plaintiff was entitled to a verdict, but only for the actual damage (*h*), but it seems that the full value for the goods distrained ought to have been given (*i*).

Distress must
not be till after
Rent Day.
*Duppa v.
Mayo.*

A distress cannot be made the same day on which the rent becomes due, for it is not in arrear until the next day (*k*). The custom of a place or an agreement between the landlord and tenant, if there be no objection to it in point of law, may indeed empower the landlord to distrain for it earlier, for *conventio vincit legem*; as where a person took a shop, and agreed to pay a year’s rent in advance (*l*). So where, by the custom of the country, half-a-year’s rent became due on the day on which the tenant entered, it was held that the land-

(*b*) *Fenton v. Logan*, 9 Bing. 676.
(*c*) Year Book, Easter T. 14 H. 8, pl. 6, cited in *Simpson v. Hartopp*, ubi supra.
(*d*) *Tutton v. Darke* and *Nixon v. Freeman*, 5 H. & N. 647; *Keen v. Priest*, 4 H. & N. 240, Watson, B.; Smith L. & T. 219 (2nd ed.).
(*e*) Gilb. Distr. 50; Co. Lit. 142 a; *Aldenburgh v. Peaple*, 6 C. & P. 212.
(*f*) *Tutton v. Darke* and *Nixon v. Freeman*, supra.

(*g*) 5 H. & N. 647, 649, per Pollock, C. B.; *Collier v. Nokes*, 2 C. & K. 1013.
(*h*) *Lamb v. Wall*, 1 F. & F. 503.
(*i*) *Edmondson v. Nuttall*, 17 C. B., N. S. 280; *Attack v. Bramwell*, 3 B. & S. 520; 32 L. J., Q. B. 146.
(*k*) *Duppa v. Mayo*, 1 Saund. 287; 2 Salk. 578; Co. Lit. 47 b, note (b); Bullen, 119; *Dibble v. Bowater*, 2 E. & B. 564.
(*l*) *Jenner v. Clegg*, 1 Moo. & R. 213; *Lee v. Smith*, 9 Exch. 662.

lord might distrain before the half-year had expired (*m*). On the other hand, the right to distrain may be *postponed* by agreement, ex. gr. until the landlord has produced his receipt for the rent due from him to the superior landlord (*n*). So a power of distress may be granted *after* demand of the rent from the tenant personally, or in some other specified manner; but where the rent is to be paid, "being lawfully demanded," the distress itself is a sufficient demand (*o*).

CH. XI. SEC. 8.
*Proceedings in
Distress (when
made).*

At common law a distress could not have been made after the expiration of the lease (*p*). But by 8 Ann. c. 14, ss. 6, 7, "any person or persons having any rent in arrear or due upon any lease for life or lives, or for years, or at will, ended or determined (*q*), may distrain for such arrears after the determination of the said respective leases, in the same manner as they might have done if such lease or leases had not been ended or determined:" "provided that such distress be made within the space of *six* calendar months after the determination of such lease, and during the continuance of such landlord's title or interest and during the possession of the tenant from whom such arrears became due."

Distress may
be within 6
Months after
Lease deter-
mined.
8 Ann. c. 14,
ss. 6, 7.

Before this act, if rent had been reserved payable, say at Lady-day and Michaelmas; the lord would have lost his remedy by distress for his last half-year's rent; for he could not have distrained for it until it was in arrear, and before then the term would have ended (*r*).

Where the tenant is allowed to hold over part of the demised property, the landlord may distrain on that part (*s*). And where the term is prolonged as to part by the custom of the country the landlord may distrain although the six months have expired (*t*). Nor does the six months' limit apply to a case where the landlord was a tenant for life, and the term is prolonged till the end of the current year, under the statute 14 & 15 Vict. c. 25, s. 1, in lieu of emblements (*u*).

Distress on
Part after
Lease deter-
mined;

Where the original tenant dies and his representative enters, the landlord may distrain upon the latter within six months after the end of the term (*x*). But where a tenant at will dies and his widow remains in possession, no distress can be made, because not only the tenancy but also the possession of the tenant from whom the arrears became due has ceased (*y*). Where the tenant of a farm remained a

and in Case of
Death of Te-
nant, &c.

(*m*) *Buckley v. Taylor*, 2 T. R. 600; *M'Leish v. Tate*, Cowp. 781; *Tracey v. Talbot*, 6 Mod. 214; *Jenner v. Clegg*, 1 Moo. & R. 213; *Lee v. Smith*, 9 Exch. 662.

(*n*) *Giles v. Spencer*, 3 C. B., N. S. 244; 26 L. J., C. P. 237.

(*o*) *Broune v. Dummery*, Hob. 208; *Kind v. Ammery*, Hutton, 23.

(*p*) Co. Lit. 47 b; *Pennant's case*, 3 Co. R. 64; *Williams v. Stiven*, 9 Q. B. 14; Bullen, 120.

(*q*) Semble, per Willes, J., in *Grimwood v. Moss*, 42 L. J., C. P. at p. 240, that

this does not include determination by forfeiture.

(*r*) Co. Lit. 47 b; Bullen, 120; *Smith L. & T. 222* (2nd ed.).

(*s*) *Nuttall v. Staunton*, 4 B. & C. 51.

(*t*) *Beavan v. Delahay*, 1 H. Blac. 5; *Knight v. Bennett*, 3 Bing. 364; *Gryffiths v. Puleston*, 13 M. & W. 358.

(*u*) *Haines v. Welch*, L. R., 4 C. P. 91; 38 L. J., C. P. 118.

(*x*) *Brathwaite v. Cookney*, 1 H. Blac. 465; *Smith L. & T. 220* (2nd ed.).

(*y*) *Turner v. Barnes*, 2 B. & S. 435; 31 L. J., Q. B. 170.

CH. XI. SEC. 8. few days after the expiration of his term, and, after entry by a new tenant, went away, leaving a cow and some pigs, but giving no further intimation of a purpose to return or to continue holding any part of the farm, it was held, that the landlord could not justify distraining the goods so left for arrears of rent, under this statute, inasmuch as the possession of the tenant had ceased (*y*).

3 & 4 Will. 4, c. 27, s. 42. By 3 & 4 Will. 4, c. 27, s. 42, "no arrears of rent or interest in respect of money charged on rent, or damages in respect of arrears, shall be recovered by distress, action or suit, but within *six* years next after the same shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto or his agent, signed by the person by whom the same was payable or his agent." This section applies to rents reserved on ordinary leases (*z*). But it is well observed by Mr. Smith (*a*) that the power to distrain for this limited amount is not lost *by reason of the mere non-payment of rent* for any time short of the period after the lapse of which the right to recover the land is gone; and we shall see presently that, although only six years of rent can be recovered by distress, twenty years' arrears may be recovered in an action of covenant (*b*).

Real Property Limitation Act, 1874.

Right to distrain must have accrued within 12 Years.

By the Real Property Limitation Act, 1874 (37 & 38 Vict. c. 57), s. 1, "no person shall make an entry or distress, or bring an action or suit to recover any land or rent, but within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to the person making or bringing the same." The subsequent sections show when the right is to be deemed to have first accrued. It has been established, however, by authority, that the repealed second section of 3 & 4 Will. 4, c. 27, with which the above section is substantially identical, excepting that the period of twelve is substituted for the period of twenty years, *does not apply to rent reserved on a demise* (which is a mere incident to the reversion), but to rents wherein a distinct estate may be had independently of any title to the land out of which the rent issues (*c*), ex. gr. an ancient quit rent (*d*), a fee farm rent reserved in letters patent (*e*). The right

(*y*) *Taylerson v. Peters*, 7 A. & E. 110.

(*z*) *Hunfrey v. Gery*, 7 C. B. 567; *Manning v. Phelps*, 10 Exch. 59.

(*a*) Smith L. & T. (2nd ed. p. 190), citing *Doe v. Oxenham*, 7 M. & W. 131.

(*b*) Post, Chap. XIII., Sect. 1, "Action on Covenant for Rent;" *Paget v. Foley*, 2 Bing. N. C. 679.

(*c*) *Grant v. Ellis*, 9 M. & W. 113; *Archbold v. Scully*, 9 H. L. 360. A criticism of the decisions in the *Jurist* Newspaper, 9 Jur., N. S., Pt. II., p. 315.

(*d*) *Owen v. De Bevoir*, 16 M. & W. 547; 5 Exch. 166.

(*e*) *Hunfrey v. Gery*, 7 C. B. 567.

to distrain, therefore—for six years' arrears—subsists as long as the relation of landlord and tenant subsists, and for the whole length, however long, of a term created by deed, notwithstanding the non-payment of the rent for any number of years (*f*). CAS. XI. SEC. 8.
*Proceedings in
Distress (where
made).*

(b) *Where Distress must be made.*

By the Statute of Marlebridge (52 Hen. 3, c. 15), "it shall be lawful for no man from henceforth for any manner of cause to take distresses out of his *fee*, nor in the king's highway, nor in the common street, but only to the king and his officers having special authority to do the same." 52 Hen. 3,
c. 15.

As a general rule, the distress must be made on the land from whence the rent issues, and not elsewhere (*g*), except in the case of the king (or queen regnant), who may distrain on any of his tenants' lands wherever situate (*h*), and except in the case of fraudulent removals (*i*), and distresses for gale rents of quarries in the Forest of Dean (*k*). A further important exception, that the parties may by agreement arrange for a right of distress upon land other than that out of which the rent issues, was established by the Exchequer Chamber in *Daniel v. Stepney* (*l*). Distress must
be on Land
out of which
Rent issues.

*Daniel v.
Stepney.*

Where two pieces of land are let by two separate demises, although both are contained in one deed, a joint distress cannot be made for them; as that would be to make the rent of one issue out of the other (*m*). Where a single rent issues out of land in the occupation of several tenants, a distress may be made for the whole amount upon the land of any one of them (*n*). Two separate
Demises, &c.

The distress may be made upon *any part* of the land, as the entire rent issues out of the whole and every part (*o*). Where the tenant of a farm holds over part of it after the expiration of the term, pursuant to some clause in the lease or the custom of the country, a distress may be made on that part for all the arrears within six months after the expiration of the tenancy (*p*). Where by indenture A. demised to B. a wharf, next the river Thames, described by abutments, together with all ways, paths, passages, easements, profits, commodities and appurtenances whatsoever to the said wharf belonging; and by the indenture the exclusive use of the land of the river Distress on
Part..

(*f*) See *Grant v. Ellis*, 9 M. & W. 113; *Doe d. Davey v. Oxenham*, 7 M. & W. 131. As to objectment, see post, Chap. XX., Sect. 1 (*b*).

(*g*) Co. Lit. 161 a; Gilb. Distr. 40; Bullen, 124; Com. Dig. *Distress* (A. 3), (B. 1); *Capel v. Buszard*, 6 Bing. 150; 3 Y. & J. 334; Smith L. & T. 211 (2nd ed.).

(*h*) 2 Inst. 132; Com. Dig. *Distress* (A. 3); Smith L. & T. 211 (2nd ed.).

(*i*) Post, 433.

(*k*) 59 Geo. 3, c. 86, s. 7.

(*l*) L. R., 9 Ex. 185; and 383, ante.

(*m*) *Rogers v. Birkmire*, 2 Stra. 1040; Rep. temp. Hardw. 245.

(*n*) 1 Roll. Abr. 671; Bullen, 125; *Woodcock v. Titterton*, 12 W. R. 685, Q. B.

(*o*) Com. Dig. tit. *Distress* (A. 3); Bullen, 125; *Woodcock v. Titterton*, supra.

(*p*) *Nuttall v. Staunton*, 4 B. & C. 51; *Beavan v. Delahay*, 1 H. Blac. 5; *Lewis v. Harris*, Id. 7, note (*a*); *Knight v. Bennett*, 3 Bing. 361; Bullen, 121, 125.

CH. XI. SEC. 8. *Proceedings in Distress (where made).* Thames opposite to and in front of the wharf between high and low water mark, as well when covered with water as dry, for the accommodation of the tenants of the wharf, was demised as appurtenant to the wharf, but the land itself between high and low water mark was not demised: it was held that the lessor could not distrain for rent in arrear barges the property of B. lying in the space between high and low water mark, and attached to the wharf by ropes (g). But where a tenant rented a stable, and was in the habit of keeping his cart on a part of the road adjoining the stable, which had been paved for that purpose by his landlord: held, that a distress for rent might be made of the cart whilst on the paved part of the road, which must be considered as part of the demised premises (r).

Lands in different Counties.

Where lands lying in different counties are held under one demise at one entire rent, a distress may be lawfully taken in either county for the whole rent in arrear, and chasing a distress over is a continuance of the taking; but where the counties do not adjoin, a distress cannot be chased out of one county into the other (s).

Distress on Highway.

By the Statute of Marlebridge (52 Hen. 3, c. 15) no person can make a distress on the highway, it being privileged for the convenience of passengers and the encouragement of commerce (t); but it would seem that where a farm adjoins a highway, goods standing in the highway, within the middle of it, and on that part of it next the demised premises, may be distrained (u). If the landlord or his agent come to distrain cattle which he sees upon the land, and the tenant or any other person drives the cattle off the land, the landlord or his agent may then follow and distrain them, even on the highway: but if he have no view of the cattle whilst on the land, although the tenant drive them off purposely to prevent a distress; or if the cattle themselves, after the view, go out of the fee, or the tenant or any other person, after the view, remove them for any other purpose than that of preventing a distress; in these cases the landlord or his agent cannot distrain them (x). Cases of fraudulent removal to avoid a distress are considered hereafter (y).

Distress on Commons.
11 Geo. 2, c. 19.

By 11 Geo. 2, c. 19, s. 8, landlords are enabled to take as a distress for rent any cattle or stock belonging to their tenants depasturing upon any common appendant or appurtenant or in any way belonging to the premises demised. This enactment does not extend to a distress for a rent-charge (z).

(g) *Capel v. Buzard*, 6 Bing. 150; 3 Y. & J. 344; 8 B. & C. 141; Bullen, 124.

(r) *Gillingham v. Gwyce*, 16 L. T. 640, per Lush, J.

(s) *Walter v. Rumball*, 1 Ld. Raym. 55; 12 Mod. 76; 1 Salk. 247.

(t) Co. Lit. 160 b; Gilb. Distr. 51; Bullen, 125.

(u) *Hodges v. Lawrence*, 18 Just. Peace, 347, Ex.

(x) Co. Lit. 161 a; 2 Inst. 132; *Clement v. Milner*, 3 Esp. 95; Bullen, 125, 126; Smith L. & T. 212 (2nd ed.).

(y) Sect. 8 (d).

(z) Bullen, 126.

(c) *Of the Mode of making a Distress, and of the Distress Warrant.*

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Proceedings in
Distress.

A distress may be made either by the landlord himself, or, as is now the usual practice, by his authorized agent or bailiff (*a*). The Statute of Westminster 2nd (13 Edw. 1, stat. 1, c. 37), which enacts that no distress shall be taken except by bailiffs "sworn and known," does not apply to distresses taken for rent in arrear (*b*). It would seem that an infant cannot be a bailiff (*c*). A person employed as a distraining broker, if engaged in the service of the landlord only, and paid a salary by him, is a servant within the meaning of 24 & 25 Vict. c. 96, s. 67, and may be found guilty of embezzlement (*d*).

By whom.
Who may be
Bailiff to dis-
train.

Care should be taken to select a proper bailiff, for the landlord is personally responsible for all *irregular* acts committed by his bailiff in the making of a distress: ex. gr. for distraining goods to an excessive amount; for selling without five days' notice; for selling without a proper appraisement; for not selling for the best price; for making extortionate charges; for not leaving the overplus in the hands of the sheriff, under-sheriff or constable; and the like (*e*). But the landlord is not liable for *illegal* acts committed by his bailiff, which are not authorized by the warrant of distress or otherwise (*f*), especially where he disclaims and repudiates such acts immediately they come to his knowledge (*g*). A slight recognition by the landlord of what has been illegally done on his behalf may amount to an adoption and ratification of such illegal acts, and so render him personally liable for them (*h*).

Landlord lia-
ble for *irregu-
lar* acts of his
Bailiff;

but not for
unauthorized
illegal acts.

Where the bailiff distrains he should properly have a warrant or authority in writing from his employer, which is commonly called a "warrant of distress" or a "distress warrant" (*i*). The warrant did not require a stamp under the old Stamp Acts (*k*), nor does it under the Stamp Act, 1870. One of several joint-tenants may sign a warrant of distress, and appoint a bailiff to distrain for rent due to all, if the others do not forbid him; and if, when applied to, they merely decline to act, that will not prevent him from proceeding (*l*). Tenants in common may distrain, each for his own share, but have no implied authority to distrain for each other; they may, however, join in a warrant to distrain for rent due to all of them (*m*): coparceners are more like joint-tenants; either they should all sign (*n*), or

Distress War-
rant.

(a) Smith L. & T. 222 (2nd ed.); Bullen, 129.

(b) *Begbie v. Hayne*, 2 Bing. N. C. 124; *Child v. Chamberlain*, 6 C. & P. 213.

(c) *Cuckson v. Winter*, 2 Man. & R. 313.

(d) *Reg. v. Flanagan*, 10 Cox C. C. 561.

(e) *Haseler v. Lemoyne*, 5 C. B., N. S. 530; 28 L. J., C. P. 103; *Ward v. Shew*, 9 Bing. 608; *Dave v. Cloud*, 14 L. T. 155.

(f) *Freeman v. Rosher*, 13 Q. B. 780.

(g) *Hurry v. Rickman*, 1 Moo. & R. 126.

(h) *Haseler v. Lemoyne*, 5 C. B., N. S. 530; 28 L. J., C. P. 103.

(i) See forms, Appendix D, No. 1.

(k) *Pyle v. Partridge*, 15 M. & W. 20.

(l) *Robinson v. Hoffman*, 4 Bing. 562; 3 C. & P. 234; ante, 393.

(m) Ante, 393; Bullen, 48.

(n) *Stedman v. Page*, 1 Salk. 390; *Horne v. Lewin*, 1 Ld. Raym. 639.

CH. XI. SEC. 8. any one may sign on behalf of herself and the others (o). So one of several co-heirs in gavelkind may sign the distress warrant on behalf of himself and his co-heirs without express authority from them (o). A mortgagor, who is permitted to remain in possession and to receive the rents and profits, has implied authority to distrain for the arrears as the bailiff or agent of the mortgagee; and he may so justify the distress notwithstanding he took it in his own name as for rent due to himself (p). A man may distrain without any express previous authority; and if he afterwards obtain the assent of the person in whose right the distress was made, such assent will be equivalent to a previous command, and will have relation to the time of the distress taken (q). Where, in replevin against a broker, it is proved that the landlord employs the solicitor to defend the broker, that is sufficient evidence of the broker's authority to distrain in the absence of any written warrant (r). So where a distress was made in the name of a person who was dead, a recognition of it by the executor was held good (s). Where a warrant of distress was addressed to Messrs. T., or their agent, and their clerk erased the name of T. and substituted that of W., by whom the distress was made, and the landlord's agent who had signed the warrant knew of the distress being so made, and communicated with W. respecting it: it was held, that the employment of W. was sufficiently authorized by the agent to make the latter liable on an indemnity given by him to T. (t).

Indemnity to Broker. Generally speaking, a warrant of distress creates an express or implied indemnity to the bailiff and his assistants against actions (in any form) which are maintainable on the ground that the landlord had no legal right to distrain. But the indemnity does not extend to illegal acts, nor to those irregular acts for which the landlord is responsible to the tenant (u). On the contrary, the landlord has a remedy over against the bailiff for any loss or damage he may have sustained by reason of such negligence or misconduct (x). Where a landlord gave authority to a broker to distrain the goods of his tenant, and an indemnity against all costs and charges that he might be at "on that account," and upon making the distress, the broker's men, being told by the son of the tenant that a cask contained spent liquor of no value, took the cask to pieces and let the liquor run off, when in fact it was cochineal dye belonging to a third person, who for wasting it recovered damages

(o) *Leigh v. Shepherd*, 2 Brod. & B. 465; Bullen, 44, 130; ante, 394.

(p) *Trent v. Hunt*, 9 Exch. 14; *Snell v. Finch*, 13 C. B., N. S. 651; 32 L. J., C. P. 117.

(q) *Gilb. Distr.* 32; *Bro. Abr. tit. Traverse*, 3; *Lamb v. Mills*, 4 Mod. 378; *Trevillian v. Pine*, 11 Mod. 112; *Jones v.*

Bright, 5 Bing. 533.

(r) *Duncan v. Meikleham*, 3 C. & P. 172.

(s) *Whitehead v. Taylor*, 10 A. & E. 210.

(t) *Toptis v. Crane*, 5 Bing. N. C. 636; 7 Scott, 620.

(u) *Ante*, 425.

(x) 2 Chit. Pl. 503 (7th ed.).

in trover against the broker: it was held, that he could not recover the amount of those damages from the landlord in an action on the indemnity; and that such an indemnity could apply only to such cases where the distress was illegal, because the landlord had no right to distrain (*y*). Where the landlord's agent employed a broker to levy a distress on the premises of an auctioneer, and urged him to make the levy forthwith as there was a large quantity of furniture in the auction room, and by the warrant he directed him to distrain the several goods and chattels on the premises, whereupon the broker seized all the goods, but some of them turned out to be privileged from distress: it was held, that an indemnification of the broker was implied to be given by the agent (*z*). But it seems that in ordinary cases a broker, who takes goods which are privileged from distress, cannot look for an indemnity from his employer (*z*). Where the warrant of distress contained the following clause:—"And for your so doing this shall be your sufficient warrant and authority and indemnification against all costs and charges in respect of any law expenses, action or actions, that may arise, as well as any other and all other charges or expenses which you or your agent may be at or be brought against you or your agent on this account:" it was held, that the indemnity extended to the costs of defending an action of trover wrongfully brought by the tenant (who admitted the tenancy and the rent being due) against the landlord's agent for goods taken under the distress, in which action the tenant was nonsuited (*a*).

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*Proceedings in
Distress.*

The outer door of the tenant's house cannot lawfully be broken open in order to make a distress (*b*); but if the outer door be open, the person distraining may justify breaking open an inner door or lock to find any goods which are distrainable (*c*). A landlord is not justified in breaking open the outer door of a stable, though not within the curtilage (*d*), nor in forcibly opening a padlock on a barn door (*e*), nor in breaking open gates or breaking down enclosures (*f*). But in order to distrain he may climb over a fence and so gain access to the house by an open door (*g*); he may also open the outer door by the usual means adopted by persons having access to the building, as by turning the key, lifting the latch, or drawing back the bolt (*h*):

Outer Door
may not be
broken open.
Semayne's case.

(*y*) *Draper v. Thompson*, 4 C. & P. 84.

(*z*) *Toplis v. Grane*, 5 Bing. N. C. 636.

(*a*) *Ibbett v. De la Salle*, 6 H. & N. 233; 30 L. J., Ex. 44.

(*b*) *Semayne's case*, 5 Co. R. 91; 1 Smith L. C. 114; Smith L. & T. 223 (2nd ed.).

(*c*) *Browning v. Dann*, Bull. N. P. 81; Co. Lit. 161 (*a*); Smith L. & T. 223 (2nd ed.).

(*d*) *Brown v. Glenn*, 16 Q. B. 254.

(*e*) 9 Vin. Abr. 128, *Distress* (F. 2), pl. 6.

(*f*) Co. Lit. 161 *a*; cited 16 Q. B. 255, 257, and in 7 Exch. 73.

(*g*) *Eldridge v. Stacey*, 15 C. B., N. S. 458; 12 W. R. 51; see contra *Scott v. Buckley*, 16 L. T. 573, Byles, J., after consulting the other judges of the Common Pleas, but *Eldridge v. Stacey* was not cited in that case.

(*h*) *Ryan v. Shilcock*, 7 Exch. 72; 21 L. J., Ex. 55.

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 Distress.*

but he may not put his hand through a hole in the door, or through a broken pane of glass, and remove a bar, window-latch, or other fastening, those not being the usual or accustomed modes of obtaining admission to the premises (*i*). It has been decided, however, that an entry to make a distress through an open window is lawful (*k*). But if the distrainer break open a window, or even unfasten a hasp, it is illegal, and the distress void *ab initio* (*l*). Indeed it seems that he may not open an unfastened window, and so obtain access to the house, and then unfasten and open the street door, to distrain (*m*). If the outer door or a window, &c. be unlawfully broken open, the distress is wholly illegal and void (*n*).

Re-entry to
 distrain.

Generally speaking, a second distress for the same rent cannot lawfully be made where the first has been abandoned (*o*). But "abandonment" does not always take place by a mere leaving of the premises, otherwise the distrainer would lose his remedy by a forcible ejection. Thus where the defendant, having with him a constable, had entered the plaintiff's house to make a distress for rent; and after he had stated his business and began to take an inventory, the plaintiff's wife tore his paper, beat him and the constable out, and then blocked up the door; upon which, about an hour afterwards, the defendant, with several others, returned and demanded admittance, which, being refused, he broke open the doors: it was held by Wilmot, J., that the distress having been lawfully begun and not deserted, but the defendant having been compelled to quit by violence, there was a recontinuance of the first taking, and so the second entrance was lawful, though the defendant could not, when he first came, have so broken open the door (*p*). When a person has once peaceably entered to distrain, and has been forcibly put out, he may legally break open a door or window to re-enter and complete the distress: but if he has merely got his foot or arm between the door and lintel, or by putting a pair of shears, or a stick, between the door and lintel, and so preventing the door being closed, that is not a sufficient entry to entitle him afterwards to break open a door or window to distrain (*q*). Where a man put in possession under a distress left the house for a purpose not necessary, but reasonably convenient, for a short time, and being forcibly kept out, broke the outer door: it was held, that there was not an abandonment of the

(*i*) Fitz. Abr. tit. *Distress*, pl. 21; cited 7 Exch. 76; *Hancock v. Austin*, 14 C. B., N. S. 634; 32 L. J., C. P. 252.

(*k*) *Nixon v. Freeman*, 5 H. & N. 617, 652; 29 L. J., Ex. 271.

(*l*) *Attack v. Bramuell*, 3 B. & S. 520; 32 L. J., Q. B. 146; *Hancock v. Austin*, *supra*.

(*m*) *Nash v. Lucas*, L. R., 2 Q. B. 590;

8 B. & S. 531.

(*n*) *Attack v. Bramuell*, 3 B. & S. 520; 32 L. J., Q. B. 146; *Nash v. Lucas*, L. R., 2 Q. B. 590; 8 B. & S. 531.

(*o*) As to "second distress," see post, Sect. 9.

(*p*) Esp. N. P. 382.

(*q*) *Boyd v. Profaze*, 16 L. T. 431, per Mellor, J.

distress, and that he was justified in breaking the outer door for the purpose of re-entering (*v*). But where a broker's man, having taken possession of property under a distress, and remained two days, left the house in a state of excitement bordering on insanity; and the landlord, thinking that his leaving had been procured by the drugging of his liquor by the parties in the house (which was not proved), six days afterwards broke into the house and took away the goods without any previous demand of admission; it was held, that he had no right to enter again after so long a delay, and that the owner of the goods might maintain trover for them (*s*).

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It is always a question for the jury whether there has or not been an abandonment (*t*). There is no abandonment of a distress where the distrainer, having seized the goods of a stranger on the premises without having given him notice of the distress, permits him to take them away for a temporary purpose, the distrainer intending that they shall be returned, which is done (*u*). Where a bailiff or broker, after having been ejected from a distress, re-enters to distrain, he should confine himself to the same goods (*x*). After a lawful entry to distrain the broker may, if necessary, break open the outer door to get out and remove the distress (*y*). In making a distress for rent, circumstances may occur which may require the presence of a police officer. But to justify the landlord in calling him in, it must be shown that his presence was rendered necessary either from threats of resistance or the apprehension of violence (*z*).

Abandonment is a Question for the Jury.

The most proper manner of making a distress is for the person distraining, whether the landlord himself or his bailiff (accompanied by a man to be left in possession), to go into the house, or upon any part of the premises out of which the rent issues, and there select and seize articles, *not privileged from distress* (*a*), of sufficient value to raise, on a broker's sale, the amount for which the distress is made, and the expenses of the distress; or, if necessary, to seize the whole, by taking hold of some piece of furniture or other article and saying, "I distrain this in the name of all the goods on the premises" (*b*), or to that effect. There could be no harm in adding, "except those privileged from distress." There need not be an *actual seizure* of the property distrained on (*c*), any expression of intention to distrain being sufficient (*d*). Thus, where a landlord to whom rent was in arrear, on hearing his tenant and a stranger disputing about removing a

Practical Directions.

(*v*) *Bannister v. Hyde*, 2 E. & E. 627; 29 L. J., Q. B. 141; *Eldridge v. Stacey*, 15 C. B., N. S. 458.

(*s*) *Russell v. Rider*, 6 C. & P. 416.

(*t*) *Eldridge v. Stacey*, 15 C. B., N. S. 458. Here the expulsion was forcible, but the distrainer did not return for three weeks.

(*u*) *Kerby v. Harding*, 6 Exch. 234.

(*x*) *Smith v. Farr*, 3 F. & F. 505.

(*y*) *Pugh v. Griffith*, 7 A. & E. 827.

(*z*) *Skidmore v. Booth*, 6 C. & P. 777.

(*a*) Ante, Sect. 6, p. 404.

(*b*) *Dodd v. Morgan*, 6 Mod. 215; *Draper v. Thompson*, 4 C. & P. 81; Bullen, 131.

(*c*) *Smith L. & T.* 224 (2nd ed.).

(*d*) *Cramer v. Mott*, L. R., 5 Q. B. 357; 39 L. J., Q. B. 172.

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 Distress.*

lathe, entered the house, and laying his hands on the machine, said, "I will not suffer this, or any of the things, to go off the premises till my rent is paid," the distress was held to be sufficiently made (e). Where a landlord's agent went upon the tenant's premises, walked round them without touching anything, and gave the usual notice of distress as to certain of the goods (of much more than sufficient value), and then went away without leaving any one in possession, it was held that this was a sufficient seizure to enable the tenant to sue the landlord for an excessive distress (f). Where a broker went to the tenant's house and pressed for payment of rent alleged to be due, and of a sum for the expense of the levy, but touched nothing and made no inventory, and the tenant then paid the rent and expenses under protest, on which the broker withdrew: it was held, in an action against the landlord for an excessive distress, that he could not say there had been no actual distress (g). But a declaration by a landlord as against the grantee of a bill of sale that the landlord means not to allow goods to be removed until his rent be paid, and that he is prepared to use force to prevent their removal, has been held not to be a conversion by the landlord (h).

Things privileged,
 not to be taken.

In making the seizure care must be taken not to distrain on anything absolutely privileged from distress, ex. gr. tenant's fixtures (i); nor anything privileged *sub modo*, i. e. provided there be other sufficient distress on the premises, ex. gr. the tools of a man's trade (i). Nor must the goods distrained be *excessive* in quantity or value, i. e. much beyond what is necessary to satisfy the actual arrears of rent, and the costs of the distress (k). The value of the goods should be estimated at what they will probably produce at a broker's sale, and not according to their value to the tenant (l). The broker's appraisalment is not evidence against the tenant as to the value (m). The broker who made it should be called. If there be no other distress on the premises, the taking of one entire thing, though of considerably greater value than the rent, is not excessive (n). An action lies for an excessive distress of growing crops, the probable produce of which is capable of being estimated at the time of seizure (o): provided the tenant

Nor an excessive
 Quantity.

(e) *Wood v. Nunn*, 5 Bing. 10.

(f) *Swann v. Earl of Falmouth*, 8 B. & C. 456.

(g) *Hutchins v. Scott*, 2 M. & W. 809.

(h) *England v. Cowley*, L. R., 8 Ex. 126; 42 L. J., Ex. 80; 28 L. T. 67, diss. Martin, B.

*(i) For a list of things privileged absolutely and *sub modo* respectively, see ante, 404.

(k) 52 Hen. 3, c. 4 (Statutes of Marlborough); 2 Inst. 107, cited 6 C. B. 430; *Wells v. Moody*, 7 C. & P. 59; *Field v. Mitchell*, 6 Esp. 71; *Willoughby v. Back-*

house, 2 B. & C. 821; *Biggins v. Goode*, 2 C. & J. 364; *Knight v. Egerton*, 7 Exch. 407; *Whitworth v. Maden*, 2 C. & K. 517; *Smith v. Ashford*, 29 L. J., Ex. 259.

(l) *Wells v. Moody*, 7 C. & P. 59.

(m) *Smith v. Ashford*, 29 L. J., Ex. 259.

(n) *Avenell v. Croker*, Moo. & M. 172; *Field v. Mitchell*, 6 Esp. 71; *Sells v. Hoare*, 1 Bing. 401; 1 C. & P. 28; explained 11 Exch. 876; *Roden v. Eytton*, 6 C. B. 427; *Tancred v. Leyland* (in error), 16 Q. B. 667, Maule, J.

(o) *Piggott v. Birtles*, 1 M. & W. 441.

thereby sustains actual loss and damage, but not otherwise (*p*). CH. XI. SEC. 8.
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Distress.*
The distress should not extend to the whole crop, where part would suffice.

The distress should not be made for more rent than is really owing: but if there be any doubt or dispute on that point, and no tender has been made by the tenant, the landlord may, with comparative safety, distrain for all that he claims, although in the result it appears to be more than is really in arrear and unpaid. No action can be maintained against him merely for distraining for *too much rent*, unless it appear by the evidence that the goods seized and sold were excessive with reference to the amount of the actual arrears (*q*); not even where it is alleged that the distress was made maliciously (*r*). The reason is, that the landlord is legally *entitled to distrain* for something, although perhaps not for all that he claims; and there is no duty on his part to inform the tenant for what he distrains: on the contrary, it is the duty of the tenant, who is presumed to know what rent he owes, to tender at his peril a sufficient sum to satisfy the amount, with or without expenses as the case may require, and until he has done *that* he has no cause of complaint (*s*). Upon the same principle, when the amount of a simple contract debt is disputed, the debtor must, at his peril, make a sufficient tender; otherwise the creditor, although he claims too much, may recover what is really due to him, with costs.

Amount of
Rent to be
distrained for.

The broker should show the cause of his making the distress, if required to do so, but if not required, he may distrain generally (*t*). The landlord or his agent or bailiff is not bound by any notice of distress given, but may show that more rent was due than is therein stated (*u*). The tenant must prove that his goods to an excessive amount or value were distrained, but it is not necessary to show that they were sold or actually taken away; the seizure as a distress is a sufficient cause of action (*x*). And it will be no defence that after the excessive distress was made the tenant authorized the defendant to sell, and gave him other powers with regard to the goods seized (*y*).

As soon as possible after the goods have been distrained they Impounding.

(*p*) *Proudlove v. Twemlow*, 1 Cr. & Mee. 326; *Owen v. Leigh*, 3 B. & A. 470; *Rodgers v. Parker*, 18 C. B. 112; but see *Chandler v. Doulton*, 3 H. & C. 553; 34 L. J., Ex. 89, where nominal damages were held recoverable.

(*q*) *Crowder v. Self*, 2 Moo. & R. 190; *Tancred v. Leyland* (in error), 16 Q. B. 669; *Glynn v. Thomas*, 11 Exch. 870; 26 L. J., Ex. 125; *French v. Phillips*, 1 H. & N. 564; 28 L. J., Ex. 82; *Loring v. Warburton*, E., B. & E. 507; 28 L. J., Q. B. 31; overruling *Taylor v. Henniker*, 12 A. & E. 488.

(*r*) *Stevenson v. Newnham* (in error), 13 C. B. 285, 297; 22 L. J., C. P. 110.

(*s*) *Glynn v. Thomas*, 11 Exch. 873, Erle, J.; *Tancred v. Leyland*, 16 Q. B. 669.

(*t*) *Buller's case*, 1 Exon. 50.

(*u*) *Grinnel v. Phillips*, 3 T. R. 645; *Crocker v. Ramsbottom*, 7 T. R. 658; *Gambrell v. Earl of Falmouth*, 4 A. & E. 73; *Trent v. Hunt*, 9 Exch. 14.

(*x*) *Sells v. Hoare*, 1 Bing. 401; 8 Moo. 453; *Baylis v. Usher*, 4 M. & P. 790.

(*y*) *Willoughby v. Backhouse*, 2 B. & C. 821; *Sells v. Hoare*, *supra*.

CH. XI. SEC. 8. *Proceedings in Distress.* should be impounded (z); especially where there is any dispute between the parties as to the amount of arrears really due. Until such

impounding the tenant may tender what he admits to be due, with expenses, and if such tender be sufficient it will be *illegal* to proceed further with the distress (a). But when the goods are impounded they are in the custody of the law, and a tender is too late to make the subsequent proceedings illegal (b). Nevertheless, if a tender be made after the impounding, but within the five days allowed the tenant to replevy, and the landlord afterwards proceeds to sell the distress, the tenant may maintain a special action on the case, founded on the equity of the statute 2 W. & M. sess. 1, c. 5, s. 2 (c). To avoid this the landlord should abstain from selling (after such a tender), and leave the tenant to obtain his goods by a replevin (which is the only remedy), in which the tenant will have to pay all that is really due, with the costs of and incident to the distress, replevy and action. If no tender be made, the landlord should *not sell* for more than the actual arrears of rent, with expenses, notwithstanding he may have claimed more in his notice of distress. He now has the opportunity of correcting any mistake previously made on that point, although perhaps he may be liable to some damages for having taken an excessive quantity of goods as a distress.

Inventory.

After a seizure has been made, as above pointed out, it is proper for the landlord or his bailiff to make an inventory (d) of as many goods as are judged sufficient to cover the rent distrained for, and also the charges of the distress. Although an inventory need not be as exact and minute as a specification, yet it ought to mention the goods taken, in such a manner that the tenant, and others, may know what is intended to be distrained. The following inventory, "one clock and weights, &c., and any other goods and effects that may be found in and about the said premises, to pay the said rent and expenses of this distress," was considered by the court objectionable, and was held sufficient only on the ground that the distress was in fact meant to include all the goods on the premises (e). A notice of distress stating that the landlord had distrained the several goods, chattels and effects specified in the schedule: which schedule, after enumerating certain goods, concluded thus:—"and all other goods, chattels and effects on the said premises, *that may be required in order to satisfy* the above rent, together with all necessary expenses:" was held to be too vague

(z) Post, 439.

(a) *Vertue v. Beasley*, 1 Moo. & R. 21; *Brankcomb v. Bridges*, 1 B. & C. 145; *Holland v. Bird*, 10 Bing. 15; *Ladd v. Thomas*, 12 A. & E. 117; *Evans v. Elliott*, 5 A. & E. 142.

(b) *Six Carpenters' case*, 8 Co. R. 146 a; 1 Smith L. C. 183 (7th ed.); *Firth v. Purvis*, 5 T. R. 432; *Thomas v. Harries*,

1 M. & G. 605; *Ladd v. Thomas*, 12 A. & E. 117; *Ellis v. Taylor*, 8 M. & W. 415; *Tennant v. Field*, 8 E. & B. 336; *Bullen & L. Pl.* 318 (3rd ed.).

(c) *Johnson v. Upham*, 2 E. & E. 250; 28 L. J., Q. B. 252; overruling *Ellis v. Taylor*, 8 M. & W. 415.

(d) See Form, Appendix D., No. 3.

(e) *Wakeman v. Lindsey*, 14 Q. B. 625.

and uncertain to justify the sale of goods of a stranger which he had deposited on the premises (*f*). CH. XI. SEC. 8.
*Proceedings in
Distress.*

After the inventory is taken it is necessary to give a notice *in writing* (*g*) to the tenant of the fact of the distress having been made and the time when the rent and charges must be paid or the goods replevied. This is usually done by writing such notice at the bottom of the inventory (*h*). A true copy of the inventory and notice must then be served personally upon the tenant or the owner of the goods, or left at the house, or if there be no house on the premises, upon the most notorious place. There should in all cases be a witness present to prove the regularity of the proceedings. When the distress has been thus made, it is the safest way to remove the goods immediately, and in the notice to acquaint the tenant where they are removed to. The place to which they are so removed must be mentioned in the notice (*i*). In many cases, however, the tenant for his own convenience requests the landlord to permit them to remain on the premises, and consents to allow him to retain possession beyond the five days; and in such cases a written consent should be procured (*k*), and some person left in possession of the goods upon the premises. No stamp is necessary to such written consent, or to a licence to re-enter and resume possession in consideration of the distress being withdrawn for a time (*l*). Notice of Dis-
tress, &c.

(d) *Distress on Goods fraudulently removed.*

To prevent the clandestine removal of goods off the demised premises by tenants, to avoid distress for rent, the 8 Ann. c. 14, s. 2, authorized landlords to follow and distrain them within *five* days after such removal. And by 11 Geo. 2, c. 19, s. 1, this term was extended to *thirty* days, with a power to break open places of concealment, but a saving for bona fide sales. By sect. 1, it is enacted that "in case any tenant or tenants, lessee or lessees for life or lives, term of years, at will, sufferance or otherwise, of any messuages, lands, tenements or hereditaments, upon the demise or holding whereof any rent is or shall be reserved, due or made payable, shall fraudulently or clandestinely convey away, or carry off or from such premises, his, her or their goods or chattels, to prevent the landlord or lessor, landlords or lessors from distraining the same for arrears of rent so reserved, due or made payable, it shall and may be lawful to or for every landlord, &c., or any person or persons by him, her or them for that purpose Fraudulent
Removal.

11 Geo. 2,
c. 19, s. 1.
Goods frau-
dulently re-
moved may
be seized
within *Thirty*
Days wher-
ever found.

(*f*) *Kerby v. Harding*, 6 Exch. 234; 20 L. J., Ex. 162.

(*g*) *Wilson v. Nightingale*, 8 Q. B. 1034, post, 443: see the Form, Appendix D., No. 4.

(*h*) See Forms, Appendix D., Nos. 4, 5.

(*i*) 11 Geo. 2, c. 19, s. 9.

(*k*) See Form, Appendix C., Sect. 3.

(*l*) *Hill v. Ramm*, 5 M. & G. 789; *Fishwick v. Milnes*, 4 Exch. 825; *Cor v. Bailey*, 6 M. & G. 193.

CH. XI. SEC. 8. lawfully empowered, *within the space of 30 days* next ensuing such conveying away or carrying off such goods or chattels as aforesaid, to take and seize such goods and chattels wherever the same shall be found, as a distress for the said arrears of rent; and the same to sell or otherwise dispose of, in such manner as if the said goods and chattels had actually been distrained by such landlord, &c. in and upon such premises for such arrears of rent." Sect. 2 provides, "that no landlord or lessor, or other person entitled to such arrears of rent, shall take or seize any such goods or chattels as a distress for the same, which shall be sold *bonâ fide* and for a valuable consideration, before such seizure made, to any person or persons not privy to such fraud as aforesaid" (*m*). Sect. 7 enacts, "that where any goods or chattels fraudulently or clandestinely conveyed or carried away by any tenant or tenants, lessee or lessees, his, her or their servant or servants, agent or agents, or other person or persons aiding or assisting therein, shall be put, placed or kept in any house, barn, stable, out-house, yard, close or place, locked up, fastened or otherwise secured, so as to prevent such goods or chattels from being taken and seized as a distress for arrears of rent; it shall and may be lawful for the landlord or landlords, lessor or lessors, his, her or their steward, bailiff, receiver, or other person or persons empowered, to take and seize as a distress for rent such goods and chattels (first calling to his, her or their assistance the constable, headborough, borsholder or other peace-officer of the hundred, borough, parish, district or place where the same shall be suspected to be concealed, who are hereby required to aid and assist therein); and, in case of a dwelling-house (oath being also first made before some justice of the peace of a reasonable ground to suspect that such goods or chattels are therein) in the day time, to break open and enter into such house, barn, stable, out-house, yard, close and place, and to take and seize such goods and chattels for the said arrears of rent, as he, she or they might have done by virtue of this or any former act, if such goods and chattels had been put in any open field or place." The subsequent proceedings under a distress after a fraudulent removal are precisely the same as in ordinary cases.

Proceedings in Distress (Goods fraudulently removed).

Sect. 2.
Saving for
bonâ fide Sale
before Seiz-

Power to
break open
Places of
Concealment.

Assistance of
Constable.

What Cases
are within
Statute 11
Geo. 2, c. 19,
as to "Frau-
dulent Re-
moval."

To justify a distress under this statute the defendant was bound to plead specially, even before the Judicature Act (*n*). Where the removal has been after the landlord has conveyed away his reversion, he cannot seize under the statute (*o*). The removal must have taken place *after* the rent became due (*p*), and as rent becomes *due* on the morning of the day on which it is payable, but is not *in arrear* until

(*m*) Sections 3—6 are stated, post, 436.

(*n*) *Fletcher v. Marillier*, 9 A. & E. 457; *West v. Nibbs*, 4 C. B. 172; *Williams v. Roberts*, 7 Exch. 618.

(*o*) *Ashmore v. Hardy*, 7 C. & P. 501.

(*p*) *Watson v. Main*, 3 Esp. 15; *Rand v. Vaughan*, 1 Bing. N. C. 767; *Bullen*, 127.

the following day (*g*), if the tenant fraudulently removes his goods on the very day the rent becomes due, the landlord may on the next day (but not before), or within thirty days after such removal, follow and distrain upon them pursuant to the statute (*g*). The act applies to all cases where a landlord is, by the conduct of his tenant in removing goods from premises for which rent is due, turned over to the barren right of bringing an action for his rent. Thus where a tenant openly, and in the face of day, and with notice to his landlord, removed his goods without leaving sufficient on the premises to satisfy the rent then due, and the landlord followed and distrained the goods, it was held, that although the removal might not be *clandestine*, yet if it was *fraudulent* (which was a question for the jury), the landlord was justified under the statute (*r*). It is to be observed that the words of the act are “fraudulently or clandestinely.” The mere removal is not of itself fraudulent as against the landlord: to justify him in following them he must show that the goods were removed with a view to elude a distress, and also that sufficient goods were not left upon the premises (*s*). It would seem that it is a question for the jury whether the removal be fraudulent within the statute, although it be admitted at the trial that the removal was to avoid a distress (*t*).

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*Proceedings in
Distress (Goods
fraudulently
removed).*

The statute applies to the goods of the *tenant* only, and not to those of a stranger or lodger; therefore a defence justifying the following goods off the premises, and distraining them for rent in arrear, must show that they were the tenant's goods (*u*); but the trustees of a bankrupt lessee are considered as the actual tenants (*x*). It is not necessary that the party upon whose land the goods are seized after removal there should himself be party or privy to the fraud (*y*).

Statute ap-
plies to Goods
of Tenant
only.

The presence of a constable is required and must be stated in the defence where doors or gates are broken open (*z*). The presence of a special constable appointed for the occasion is sufficient (*a*).

Presence of
Constable.

In the Metropolitan Police District, by virtue of 2 & 3 Vict. c. 47, s. 67, any constable is empowered to stop and detain, until due inquiry can be made, all carts and carriages which he shall find employed in removing the furniture of any house or lodging between the hours of eight in the evening and six in the following morning, or whenever the constable shall have good grounds for believing that

Metropolitan
Police Dis-
trict.

(*g*) *Dibble v. Bowater*, 2 E. & B. 564.

(*r*) *Opperman v. Smith*, 4 D. & R. 33;
Bach v. Meats, 5 M. & S. 200.

(*s*) *Parry v. Duncan*, 7 Bing. 243;
Inkop v. Morchurch, 2 F. & F. 501. But
see *Gilham v. Arkwright*, 16 L. T. 88,
where it was ruled by Patteson, J. (*Parry*
v. Duncan being cited), that the landlord
need not prove that a sufficient distress
was not left on the premises.

(*t*) *John v. Jenkins*, 1 C. & M. 227;
Inkop v. Morchurch, 2 F. & F. 501.

(*u*) *Thornton v. Adams*, 5 M. & S. 38;
Postman v. Harrell, 6 C. & P. 225; *Fletcher*
v. Marillier, 9 A. & E. 457; *Foulger v.*
Taylor, 5 H. & N. 202.

(*x*) *Weich v. Myers*, 4 Camp. 368.

(*y*) *Williams v. Roberts*, 7 Exch. 618.

(*z*) *Rich v. Woolley*, 7 Bing. 651.

(*a*) *Cartwright v. Smith*, 1 Moo. & R.

CH. XI. SEC. 8. such removal is made for the purpose of evading the payment of rent. *Proceedings in Distress (Goods fraudulently removed).* It is also provided, by further sections of the same statute, that both the tenant fraudulently removing goods, and also all persons assisting him, shall forfeit to the landlord double the value of the goods distrained, to be recovered before justices if the goods be worth less than 50*l.*, or by an action of debt if they be worth more.

11 Geo. 2,
c. 19, ss. 3—6.
Forfeiture of
double Value.

By 11 Geo. 2, c. 19, s. 3, “to deter tenants from such fraudulently conveying away their goods and chattels, *and others from wilfully aiding or assisting therein or concealing the same,*” it is enacted, “that if any tenant or lessee shall fraudulently remove and convey away his or her goods or chattels as aforesaid, or if any person or persons shall *wilfully and knowingly aid or assist* any such tenant or lessee in such fraudulent conveying away or carrying off of any part of his or her goods or chattels, or in concealing the same, all and every person or persons so offending shall forfeit and pay to the landlord or landlords, lessor or lessors, from whose estates such goods and chattels were fraudulently carried off as aforesaid, double the value of the goods by him, her or them respectively carried off or concealed as aforesaid, to be recovered by action of debt.” Sect. 4 provides, “that where the goods and chattels so fraudulently carried off or concealed shall not exceed the value of 50*l.*, it shall and may be lawful for the landlord or landlords, from whose estates such goods or chattels were removed, his, her or their bailiff, servant or agent, in his, her or their behalf, to exhibit a complaint in writing against such offender or offenders, before two or more justices of the peace of the same county, riding or division of such county, residing near the place whence such goods and chattels were removed, or near the place where the same were found, not being interested in the lands or tenements whence such goods were removed; who may summon the parties concerned, examine the fact and all proper witnesses upon oath, or if any such witness be one of the people called Quakers, upon affirmation required by law; and in a summary way determine whether such person or persons be guilty of the offence with which he or they are charged; and to inquire in like manner of the value of the goods and chattels by him, her or them respectively so fraudulently carried off or concealed as aforesaid: and *upon full proof of the offence, by order*, under their hands and seals, the said justices may and shall adjudge the offender or offenders to pay double the value of the said goods and chattels to such landlord or landlords, his, her, or their bailiff, servant or agent, at such time as such justices shall appoint; and, in case the offender or offenders, having notice of such order, shall refuse or neglect so to do, may and shall, by warrant under their hands and seals, levy the same by distress and sale of the goods and chattels of the offender or offenders; and for want of such distress may commit

Double Value,
where Goods
worth less
than 50*l.*,
may be reco-
vered before
Justices.

11 Geo. 2,
c. 19, s. 4.

the offender or offenders to the house of correction, there to be kept to hard labour, without bail or mainprize, for the space of six months, unless the money so ordered to be paid as aforesaid shall be sooner satisfied." Sections 5 and 6 provide, "that it shall be lawful for any person, who thinks himself aggrieved by such order of the said two justices, to appeal to the next general or quarter sessions for the same county, who may and shall hear and determine such appeal, and give such costs to either party as they shall think reasonable, whose determination therein shall be final;" and that "where the party appealing shall enter into a recognizance with one or two sufficient surety or sureties in double the sum so ordered to be paid, with condition to appear at such general or quarter sessions, the order of the said two justices shall not be executed against him in the meantime."

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*Proceedings in
Distress (Goods
fraudulently
removed).*

Appeal to
Quarter Ses-
sions.

Secs. 5, 6.

The third section of the above act is so far penal, that it is incumbent, in an action by the landlord against a third party, for assisting the tenant in such fraudulent removal, to bring the case by strict proof within the words of the first section (*b*); and the landlord must not only prove that the defendant assisted the tenant in such fraudulent removal, but also that he was privy to the fraudulent intent of the tenant (*c*). But a creditor, with the assent of his debtor, may take possession of the goods of the latter, and remove them from the premises for the purpose of satisfying a bona fide debt, without incurring the penalty inflicted by the third section, although the creditor takes possession knowing the debtor to be in distressed circumstances, and under an apprehension that the landlord will distrain (*d*). In an action on that section against the tenant for fraudulently removing his goods from off the premises to avoid a distress for rent, it is not necessary to show an actual participation in the act, if the removal was with his privity (*e*); and in such a case it seems that it is immaterial whether the removal took place by night or with any particular concealment. In an action upon the statute against a defendant for aiding and assisting a tenant in removing and concealing his cattle, to hinder the landlord from distraining, the acts and orders of the tenant are admissible evidence of his own fraud, and of knowledge on the part of the defendant, if by other evidence he is proved to have contributed to the facility of it. Circumstances of suspicion may be laid before the jury to prove such a fraudulent co-operation as the legislature contemplated, and it is not necessary, to support such an action, that it should be proved that a distress was in progress, or about to be put in execution, or even contemplated; it is enough if the

Decisions on
Sect. 3 of 11
Geo. 2, c. 19,
providing for
Recovery of
double Value
by Action.

(*b*) *Ante*, 433.

(*c*) *Brooks v. Noakes*, 8 B. & C. 537;
Reg. v. JJ. of Radnor, 9 Dowl. 90.

(*d*) *Bach v. Meale*, 5 M. & S. 200.

(*e*) *Lister v. Brown*, 1 C. & P. 121;
3 D. & R. 501.

CH. XI. SEC. 8.
*Proceedings in
 Distress (Goods
 fraudulently
 removed).*

Decisions on
 Sect. 4, pro-
 viding Reco-
 very before
 Justices.

rent be shown to be in arrear, and that the goods have been removed afterwards (*f*). A variance in stating the amount of rent in arrear was held immaterial even before the Judicature Act (*g*).

The fourth section, which gives a summary remedy before two magistrates, provided the value of the goods shall not exceed 50*l*., does not take away the jurisdiction of the High Court in cases where the goods are of less than that value (*h*). And the fact that the landlord in the first instance made his complaint before a magistrate, will not preclude him from afterwards maintaining an action; for the remedy given by that section is cumulative, and therefore the landlord may elect at his option which course may be most convenient to himself (*i*). Justices may determine whether the goods have been fraudulently removed, even in cases where there are conflicting claims to the premises (*k*). Justices, either of the county from which tenants fraudulently remove goods, or of that in which they are concealed, may convict the offenders in their own counties (*l*). The goods need not be enumerated or specified in the order of the justices; it is sufficient if they find the value (*m*). The adjudication of the justices is an order and not a conviction, and cannot, therefore, like a conviction, be returned to the sessions in an amended form (*n*). It must show on the face of it that the party removing the goods was tenant; and that is not sufficiently shown by stating, that on complaint duly made, the party was charged with having fraudulently removed his goods from certain premises to prevent A. B. from distraining them for arrears of rent due to him for the said premises, and that, it appearing that he did so remove, &c., he is convicted thereof. It would seem, also, that the order should state that the complainant was the party's landlord, or the bailiff, servant or agent of such landlord (*o*). An order of justices convicting a person aiding and abetting a fraudulent removal of goods to avoid a distress, must show that the defendant acted wilfully and knowingly (*p*). An order, which states that the witnesses were examined upon oath, is not bad because it omits to state that they were examined on oath as to the value of the goods removed; nor is the warrant on such an order invalid for omitting to state that the witnesses were examined upon oath (*q*).

(*f*) *Stanley v. Wharton*, 9 Price, 301; 10 Id. 138; *Woodgate v. Knatchbull*, 2 T. R. 154.

(*g*) *Gwinnett v. Phillips*, 3 T. R. 643.

(*h*) *Horsfall v. Davy*, Holt, 147; 1 Stark. R. 169; *Basten v. Carew*, 3 B. & C. 649; *Stanley v. Wharton*, 9 Price, 301; 10 Id. 138; *Bromley v. Holder*, 1 Moo. & M. 175.

(*i*) *Stanley v. Wharton*, 9 Price, 301; 10 Id. 138.

(*k*) *Coster v. Wilson*, 3 M. & W. 411.

(*l*) *Rex v. Morgan*, Cald. 157.

(*m*) *Rex v. Rabbitts*, 6 D. & R. 343; *Burn's Justice*, tit. *Distress*.

(*n*) *Reg. v. J.J. of Cheshire*, 5 B. & Adol. 439; *Rex v. Bissex, Sayer*, 304; 3 *Burn's Justice*, 1109 (30th ed.).

(*o*) *Rex v. Davis*, 5 B. & Adol. 551.

(*p*) *Reg. v. J.J. of Radnorshire*, 9 Dowl.

90. (*q*) *Coster v. Wilson*, 3 M. & W. 411.

(e) *How Distress impounded.*

CH. XI. SEC. 8.
*Proceedings in
Distress (how
impounded).*

Of Impound-
ing at Com-
mon Law.

At common law, where a distress was made, the cattle or goods were to be kept in a pound; which is nothing more than a prison for that purpose, and is either *overt*, that is, public and open overhead, or *covert*, that is, private and covered or protected from the rain, &c. (r). Household goods and other things liable to damage from the weather, or which may be easily carried away, should be put in a pound covert (s). But all animals distrained should regularly be put into a pound overt, because at common law the owner was at his peril to sustain them, wherefore they ought to be put into such open place as he could resort to for the purpose: and if they were placed in a private pound, the distrainer was bound to keep them at his peril with provision, for which he had no satisfaction, and if they died for want of sustenance, he was considered answerable for them (t).

By 12 & 13 Vict. c. 92, s. 5, "every person who shall impound or confine, or cause to be impounded or confined, in any pound or receptacle of the like nature, any animal, shall provide and supply, during such confinement, a sufficient quantity of fit and wholesome food and water to such animal; and every such person who shall refuse or neglect to provide and supply such animal with such food and water as aforesaid shall for every such offence forfeit and pay a penalty of twenty shillings." The penalty imposed by this section falls not upon the keeper of the pound, but upon the distrainer (u).

12 & 13 Vict.
c. 92, s. 5.
Persons im-
pounding
Animals to
provide Food
and Water.

By sect. 6, "in case any animal shall at any time be impounded or confined as aforesaid, and shall continue confined without fit and sufficient food and water for more than twelve successive hours, it shall and may be lawful to and for any person whomsoever, from time to time, and as often as shall be necessary, to enter into and upon any pound or other receptacle of the like nature in which any such animal shall be so confined, and to supply such animal with fit and sufficient food and water during so long a time as such animal shall remain and continue confined as aforesaid, without being liable to any action of trespass or any other proceeding by any person whomsoever for or by reason of such entry for the purposes aforesaid: and the reasonable cost of such food and water shall be paid by the owner of such animal, before such animal is removed, to the person who shall supply the same, and the said cost may be recovered in like manner as herein provided for the recovery of penalties under this act," i. e. by summary proceedings before a justice.

Sect. 6. Power
to any of the
Public to sup-
ply Food and
Water.

By 17 & 18 Vict. c. 60, s. 1, "every person who since the passing

17 & 18 Vict.
c. 60, s. 1.

(r) Co. Lit. 47 b; 3 Blac. Com. 13; Bullen, 142; Smith L. & T. 233 (2nd ed.).

(s) Co. Lit. 47 b; Bullen, 143.

(t) 1 Inst. 4; Co. Lit. 47 b; Bullen, 143.

(u) *Dargan v. Davies*, L. R., 2 Q. B. D. 118; 46 L. J., M. C. 122; 35 L. T. 810.

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*Proceedings in
 Distress (how
 impounded).*

Expenses of
 Food and
 Water—how
 recovered by
 Distrainer.

of the said act of the twelfth and thirteenth years of her Majesty has impounded or confined, or hereafter shall impound or confine as in the said act mentioned, any animal, and has provided and supplied, or shall hereafter provide and supply such animal with food and water as therein mentioned, shall and may and he is hereby authorized to recover of and from the owner or owners of such animal not exceeding double the value of the food and water so already or hereafter to be supplied to such animal, in like manner as is by the said last-mentioned act provided for the recovery of penalties under the same act; and every person who has supplied or shall hereafter supply such food and water shall be at liberty, if he shall so think fit, instead of proceeding for the recovery of the value thereof as last aforesaid, after the expiration of seven clear days from the time of impounding the same, to sell any such animal openly at any public market (after having given three days' public printed notice thereof) for the most money that can be got for the same, and to apply the produce in discharge of the value of such food and water so supplied as aforesaid, and the expense of and attending such sale, rendering the overplus (if any) to the owner of such animal." Where several animals are distrained for rent, one of them may be sold for the expenses of all—and this may be repeated *toties quoties* (x).

Liability of
 Distrainer.

A distrainer is liable for any injury which animals distrained receive in consequence of the wet, muddy or otherwise unfit state of the pound at the time of impounding (y). The distrainer cannot tie or bind a beast in the pound, though it be to prevent its escape (z); for any act of his which tends to the injury of the thing distrained is done at his peril; but if animals distrained die in the pound, or are stolen, without any fault of the distrainer or insufficiency of the pound, in such case he who made the distress is not answerable, but has an action of trespass, if the distress was for damage feasant, or may distrain again, if the distress was for rent (a). The distrainer cannot work or use the thing distrained, whether it be in pound overt or covert: because the distrainer has only the custody of the thing as a pledge. An exception to this rule exists in respect to milch kine, which may be milked by the distrainer, because it may be necessary to their preservation, and consequently of benefit to, the owner (b).

Liability of
 Pound-
 keeper.

A pound-keeper is bound to receive everything offered to his custody, and is not answerable whether the thing were legally impounded or not (c): an action of trespass, therefore, will not lie

(x) *Leyton v. Hurry*, 8 Q. B. 811.

(y) *Wilder v. Speer*, 8 A. & E. 547;
Bignell v. Clarke, 5 H. & N. 485; 29 L. J.,
 Ex. 257.

(z) *Gilb. on Distr.* 65; *Smith L. & T.*
 234 (2nd ed.).

(a) *Vasper v. Eddowes*, 1 Salk. 248; 1 Ld.
 Raym. 719; Holt, 256.

(b) *Cro. Jac.* 148; *Bac. Abr. tit. Distress*
 (D. 2).

(c) *Radkin v. Powell*, *Cowp.* 476, 478;
Branding v. Kent, 1 T. R. 62.

against him merely for receiving a distress, though the original taking be tortious; for the pound being the custody of the law, if the distress be wrongfully taken, the distrainer is answerable, not he. When the cattle are once impounded he cannot let them go without a replevin or the consent of the party (*d*). Neither can a pound-keeper bring an action if the pound be broken, but it must be brought by the party interested (*e*).

CH. XI. SEC. 8.
*Proceedings in
Distress (how
impounded).*

By 1 & 2 Ph. & M. c. 12, s. 1, no distress of cattle is to be driven out of the hundred, rape, wapentake or lathe, where the same is taken, except it be to a *pound overt within the same shire*, nor above three miles from the place where the same is taken, nor impounded in several places, whereby the owner may be constrained to sue several replevins, on pain of forfeiting to the party grieved one hundred shillings and treble damages. By sect. 2, no person shall take for keeping in pound or impounding any distress above four-pence for any one whole distress; and where less has been used, there to take less, on pain of forfeiting 5*l.* to the party grieved, besides what he should take above four-pence. On this statute it has been held that where lands lying in two adjoining counties were let under one demise at one entire rent, and the landlord distrained cattle in both counties for rent in arrear, he might chase them all into one county; but that if the counties had not adjoined it would have been otherwise (*f*). The offence created by this statute for impounding a distress in a wrong place is but a single offence, and satisfied with one forfeiture, though three or four are concerned in doing the act, as the offence cannot be severed so as to make each offender separately liable to the penalty: the meaning of the statute being, that the penalty shall be referred to the offence, not to the person (*g*): thus where three persons distrained a flock of sheep, and severally impounded them in three several pounds, it was held, that they should forfeit but one 5*l.* and one treble damages (*h*). The second section does not extend to cases where the goods are impounded on the premises by virtue of the statute next mentioned (*i*), which is the statute usually resorted to, as it is obviously for the advantage of both landlord and tenant that the distress should remain in a situation equally and easily accessible to both (*k*).

1 & 2 Ph. & M.
c. 12.

Cattle may not
be driven more
than 3 Miles,
&c.

Fee on im-
pounding.

Decisions.

By 11 Geo. 2, c. 19, s. 10, "any person lawfully taking any distress for any kind of rent may impound or otherwise secure the

11 Geo. 2,
c. 19, s. 10.

(*d*) *Badkin v. Powell*, Cowp. 476, 478.

(*g*) *Rex v. Clarke*, Cowp. 612.

(*e*) *Id.* 479; *Fitz. N. B.* 228; 2 Chit. Pl. 549 (7th ed.).

(*h*) *Partridge v. Naylor*, Cro. Eliz. 480; Moor, 453.

(*f*) *Walter v. Rumball*, 1 *Id.* Raym. 63; 1 Salk. 247; *Woodcroft v. Thompson*, 3 Lev. 48; *Gimbart v. Pelah*, 2 Stra. 1272; Bullen, 145.

(*i*) *Child v. Chamberlain*, 5 B. & Adol. 1049.

(*k*) *Smith L. & T.* 237.

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 Distress (how
 impounded).*

Impounding
 on the Pro-

distress so made, of what nature or kind soever it may be, *in such place, or on such part of the premises* chargeable with the rent as shall be *most fit and convenient* for the impounding and securing such distress; and may appraise, sell and dispose of the same *upon the premises*, in like manner, and under the like directions and restraints to all intents and purposes as any person taking a distress for rent may now do off the premises, by virtue of 2 W. & M. sess. 1, c. 5, or 4 Geo. 2, c. 28; and any person whatsoever may come and go to and from such place or part of the said premises, where any distress for rent shall be impounded and secured as aforesaid, in order to view, appraise and buy, and also in order to carry off or remove the same on account of the purchaser thereof; and if any pound-breach or rescous shall be made of any goods and chattels, or stock distrained for rent, and impounded or otherwise secured by virtue of this act, the person aggrieved thereby shall have the like remedy as in cases of pound-breach or rescous is given and provided by the said statute." The distrainer ought either to put all the goods distrained into one room, and keep possession of that only, or to remove such goods out of the house, in the absence of any consent to the contrary; but very slight evidence of such a consent will be sufficient (*l*). Two or three rooms may be used, if necessary, as may appear most fit and convenient (*m*).

An open field is a sufficient pound for cattle (*n*). The agent of a landlord went into a field where the tenant's cattle were feeding, and placing his hands on one of the beasts, said he distrained them all, counted them, and took a note of them, which he left with the tenant, and then went away, doing nothing further with the beasts; the next morning he left with the tenant a notice, stating he had distrained the cattle, and had impounded them in the place or places therein mentioned, and the notice afterwards stated they were impounded "on the premises;" it was held, that this impounding was sufficient to make a tender of the rent and costs afterwards too late (*o*).

Tenant may
 not be ex-
 cluded.

It has been ruled, that if necessary to secure a distress in a cottage, it might be locked up so as to exclude the tenant altogethor (*p*). But it would rather seem that the landlord is never entitled to lock up the whole of the demised premises, so as to exclude the tenant therefrom, except with his express consent; rather than do that he must remove the goods distrained (*q*).

Corn may not
 be removed.

Corn loose or in the straw, hay, &c. which is distrained by virtue

(*q*) *Washborn v. Black*, 11 East, 405;
Tennant v. Field, 8 E. & B. 336; Smith
 L. & T. 238 (2nd ed.).

(*m*) *Woods v. Durrant*, 16 M. & W. 149.
 (*n*) *Castleman v. Hicks*, 1 C. & M. 266.

(*o*) *Thomas v. Harries*, 1 M. & G. 695.

(*p*) *Cox v. Painter*, 7 C. & P. 767.

(*q*) *Smith v. Ashforth*, 29 L. J., Ex.
 259; Bullen, 147.

of 2 W. & M. sess. 1, c. 5 (*r*), cannot be removed from the premises, but must be impounded where found (*s*). And growing corn, &c. distrained under 11 Geo. 2, c. 19, s. 8, must, after it is cut, be placed in a proper place on the premises, and cannot be removed except in default of there being such proper place (*t*).

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impounded).*

(f) *Notice of Distress.*

The distress, being considered merely as a pledge, could not at the common law be sold (*u*). But by 2 W. & M. sess. 1, c. 5, s. 2, "where any goods shall be distrained for rent reserved and due upon any demise, lease or contract whatsoever, and the tenant or owner of the goods so distrained shall not, *within five days next after such distress taken, and notice thereof* (with the cause of such taking) left at the chief mansion-house or other most notorious place on the premises, replevy the same, in such case, the person distraining shall *cause the goods so distrained to be appraised by two appraisers, and after such appraisement may sell the same* for the best price that can be gotten for them, towards satisfaction of the rent and charges of the distress, appraisement and sale; leaving the overplus (if any) for the owner's use." This statute also required the appraiser to be sworn, by a sheriff, under-sheriff or constable, on the spot, but the Parish Constables Act, 1872 (35 & 36 Vict. c. 92), s. 13, has repealed that part of it. The 11 Geo. 2, c. 19, s. 9, requires that the tenants have notice of *the place* where the distress is lodged when it is removed.

2 W. & M.
c. 5, s. 2.
Notice and
Sale of Dis-
tress.

Appraise-
ment.

Appraisers
need not be
sworn.

The notice of distress must be in writing (*x*); and its object being to enable the distrainer to sell under 2 W. & M. sess. 1, c. 5, s. 2, it ought to inform the tenant or the person whose effects are taken what goods are distrained, and the amount of rent in arrear (*y*). A notice stating that the distrainer had distrained the goods, chattels and things mentioned in the inventory thereunder written,—which inventory was "one clock and weights, &c. &c., and any other goods and effects that may be found in and about the said premises, to pay the said rent and expenses of this distress,"—has been held sufficient in a case where it appeared that the distress was in fact meant to include all the goods on the premises (*z*). But where a notice stated a distress of the several goods specified in the schedule, which, after enumerating certain goods, concluded thus—"and all other goods that may be required, in order to satisfy the above rent, together with all necessary expenses;" it was held, that this notice was too vague and uncertain to justify the sale of the goods of a stranger which he had deposited

What is a suf-
ficient Notice
of Distress.

(*r*) *Ante*, 406.

(*s*) Sect. 3; Bullen, 141, note (2); 12 Q. B. 674.

(*t*) *Ante*, 406.

(*u*) *Ante*, 406.

(*x*) *Wilson v. Nightingale*, 8 Q. B. 1034; see Form, Appendix D., No. 4.

(*y*) *Kerby v. Harding*, 6 Exch. 234; 20 L. J., Ex. 163.

(*z*) *Wakeman v. Lindsey*, 14 Q. B. 625.

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in Distress
(Notice of).*

on the premises (a). No defect in the notice, nor even the total omission to give any such notice, will render the distress itself invalid or illegal; the notice is only required by the statute to entitle the landlord to sell under the distress (b). It is only *irregular* to sell without due notice (c). The notice need not set forth at what time the rent became due for which the distress is made, nor the correct amount of the arrears really due, as the tenant is supposed to know all this and must tender the proper amount at his peril (d). Any defect or mistake in the notice on the above or similar points is immaterial, for a man may distrain for one cause and avow or justify for another (e). Notice to the owner of the goods distrained (not being the tenant) is sufficient as against him, unless a replevin has been sued by the tenant (f). In all cases personal notice is sufficient, and indeed preferable to notice left at the mansion-house or other notorious place, on account of the difficulty of proof (f).

*Time of Removing and
Selling the
Distress.*

The landlord cannot sell the goods distrained until after the expiration of the five days allowed by the statute for the tenant to replevy, and those days must be calculated exclusively of the day of taking and notice, and also exclusively of the day of sale. Therefore where a distress is taken and notice thereof given on a Saturday, the five days expire on the following Thursday, and the goods cannot lawfully be sold before Friday (g). A distress taken on Monday or Tuesday cannot lawfully be sold until the following Monday (h). But no action will lie for selling too soon unless actual damage be shown (i). The landlord should remove the goods from the tenant's premises at the end of the five days allowed the tenant to replevy, or within a reasonable time afterwards, otherwise he may be deemed a trespasser for keeping them there (k): thus where A. entered under a warrant of distress for rent in arrear, and continued in possession of the goods upon the premises fifteen days, during the last four of which he was removing the goods, which were afterwards sold under the distress; it was held, that he was liable to an action of trespass for continuing on the premises, and disturbing the plaintiff in the occupation of his house, after the time allowed by law (l); but a reasonable time after the expiration of the five days from the time of the distress is allowed

(a) *Kerby v. Harding*, *supra*.

(b) *Trent v. Hunt*, 9 Exch. 14.

(c) *Lucas v. Tarkenton*, 3 H. & N. 116; *Wilson v. Nightingale*, 8 Q. B. 1031; *Robinson v. Waddington*, 13 Q. B. 753.

(d) *Ante*, 387.

(e) *Craigher v. Ramsbottom*, 7 T. R. 564; *Etherton v. Popplewell*, 1 East, 139; *Wootley v. Gregory*, 2 Y. & J. 536; *Trent v. Hunt*, 9 Exch. 14; 22 L. J., Ex. 318; *Phillips v. Whitard*, 2 E. & E. 804; 29 L. J., Q. B. 164.

(f) *Walter v. Rumball*, 1 Ld. Raym. 53;

1 Salk. 247.

(g) *Robinson v. Waddington*, 13 Q. B. 753; overruling *Wallace v. King*, 1 H. Blac. 13; and see *Harper v. Taswell*, 6 C. & P. 166.

(h) *Lucas v. Tarkenton*, 3 H. & N. 116.

(i) *Lucas v. Tarkenton*, *supra*; *Rodgers v. Parker*, 18 C. B. 112.

(k) *Griffin v. Scott*, 2 Stra. 716; 2 Ld. Raym. 1424.

(l) *Winterbourne v. Morgan*, 11 East, 395; 2 Camp. 117, n.; *Etherton v. Popplewell*, 1 East, 139.

by law to the landlord to remain on the premises for appraising and selling the goods distrained (*m*). It is usual for the tenant to give a consent for the landlord to remain beyond the five days, as it is for the tenant's advantage that the goods be not sold, or, at all events, not sacrificed by hurrying on the sale; if such consent be given, it is prudent, although not absolutely necessary, to have it in writing (*n*). If a landlord has distrained for rent, but by an arrangement between him and the tenant does not sell immediately after the five days, that is no proof per se of collusion (*o*); and the request of the tenant will justify the landlord in detaining the goods of a lodger upon the premises beyond the proper time of selling, if he did not know which were the goods of the lodger, and which were those of the tenant (*p*). Standing corn and growing crops, seized as a distress for rent, cannot be sold before they are ripe, for the tenant may tender the rent before they are ripe (*q*). But no action can be maintained for selling them prematurely, if the jury find that the tenant thereby sustained no damage (*r*).

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in Distress
(Notice of).*

(g) *Appraisement and Sale.*

Before the distress can be sold, it must be appraised by *two* appraisers (*s*), who must be reasonably competent, but need not be professional appraisers (*t*): it must not be appraised by the party making it (*u*), for he is interested in the business. A landlord, who was a broker, having distrained goods for rent, was sworn one of the appraisers, and together with another broker valued them to the plaintiff, who became the purchaser according to such valuation; it was held, that the sale was irregular (*r*). So the landlord cannot sell the goods to himself (*y*). It has been held, that if the tenant, to save expense, requests that appraisers may not be called in, and in consequence the broker who made the seizure values the goods, the tenant cannot in an action complain of that which was done as an irregularity (*z*).

Who may act
as Appraisers.

The appraisers proceed to appraise the goods, and usually write their appraisement upon the inventory (*a*).

By the Stamp Act, 1870 (33 & 34 Vict. c. 97), s. 38, and Sched. tit. "Appraisement or Valuation," the following stamp duties are

Stamp on Ap-
praisement.

(m) *Pitt v. Shew*, 4 B. & A. 208.

(n) See Form, Appendix D., No. 7.

(o) *Harrison v. Barry*, 7 Price, 690.

(p) *Fisher v. Algar*, 2 C. & P. 374.

(q) *Owen v. Leigh*, 3 B. & A. 470;
Proudlove v. Twenlow, 1 Cr. & M. 326.

(r) *Lucas v. Tarleton*, 3 H. & N. 116;
Rodgers v. Parker, 18 C. B. 112.

(s) 2 W. & M. sess. 1, c. 5, s. 2; ante,
443; *Allen v. Ficker*, 10 A. & E. 640;
Bishop v. Bryant, 6 C. & P. 484.

(t) *Roden v. Eytton*, 6 C. B. 427; *Clarke v. Holford*, 2 C. & K. 540; *Child v. Chamberlain*, 6 C. & P. 213. They need not be sworn; ante, 443.

(u) *Westwood v. Cowne*, 1 Stark. R. 172.

(x) *Lyon v. Weldon*, 2 Bing. 334.

(y) *King v. England*, 4 B. & S. 782; 33 L. J., Q. B. 145.

(z) *Bishop v. Bryant*, 6 C. & P. 484.

(a) See Form, Appendix D., No. 3.

CH. XI. SEC. 8. made payable on appraisements and valuations made on and after 1st January, 1871:—

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Distress (Ap-
praisement
and Sale).*

Where the amount of the appraisement or valuation does not exceed 5l.		£	s.	d.
Exceeds 5l. and does not exceed 10l.		0	0	3
„ 10l.	20l.	0	1	0
„ 20l.	30l.	0	1	6
„ 30l.	40l.	0	2	0
„ 40l.	50l.	0	2	6
„ 50l.	100l.	0	5	0
„ 100l.	200l.	0	10	0
„ 200l.	500l.	0	15	0
„ 500l. . . . .	. . . . .	1	0	0

Where goods are distrained, and at the end of the five days appraised but not sold, the act of appraisement does not take away the tenant's right to replevy them (b). Until they are duly sold, the property in them remains vested in the tenant or other owner (c).

A bailiff who seizes goods under a distress warrant, if his authority to sell on behalf of the landlord is afterwards withdrawn, has no right to go on and sell for his expenses (d).

*Mode of Sell-
ing the Goods
distrained.*

Before any sale takes place, the county court registrar's office should be searched to see if the goods have been replevied; if that is not the case, and the rent and charges remain unpaid at the end of the five days allowed by law, the goods should be sold for the best price which can be got for them. If the distress is for less than 20l., a person selling the goods by auction need not have an auctioneer's licence (e). It seems that there is no order required by law to be observed on the sale of goods distrained,—as that beasts of the plough should be postponed to other goods (f).

*Landlord may
not buy.*

The landlord cannot sell the goods to himself or take them at the appraised price (g). It is not unusual for the appraisers to buy them at their own valuation. A distress sold at the appraised value was taken, when appraisers were sworn, to have been sold at the best price, since the law relied upon the appraisers having been sworn (h); but it was held, that upon a count for not selling goods distrained at the best prices, the plaintiff might go into evidence to show that the goods were allowed to stand in the rain, and that they were improperly allotted (i). Where a tenant is under a covenant not to carry hay and straw off the premises, a distraining landlord is not

^a (b) *Jacob v. King*, 5 Taunt. 451.

(c) *Moore v. Pyrke*, 11 East, 52, 54; *King v. England*, supra, note (y).

(d) *Harding v. Hall*, 14 W. R. 646; 14 L. T., N. S. 410.

(e) 8 & 9 Vict. c. 15, s. 5.

(f) *Jenner v. Yolland*, 6 Price, 5; 2 Chit. R. 167.

(g) *King v. England*, supra, note (y).

(h) *Walter v. Rumball*, 1 Ld. Raym. 53; 1 Salk. 247; Bullen, 160.

(i) *Poynter v. Buckley*, 5 C. & P. 512.

entitled to sell it too cheap, on the condition that the purchaser shall consume it on the premises (*k*). If goods on the tenant's lands be sold under a distress with a condition, to which the tenant is a party, that they may remain on the land up to a certain day, and that the buyer may enter and take the goods, the tenant cannot revoke this licence to enter on the land (*l*). But such a licence is not implied by law, though the goods may have remained on the land with the tenant's assent (*m*). The whole produce of the sale may, if necessary, be applied in or towards satisfaction of the rent and expenses of the distress; but if the produce be more than sufficient for that purpose, the residue should be left in the hands of the sheriff, under-sheriff, or constable—usually the latter—for the use of the owner of the goods distrained (*n*). And if the goods have been removed for sale, the surplus thereof remaining unsold (if any) should be returned to the premises from which they were taken (*o*).

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Distress (Ap-
praisement
and Sale).*

(h) *Costs of Distresses.*

By 57 Geo. 3, c. 93, for regulating the costs of distresses levied for payment of small rents, after reciting that divers persons acting as brokers, and distraining on the goods and chattels of others, or employed in the course of such distresses, had of late made excessive charges, to the great oppression of poor tenants and others, and that it was expedient to check such practices, it was enacted, sect. 1, "that no person making any distress for rent, where the sum demanded and due *shall not exceed* 20*l.* for and in respect of such rent, nor any person whatsoever employed in any manner in making such distress, or doing any act whatsoever in the course of such distress, or for carrying the same into effect, shall have, take or receive out of the produce of the goods or chattels distrained upon and sold, or from the tenant distrained on, or from the landlord, or from any other person whatsoever, any other or more costs and charges for and in respect of such distress, or any matter or thing done therein, than such as are fixed and set forth in the schedule" annexed and appropriated to each act which shall have been done in the course of such distress; and no person or persons whatsoever shall make any charge for any act, matter or thing mentioned in the schedule, unless such act shall have been really done.

57 Geo. 3,
c. 93, s. 1.
Fixed Limit
to Costs where
Distress for
20*l.* or less.

Statutory
Schedule.

By sect. 2, "if any person shall in any manner levy, take or re-

Party ag-
grieved by

(*k*) *Ridgway v. Ld. Stafford*, 6 Exch. 404; overruling *Abbey v. Fetch*, 8 M. & W. 419; and followed in *Hawkins v. Walrond*, 45 L. J., O. P. 772; see also *Fruisher v. Lee*, 10 M. & W. 709; *Roden v. Byton*, 6 C. B. 427; *Smith L. & T.* 210 (2nd ed.).

(*l*) *Wood v. Manley*, 11 A. & E. 34; *Wood v. Leadbitter*, 13 M. & W. 838.

(*m*) *Williams v. Morris*, 8 M. & W. 488.

(*n*) Post, 449.

(*o*) *Evans v. Wright*, 2 H. & N. 527; 27 L. J., Ex. 50.

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 Distress (Costs
 of),*

57 Geo. 3, c. 93
 —*contd.*

Extortion of
 greater than
 prescribed
 Amount may
 apply to Jus-
 tice of the
 Peace.

Sect. 2.

ceive from any person whatsoever, or retain or take from the produce of any goods sold for the payment of such rent, any other (p) or greater costs and charges than are mentioned and set down in the schedule, or make any charge whatsoever for any act, matter or thing mentioned in the schedule, and not really done, the party aggrieved by such practices may apply to any one justice of the peace for the county, city or town, and acting for the division where such distress shall have been made, or in any manner proceeded in, for redress; whereupon such justice shall summon the person complained of to appear before him, and shall examine into the matter of such complaint, and hear the defence of the person complained of; and if the fact shall appear to such justice, he shall order and adjudge trouble the amount of the monies so unlawfully taken to be paid, by the person so having acted, to the party who shall have made complaint thereof, together with full costs; and, in case of non-payment, shall issue his warrant to levy the same by distress and sale of the goods and chattels of the party ordered to pay, rendering the overplus (if any) to the owner; and in case no sufficient distress can be had, he shall commit the party to prison, there to remain until such order or judgment be satisfied."

Landlord
 liable only in
 Case of Per-
 sonal Levy.
 Sect. 4.

Sect. 4 provides, that nothing contained in the act "shall empower such justice to make any order or judgment against the landlord for whose benefit any such distress shall have been made, unless such landlord shall have personally levied such distress; and that no person who shall be aggrieved shall be debarred from any legal or other suit or remedy which he might have had before the passing of the act, excepting so far as such complaint shall have been determined by the order and judgment of the justice, and which may be given in evidence under the plea of the general issue in all cases where the matter of such complaint shall be made the subject of any action."

Schedule of
 Expenses for
 Distresses not
 exceeding 20*l.*

The schedule of expenses referred to in the above act is as follows:—

	£	s.	d.
Levying distress	0	3	0.
Man in possession, per day	0	2	6
Appraisement, whether by one broker or more, 6 <i>l.</i> in the pound on the value of the goods.			
Stamp, the lawful amount thereof.			
All expenses of advertisements, if any such	0	10	0
Catalogues, sale and commission, and delivery of goods, 1 <i>s.</i> in the pound on the net produce of the sale.			

The statute does not apply to a case of a distress taken for more

than 20*l.*, though made upon goods which are appraised at and sold for less than 20*l.* (*q*).

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By sect. 6 of the same statute, "every broker or other person who shall make and levy any distress whatsoever, shall give a copy of his charges, and of all the costs and charges of any distress whatsoever, signed by him, to the person or persons on whose goods and chattels any distress shall be levied, although the amount of the rent demanded shall exceed the sum of twenty pounds." This section does not apply where the goods have not been sold (*r*), and where it does apply, the landlord, not personally interfering in the distress, is not liable for the omission of the broker to give a copy of his charges (*s*).

Copy of Broker's Charges to be delivered to the Party distrained on.
Sect. 6.

Where the sum distrained for exceeds 20*l.*, the above act does not apply, and the only rule is that the charges must be reasonable (*t*). It is to be regretted that some reasonable scale of charges in such cases has not been sanctioned by the legislature, to prevent extortion, and because tenants ought to know accurately how much to tender (with the arrears of rent) for the expenses of the distress. The general practice appears to be, to charge 1*s.* in the pound for the levy, and 2*s.* 6*d.* per day for the man in possession, if the tenant keep him, and 3*s.* 6*d.* per day if he keep himself (*u*), besides the usual charges for appraisement, advertisements, catalogues, &c. The 1 & 2 Ph. & M. c. 12, s. 2 (*x*), allowing only 4*d.* for impounding any one whole distress, does not extend to cases where the goods are impounded on the premises, pursuant to 11 Geo. 2, c. 19, s. 10. A bailiff has no right to go on with the distress, and sell for his expenses, after his authority has been withdrawn by the landlord (*y*).

Costs of Distresses for more than 20*l.*

(i) *Surplus Proceeds and Unsold Goods.*

By 2 W. & M. sess. 1, c. 5, s. 2, landlords are authorized, after giving five days' notice of the distress (*z*), to cause the goods and chattels distrained to be appraised and sold (*a*), "towards satisfaction of the rent for which the said goods and chattels shall be distrained, and of the charges of such distress, appraisement and sale, leaving the

2 W. & M. c. 5, s. 2.
Overplus of Distress for Rent to be paid to Tenant.

(*q*) *Child v. Chamberlain*, 5 B. & A. 1049; 6 C. & P. 213.

(*r*) *Hills v. Street*, 5 Bing. 39.

(*s*) *Hart v. Leach*, 1 M. & W. 560; Bullen, 165. By 7 & 8 Geo. 4, c. 17, "all the rules, regulations, clauses, provisions, penalties, matters and things" in the above act (57 Geo. 3, c. 93) contained, "shall extend and be construed to extend, and shall be applied and put in execution—so far as the same are applicable and capable of being put in execution—with respect to any distress or levy which shall be made for any land tax, assessed taxes, poor's rates, church

rates, tithes, highway rates, sewer rates or any other rates, taxes, impositions or assessments whatever, in all cases where the sum demanded and due for or in respect of such taxes, rates, tithes, assessments or impositions, shall not exceed the sum of 20*l.*"

(*t*) *Lyon v. Tomkies*, 1 M. & W. 603.

(*u*) Bullen, 164, 165.

(*x*) Ante, 441.

(*y*) *Harding v. Hall*, 14 W. R. 646; 14 L. T., N. S. 410.

(*z*) Ante, 413 (*f*).

(*a*) Ante, 445 (*g*).

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 Distress (Sur-
 plus Proceeds).*

overplus (if any) in the hands of the said sheriff, under-sheriff or constable, for the owner's use." If the overplus be not so left, and the tenant or owner of the goods thereby sustains actual damage (but not otherwise), a special action on the case is maintainable (b), but not an action for money had and received, to recover the amount of such overplus (c). The "overplus" means what remains after payment of the rent, and the reasonable charges of the distress, which may be questioned in such special action (d). Whether the amount deducted for rent can be questioned in such action, is not clear. Although the tenant or owner of the goods has received the balance from the broker, it is a question for the jury whether it was accepted in full satisfaction: and if not, then whether it was sufficient to satisfy the real balance (e). And although the distress be insufficient, no action can be maintained for the rent until a sale has been had (f), after which the landlord may sue for the balance (g). Where goods distrained for rent in arrear have been removed to a convenient place for sale, and sufficient sold to satisfy the distress, including the expenses, the proper course is for the broker to leave the surplus money with the sheriff, under-sheriff or constable (generally the constable), and return the surplus goods to the premises from whence he took them (h).

No Action for
 Rent till Sale.

*Lehain v.
 Philpott.*

SECT. 9.—*Second Distress.*

17 Car. 2, c. 7,
 s. 4.
 Second Dis-
 tress in Case of
 Insufficiency.

By 17 Car. 2, c. 7, s. 4, "in all cases where the value of the cattle distrained shall not be found to be of the full value of the arrears distrained for, the party to whom such arrears are due, his executors or administrators, may from time to time distrain again for the residue of the said arrears." But a second distress cannot be justified where there is enough which might have been taken upon the first distress, if the distrainer had then thought proper; for it was his folly that he did not take sufficient at first (i); and a man who has an entire duty (as rent, for example) may not split the entire sum, and distrain for one part of it at one time, and for the other part of it at another time, and so toties quoties for several times; for that is great oppression (k). And therefore an action will lie against a landlord for the goods taken

(b) *Lyon v. Tomkies*, 1 M. & W. 603.

(c) *Yates v. Eastwood*, 6 Exch. 805; 20 L. J., Ex. 303; *Evans v. Wright*, 2 H. & N. 527; 27 L. J., Ex. 50; 2 Chit. Pl. 544 (7th ed.).

(d) *Lyon v. Tomkies*, 1 M. & W. 603; *Knight v. Egerton*, 7 Exch. 407 (6th issue, and verdict thereon).

(e) *Lyon v. Tomkies*, supra.

(f) *Lehain v. Philpott*, L. R., 10 Ex. 242; 44 L. J., Ex. 225.

(g) *Philpott v. Lehain*, 35 L. T. 855.

(h) *Evans v. Wright*, 2 H. & N. 527; 27 L. J., Ex. 50.

(i) Com. Dig. *Distress* (A. 1); *Bagge*, app., *Mawby*, resp., 8 Exch. 641; Smith L. & T. 191, 192 (2nd ed.).

(k) *Gambrell v. Earl of Falmouth*, 4 A. & E. 73; *Lear v. Caldecott*, 4 Q. B. 123; *Owen v. Wynne*, 4 E. & B. 579; Smith L. & T. 192 (2nd ed.).

on a second distress, where he might have taken sufficient on the first, or where he has voluntarily abandoned it (*l*). Where a landlord, having distrained a tenant who had committed an act of bankruptcy, withdrew the distress in consequence of a creditor of the tenant stating that he was proceeding in bankruptcy against the tenant, and warning the landlord not to sell, it was held, that such notice or warning ought not to have been regarded, and that a second distress was illegal (*m*). If a man, however, seize for the whole sum that is due to him, and only mistake the value of the goods seized, which may be of uncertain or imaginary value, as pictures, jewels, race-horses, &c., there is no reason why he should not afterwards complete his execution by making a further seizure (*n*). So if he withdraw the distress at the request of the tenant and for his accommodation (*o*), or is induced to do so by a false statement made by the tenant (*p*). So if he be forcibly prevented by the tenant from selling the goods distrained, or from delivering them to the purchaser, whereby the distress is defeated (*q*). But the re-entry in such cases does not amount to a second distress; it is merely a continuance of the original taking, and it should be confined to the goods previously taken and not extend to any others (*r*).

CH. XI. SECT. 9.
Second Dis-
tress.

If a plaintiff in replevin be nonsuited, the defendant may again distrain the same goods for rent subsequently accrued, previously to executing his retorno habendo, without waiving his action against the sureties on the bond (*s*). Where to a cognizance for rent in arrear there was a plea in bar, that the defendant, on a former occasion, made a distress for the same rent, and took goods liable to distress sufficient to discharge the rent in arrear and the costs of the distress, and might thereby have paid the arrears of rent, but neglected so to do, and wrongfully made a second distress for the same rent; it was held ill on special demurrer, assigning for cause that the plea did not show that the rent was satisfied by the former distress (*t*). And where to an avowry by executors, for rent due in the lifetime of their testator, there was a plea in bar that the testator took as a distress for the same rent goods of a sufficient value to satisfy such rent and the costs of taking the distress; it was held insufficient, as it should have shown that such distress produced a satisfaction of the rent (*u*).

Second Dis-
tress in Case
of Replevin.

(*l*) *Smith v. Goodwin*, 4 B. & Adol. 413; *Dawson v. Cropp*, 1 C. B. 961; 3 D. & L. 225; *Lear v. Caldecott*, 4 Q. B. 123; *Piggott v. Birtles*, 1 M. & W. 441.

(*m*) *Bagge*, app., *Mawby*, resp., 8 Exch. 641.

(*n*) *Hutchins v. Chambers*, 1 Burr. 579; 1 Wms. Saund. 201, n. 1.

(*o*) See Form of Request, Appendix D., No. 8.

(*p*) *Woollaston*, app., *Stafford*, resp., 15

C. B. 278.

(*q*) *Lee v. Cooke*, 2 H. & N. 584; 3 Id. 203; 27 L. J., Ex. 337.

(*r*) *Smith v. Torr*, 3 F. & F. 505; and see Sect. 4, ante, 401.

(*s*) *Hefford v. Alger*, 1 Taunt. 218.

(*t*) *Hudd v. Ravenor*, 2 Brod. & B. 662; *Dawson v. Cropp*, 1 C. B. 961; 3 D. & L. 225.

(*u*) *Lingham v. Warren*, 2 Brod. & B. 36; Bullen, 206.

CH. XI. s. 10.

Rescue and Pound-Breach.

What
amounts to a
Rescue.

SECT. 10.—*Rescue and Pound-Breach.*

Rescue is where the owner, or other person, by force takes away a thing distrained from the person distraining, after the latter has been actually in possession; but if he never in fact had possession—as when disturbed in making the distress—it is no rescue (*x*). It is also called rescous, from *recourser* (*recuperare*), to take from or recover. It is defined by Lord Coke to be a taking away and setting at liberty against law a distress taken, or a person arrested by the process or course of law (*y*). If cattle distrained go on to the premises of the owner while being driven to the pound, and he refuse to deliver them up upon demand by the distrainer, it is a rescue in law (*z*): but where the plaintiff distrained the defendant's cattle damage feasant, and went to apprise the defendant, and during his absence the cattle escaped for half an hour into the defendant's grounds, from whence the plaintiff on his return drove them to his own yard; it was held, that the defendant having taken them from thence, it was no rescue (*a*). Where the landlord employed a sheriff's officer, who took possession under the distress, and then, on receiving a fi. fa., sold the goods under it, this, though done by the same person, was held to be a rescue and pound-breach (*b*). The following facts, however, were held insufficient to enable the plaintiff to maintain an action for a pound-breach or rescue. The plaintiff levied a distress for rent in arrear, and impounded the goods upon the premises; the superior landlord afterwards distrained for rent due to him from the plaintiff: whilst the plaintiff's bailiff was removing the goods, the defendant, a sheriff's officer, came into the house, and said that he had a fi. fa. against the plaintiff, and that he would not allow the goods to be removed: plaintiff's tenant thereupon ejected plaintiff's bailiff, and brought back the goods which had been removed (*c*).

When a Rescue may be made.

If a distress be taken without cause, the party may lawfully make a rescue before it is impounded (*d*); but if it is impounded, he cannot justify a breach of the pound to take it out; because the distress is then in the custody of the law (*e*). Whenever the distrainer abandons and quits possession of the distress, the re-taking of it by the tenant or owner is not a rescue (*f*). So if a distrainer takes the distress out of the place where it was originally impounded, for the purpose of making an unlawful use of it, the owner may interfere and take it

(*x*) Bullen N. P. 34.

(*y*) Co. Lit. 160.

(*z*) Co. Lit. 161 a.

(*a*) *Knowles v. Blake*, 5 Bing. 499.

(*b*) *Reddell v. Stowey*, 2 Moo. & R. 358;
Turner v. Ford, 15 M. & W. 212.

(*c*) *Story v. Finnis*, 6 Exch. 123; 2 L.,
M. & P. 198.

(*d*) Co. Lit. 47 b; 161 a; *Bevil's case*, 4
Co. R. 11 b; *Case of Avovery*, 9 Co. R.
23 b; *Keen v. Priest*, 4 H. & N. 240,
Bramwell, B.; Bullen, 207.

(*e*) *Cotsworth v. Bettison*, 1 Salk. 247;
1 Ld. Raym. 106.

(*f*) *Dod v. Monger*, 6 Mod. 216; Bradley,
282.

out of his possession, without rendering himself liable either for a rescue or for pound-breach (*g*).

By the common law, if a man broke the pound, or the lock of it, or any part of it, he “greatly offended against the peace, and committed a trespass against the king, and to the lord of the fee, the sheriffs and hundredors in breach of the peace, and to the party in delay of justice; wherefore hue and cry was levied against him as against those who broke the peace; and the party who distrained might take the goods again wheresoever he found them, and again impound them” (*h*).

CH. XI. s. 10.
*Rescue and
Pound-Breach.*

Remedies for
Rescue and
Pound-
Breach.

By 2 W. & M. sess. 1, c. 5, s. 4, on any pound-breach or rescous of goods distrained for rent, the person grieved thereby shall, in a special action upon the case, recover treble damages and costs against the offender, or against the owner of the goods, if they be afterwards found to come into his use or possession. If a distrainer abuse a distress by working it, the owner may interfere and prevent it, and no action is maintainable against him for pound-breach or rescue (*i*). Where goods fraudulently removed and distrained on the premises of a third party are rescued by him, it may be a question whether an action in respect of such rescue can be maintained under this section (*k*). In an action on this statute it has been held that it is no answer that the rent and demand were tendered after the distress and impounding (*l*). Trover is not maintainable by the landlord for goods distrained by him, he having no property in them, nor even the constructive possession of them (*m*).

2 W. & M.
sess. 1, c. 5, s. 4.
Recovery of
treble Da-
mages in Case
of Pound-
Breach.

Treble costs as well as treble damages are given by this statute, but treble costs were abolished by Pollock's Act (6 & 7 Vict. c. 97), which substituted “a full and reasonable indemnity as to all costs and charges in and about the action” (*n*).

Costs.

The act 6 & 7 Vict. c. 30, amending the “Law relating to Pound-Breach and Rescue in certain Cases,” does not extend to distress for rent, but applies only to distress of cattle “damage feasant.”

NOTE ON DISTRESS DAMAGE FEASANT.—Although the right of distress damage feasant does not arise out of the relation between landlord and tenant, it may be useful to add here a few words respecting that kind of distress, which resembles distress for rent in many of its incidents, but not in all. It is laid down in Bullen on Distress (where the law of the subject is fully discussed (see pp. 227—242)), that a distress damage feasant may be made of any cattle or other things animate or inanimate which are wrongfully upon a man's land or in his house, incumbering it or otherwise doing damage. This right is founded on the principle of recompense, which justifies a person in retaining that which occasions injury to his property till amends be made by the owner. The

Note on Dis-
tress Damage
Feasant.

(*g*) *Smith v. Wright*, 6 H. & N. 821; 30 L. J., Ex. 313.

(*h*) 1 Inst. 47.

(*i*) *Smith v. Wright*, *supra*.

(*k*) *Harris v. Thirkeld*, 20 L. T. 98.

(*l*) *Firth v. Purvis*, 5 T. R. 432.

(*m*) *Turner v. Ford*, 15 M. & W. 212; *Wilbraham v. Snow*, 2 Saund. 47 a.

(*n*) It is doubtful whether Pollock's Act is not repealed by R. S. C. Order LV. See *Garnett v. Bradley*, L. R., 3 App. Ca. at pp. 961, 970.

CH. XI. s. 10.
Note on Dis-
tress Damage
Fasant—cont.

thing distrained must be taken in the act (*Wormer v. Biggs*, 2 C. & K. 31). There is this difference between a distress for rent and a distress damage feasant, that in the former case a man may distrain any cattle he finds on the premises, but in the other case they must be actually doing damage, and are only distrainable for the damage they are then doing and continuing: for if they have done damage to-day and have gone off, and come again at another time and are doing damage, and are taken for that, and the owner tenders amends for the latter damage, the party cannot justify keeping them for the first damage (*Vaspor v. Edwards*, 12 Mod. 658, 660; 1 Ld. Raym. 719; 1 Salk. 248; Co. Lit. 161 a). Each beast taken can be seized and detained for the damage which has actually been done by itself only, and not for the general damage, or any part of it which has been done by the others (Id.). To justify a distress damage feasant it is sufficient, however, that the distrainer entered the locus in quo whilst the cattle were in it (*Clement v. Milner*, 3 Esp. 95); but if it appear that the party distraining had not actually got into the locus in quo before the cattle had got out of it, the justification cannot be supported (Id.). The remedy is not confined to the mere owner of the soil upon which they may be found, but extends to all who may receive injury, such as commoners or other persons entitled to the use or produce of the land merely (*Hall v. Harding*, 4 Burr. 2432). Where A. demised to B. the milk of twenty-two cows to be provided by A. and to be fed at A.'s expense on certain closes belonging to A.; A. covenanting that B. might turn out a mare, and that no other cattle should be fed there; it was held, that the separate herbage and feeding of those closes passed to B., and that B. might distrain other cattle of A. doing damage there (*Burt v. Moore*, 5 T. R. 329). A tenant holding over after the expiration of his term cannot lawfully distrain the landlord's cattle put upon the premises by way of taking possession (*Taunton v. Costar*, 7 T. R. 431; *Butcher v. Butcher*, 7 B. & C. 399). No kind of thing which is capable of being damage feasant and not in actual use is exempt from distress for such damage. For damage feasant the party grieved or his agent may distrain in the night, otherwise it may be the beasts will be gone before he can take them (Co. Lit. 142 a). If a sufficient tender be made of damages before the taking, the taking is unlawful; if after the taking, and before the impounding, then although the taking is lawful, the detainer after the tender is unlawful; and in either case replevin may be maintained (*Evans v. Elliott*, 5 A. & E. 142; *Gulliver v. Cozens*, 1 C. B. 788; *West v. Nibbs*, 4 C. B. 172). A distress damage feasant cannot be sold for the damage done (*Layton v. Hurry*, 8 Q. B. 811). By 6 & 7 Vict. c. 30, power is given to two justices, where cattle are distrained, to convict persons releasing or attempting to release them; and the justices may award any part of the penalty to the person on whose behalf the distress is made. The justices cannot act in cases of disputed title and other cases.

SECT. 11.—*Satisfaction of Arrears of Rent by Execution Creditor.*

(a) *Execution in High Court.*

Goods in the custody of the law under an execution cannot at common law be distrained for rent (o). But to prevent collusion between tenants and their judgment creditors to defeat the landlord's remedy by distress, 8 Ann. c. 14, s. 1, enacts, that "no goods or chattels whatsoever lying or being in or upon any messuage, lands or tenements which are or shall be leased for life or lives, term of years, at will or otherwise, shall be liable to be taken by virtue of any execution on any pretence whatsoever, unless the party at whose suit the said execution is sued out, shall, before the removal of such goods from off the said premises, by virtue of such execution, or extent, pay to the landlord of the said premises or his bailiff all such sum or sums of money as are or shall be due for rent for the said premises at the time of the taking

8 Ann. c. 14,
s. 1.

No Goods
may be taken
in Execution
till Arrears of
Rent (for not
more than one
Year) be paid.

(o) Ante, 412; Co. Lit. 47 a; *Wharton v. Naylor*, 12 Q. B. 673; 6 D. & L. 136.

such goods or chattels by virtue of such execution, provided the said arrears of rent do not amount to more than one year's rent; and in case the said arrears shall exceed one year's rent, then the said party at whose suit such execution is sued out, paying the said landlord or his bailiff one year's rent, may proceed to execute his judgment as he might have done before the making of the act; and the sheriff or other officer is hereby empowered and required to levy and pay to the plaintiff as well the money so paid for rent as the execution money." Section 8 provides, that nothing in the act contained shall extend, or be construed to extend, to let, hinder or prejudice her Majesty, her heirs or successors, in the levying, recovering or seizing any debts, fines, penalties or forfeitures due, payable or answerable to her, but that it shall and may be lawful for her to levy, recover and seize the same in the same manner as if the act had never been made.

CH. XI. s. 11.
*Satisfaction of
Arrears
by Execution
Creditor.*

Saving for
Crown Debts.

By 7 & 8 Vict. c. 96, s. 67, "no landlord of any tenement let at a weekly rent shall have any claim or lien upon any goods taken in execution under the process of any court of law for more than four weeks' arrears of rent; and if such tenement shall be let for any other term less than a year, the landlord shall not have any claim or lien on such goods for more than the arrears of rent accruing during four such terms or times of payment."

7 & 8 Vict.
c. 96, s. 67.
Tenancies for
less than a
Year.

The 19 & 20 Vict. c. 108, s. 75, enacts that the 8 Ann. c. 14, s. 1, "shall not apply to goods taken in execution under the warrant of a county court," and provides a special process for such a case (*p*).

County Court
Executions.

The 8 Ann. c. 14, s. 1, is to be construed liberally (*q*), i. e. in favour of landlords. It does not, however, apply to executions at the suit of the landlord (*r*). The words "party at whose suit the execution is sued out" are not confined to plaintiffs, but have been held to apply where a defendant sued out execution for his costs of defence (*s*), and to a seizure under an outlawry in a civil suit (*t*), or under a sequestration from the Court of Chancery (*u*). Where there are two or more executions the landlord cannot have a year's rent on each (*x*). If the goods remain on the demised premises after a fictitious bill of sale made of them under an execution, they are liable to be distrained (*y*). Notwithstanding a fraudulent bill of sale by the tenant the property remains vested in him, so as to be liable to an execution against his goods, or a distress (*z*). The act applies to all goods and chattels to all Goods.

Application
of Statute of
Anne

(*p*) Post, 480.
(*q*) *Henchett v. Kimpson*, 2 Wils. 141.
(*r*) *Taylor v. Lanyon*, 6 Bing. 536.
(*s*) *Henchett v. Kimpson*, supra.
(*t*) *St. John's College, Oxford v. Murcott*,
R. 259; *Watson on Sheriff*, 277

(2nd ed.); *Atkinson on Sheriff*, 311 (5th
ed.).
(*u*) *Dizon v. Smith*, 1 Swanst. 457.
(*x*) *Dod v. Sarby*, 2 Stra. 1024.
(*y*) *Smith v. Russell*, 3 Taunt. 400.
(*z*) *Reed v. Thoyts*, 6 M. & W. 410; 8
Dowl. 410.

CH. XI. s. 11. whatsoever upon the demised premises, whether belonging to the tenant or not (a) : and whether liable to a distress or not (b).

Satisfaction of Arrears by Execution Creditor.

8 Ann. c. 14, s. 1—*contd.*

No Goods may be removed without paying Rent; but actual Removal is necessary.

None of the goods may be removed from off the demised premises until the rent is paid, otherwise the sheriff will be personally liable to an action founded on the statute (c) ; or to a summary application to the Division of the High Court out of which the execution issued, or to a judge, to compel him to pay the arrears of rent (not exceeding one year's rent) and the costs of the application (d), but an actual removal is necessary : the mere execution of a bill of sale by the sheriff to a purchaser is not sufficient (e). No action lies against the execution creditor for any such removal, it being the act of the sheriff (f).

There must be a subsisting Tenancy.

Cox v. Leigh.

The act only applies to a subsisting tenancy, and the landlord's statutory right to be paid arrears of rent ceases on determination of the lease (g). Where in an agreement for the sale of certain premises there was a stipulation that "in the mean time and until the assignment was made, the purchaser should pay and allow to the vendor at the rate of 100*l.* per annum, from the time of taking possession of the premises until the completion of the purchase, in equal half-yearly payments;" the purchaser having taken possession, and one half-yearly payment being due, it was held that it was due *as rent*, and that the vendor was entitled to it, under the statute of Anne, before the removal of any of the goods which had been seized under an execution after it became due (h). The act applies to *forehand rents*, payable in advance (i), even when reserved in a mortgage deed by way of further security for the interest (k), also to cases of lessee and subtenant of apartments (l), but not as between the ground landlord and a sublessee of his tenant (m).

Forehand Rents.

Executors and Administrators.

The executor or administrator of a deceased landlord who might, but for the execution, distrain for arrears of rent, is entitled to claim such rent (not exceeding one year's rent) from the sheriff (n) ; but not

(a) *Forster v. Cookson*, 1 Q. B. 419; *Duck v. Braddyll*, M'Clel. 217; 13 Price, 455.

(b) *Riseley v. Ryle*, 11 M. & W. 16, 22. (c) *Levy v. Godson*, 4 T. R. 687; *Calvert v. Joliffe*, 2 B. & Adol. 418; *Wintle v. Freeman*, 11 A. & E. 547; *Riseley v. Ryle*, 1 Dowl. N. S. 660; 10 M. & W. 101; 11 Id. 16; *Forster v. Cookson*, 1 Q. B. 419; *Rible v. Hussey*, 2 Ir. Com. L. R. 308; 16 W. R. 710; *Watson on Sheriff*, 277 (2nd ed.).

(d) *West v. Hedges*, Barnes, 211; 6 M. & G. 1004, note; *Henchell v. Kimpson*, 2 Wils. 140; *Arnett v. Garnett*, 3 B. & A. 440; *Yates v. Ratledge*, 5 H. & N. 249.

(e) *Smallman v. Pollard*, 6 M. & G. 1001; 1 D. & L. 901; *White v. Binstead*, 13 C. B. 304.

(f) *Palgrave v. Windham*, 1 Stra. 212; *Riseley v. Ryle*, 11 M. & W. 16, 20; *Cocker v. Musgrave*, 9 Q. B. 230.

(g) *Cox v. Leigh*, L. R., 9 Q. B. 333; 43 L. J., Q. B. 123; 30 L. T. 494; 22 W. R. 730. See too *Cook v. Cook*, Andrews, 219; *Hodgson v. Gascoigne*, 5 B. & Ald. 88; *Riseley v. Ryle*, 10 M. & W. 101; 11 Id. 16.

(h) *Saunders v. Musgrave*, 6 B. & C. 524; 2 C. & P. 294; *Anderson v. Midland R. Co.*, 3 E. & F. 614; 30 L. J., Q. B. 94.

(i) *Harrison v. Barry*, 7 Price, 690; *Duck v. Braddyll*, M'Clel. 217; 13 Price, 455.

(k) *Yates v. Ratledge*, 5 H. & N. 249.

(l) *Thurgood v. Richardson*, 7 Bing. 428; 4 C. & P. 481.

(m) *Bennett's case*, 2 Stra. 787.

(n) *Palgrave v. Windham*, 1 Stra. 212.

an administrator who first obtains letters of administration after the goods have been removed and sold, and the proceeds paid over to the execution creditor (o).

CH. XI. s. 11.
*Satisfaction of
Arrears
by Execution
Creditor.*

The sheriff is liable to an action at the suit of the landlord, for not paying a year's rent, though the sheriff ought not to have seized the goods on account of the tenant having become bankrupt, and may therefore be liable also to an action at the suit of the assignees (p).

8 Ann. c. 14,
s. 1—*contd.*
*Liability of
Sheriff.*

Where a sheriff seized and sold goods under a fi. fa., he was held to be liable to pay the whole of the proceeds to the assignees of the tenant, though he had paid a year's rent to the landlord (q). In order to enforce a landlord's claim for a year's rent against trustees of a bankrupt tenant, after a seizure under a fieri facias which is illegal as against them, there must be an actual distress: unless, perhaps, the sheriff has paid the amount before he had notice of the bankruptcy (r). Where the sheriff seizes and removes, under a fi. fa., goods which are not the property of the judgment debtor, and afterwards pays the whole of the proceeds of the sale to the real owner, he is still liable under the statute for not paying a year's rent to the landlord (s). Under a fi. fa. against A., the sheriff seized the goods of B.; B. claiming them, the sheriff obtained an order under the Interpleader Act, and C., the landlord, claimed 25*l.* for a quarter's rent. The goods were sold under the order, and the amount, after deducting the 25*l.*, was paid by the sheriff into court. On the trial of the issue, B. established his claim; it was held, that, under the circumstances, the sheriff was not justified in paying the rent (t).

The landlord is entitled to a full year's rent (if so much is in arrear) notwithstanding he has usually remitted some portion of it to the tenant (u). But he can only claim from the sheriff the rent which was due at the time of the taking the goods in execution, and not that which accrued after the taking and during the continuance of the sheriff in possession (x). This used to be so where growing crops were seized under an execution and remained in the custody of the sheriff or his vendee until they became ripe and were cut and carried within a reasonable time in that behalf (y). But now, by 14 & 15 Vict. c. 25, s. 2, "in case all or any part of the growing crops of the tenant of any farm or lands shall be seized and sold by any sheriff or other officer by virtue of any writ of fieri facias or writ of execution, such crops, so long as the same shall remain on the farms or lands, shall, in default of sufficient distress of the goods and chattels of the

*Landlord en-
titled to full
Year's Rent.*

14 & 15 Vict.
c. 25, s. 2.
*Growing
Crops seized
under Fi. fa.
liable to Dis-
tress for Rent
due after
Seizure.*

(o) *Waring v. Dewberry*, 1 Stra. 97.
(p) *Duck v. Braddyll*, M'Clel. 217; 13 Price, 455.

(q) *Lee v. Lopes, Bart.*, 15 East, 230.

(r) *Gethin v. Wilks*, 2 Dowl. 189.

(s) *Forster v. Cookson*, 1 Q. B. 419.

(t) *White v. Binstead*, 13 C. B. 304.

(u) *Williams v. Lewsey*, 8 Bing. 28.

(x) *Hoskins v. Knight*, 1 M. & S. 245;
Reynolds v. Barford, 7 M. & G. 449; 2 D. & L. 327.

(y) *Wharton v. Naylor*, 12 Q. B. 673; 6 D. & L. 136.

CH. XI. s. 11. tenant, be liable to the rent which may accrue and become due to the landlord after any such seizure and sale, and to the remedies by distress for recovery of such rent, and that notwithstanding any bargain and sale or assignment which may have been made or executed of such growing crops by any such sheriff or other officer." In consequence of this enactment, the execution creditor can only make sure of being able to sell the crops, under an execution for their value, *minus the accruing rent*; and the landlord may afterwards favour the purchaser to the detriment of the tenant by abstaining from distraining upon the crops so sold, and suing the tenant for such rent, or distraining for it on other goods.

Whether actual Notice to the Sheriff is necessary.

It is not clear whether the statute of Anne requires notice to be given to the sheriff of the arrears of rent due and claimed by the landlord. Such notice is not required in express terms; and it has been held that knowledge by the sheriff of the arrears due is equivalent to actual notice thereof (*z*). In more recent acts in *pari materiâ* notice is expressly required (*a*). And under 8 Anne it has been held that the landlord must demand, or the sheriff is not bound to secure, the rent, for he cannot take notice what the arrears are; but if the landlord comes and acquaints him with them, then and not till then is he obliged to see the year's rent satisfied before removal of the goods (*b*). Where an action was brought against the sheriff by the execution debtor for seizing and selling more goods than were necessary to satisfy two executions, the court decided against the sheriff expressly on the ground that he had no right to levy for rent without a claim being first made by the landlord (*c*). In an action against the sheriff, founded on the statute, notice is always alleged, and should not be omitted (*d*). But after verdict, an allegation that the sheriff, "well knowing the premises," removed the goods without paying the rent, seems to be sufficient upon motion in arrest of judgment or on appeal (*e*). Notice from the landlord to the execution creditor is clearly unnecessary (*f*). The notice to the sheriff is only for the purpose of establishing beyond all doubt his knowledge of the landlord's claim (*g*), and should always be given by or on behalf of the landlord (*h*). As the statute has not specified any particular form, there can be no dispute about the terms (*i*). A notice to the sheriff stating

Such Notice should always be given.

(*z*) *Andrews v. Dixon*, 3 B. & A. 645; *Riseley v. Kyle*, 11 M. & W. 20; *Bible v. Hussey*, 2 Ir. Com. L. R. 308; 16 W. R. 710.

(*a*) 19 & 20 Vict. c. 108, s. 75; post, ¶60; 24 Vict. c. 10, s. 16; post, 462.

(*b*) *Waring v. Dewberry*, 1 Stra. 97; and see *Colyer v. Speer*, 2 Brod. & B. 67; *Smith v. Russell*, 3 Taunt. 400.

(*c*) *Gawler v. Chaplin*, 2 Exch. 503, 507.

(*d*) Arch. L. & T. 255; Bullen & L. Pl.

403 (3rd ed.); *Thurgood v. Richardson*, 7 Bing. 428; 4 C. & P. 481; *Reed v. Thoyts*, 6 M. & W. 410; 8 Dowl. 410; *Bible v. Hussey*, 2 Ir. Com. L. R. 308; 16 W. R. 710.

(*e*) See *Lane v. Crockett*, 7 Price, 566; *Palgrave v. Windham*, 1 Stra. 212, 214.

(*f*) *Palgrave v. Windham*, *supra*.

(*g*) *Andrews v. Dixon*, 3 B. & A. 645.

(*h*) See Form, Appendix D., No. 9.

(*i*) *Colyer v. Speer*, 2 Brod. & B. 67.

that the rent is due to J. S. and the mortgagees of his estate, and signed by a person who is not the receiver appointed by the mortgage deed, is sufficient (*i*). The notice may be given before or after the goods have been removed from the demised premises, and even after they have been sold, but before the proceeds have been actually paid over to the execution creditor (*k*).

CH. XI. s. 11.
*Satisfaction of
Arrears
by Execution
Creditor.*

When the sheriff has notice or knowledge of rent due to the landlord, he should endeavour to secure legal evidence on that point, and if possible inspect the lease (*l*). He should also forthwith give notice to the execution creditor or his solicitor of the rent in arrear, and request him to pay the same to the landlord or his bailiff pursuant to the statute, in default whereof the sheriff will withdraw from possession of the goods seized (*m*). In case of non-compliance with this notice, within a reasonable time, the sheriff should withdraw from possession and make a return of nulla bona (*n*); unless, indeed, there are other goods within his bailiwick, in which case the levy should be confined to them. "The sheriff," it is observed, in *Cocker v. Musgrove*, "is not called upon by law to advance money to pay the rent; it is plain that such advance must be made by the execution creditor; and if he neglects to make it, after notice of the rent being due at all events (and it is not necessary now to say whether notice be requisite), the sheriff cannot be called upon to sell the goods *let their value be what it will*. Until the rent be paid, there are *no goods out of which the sheriff is bound to levy*, that is, which he is bound to sell" (*o*). The statute says that the goods shall not be "liable to be taken," i.e. taken and sold under the execution, "unless the party at whose suit the said execution is sued out, shall before the removal" pay the rent (*p*). "It is clear the statute does not mean the original taking, but that there shall not be a substantial taking for the satisfaction of the debt, that is, by the removal and sale of the goods, without payment of the rent" (*q*). Prior to the decision in *Cocker v. Musgrove* (*r*), the usual practice was for the sheriff to sell the goods under the execution and out of the proceeds to pay the landlord's rent, and to apply the surplus (minus expenses) in or towards satisfaction of the debt or damages and interest, with costs of the execution, &c., as indorsed on the writ (*s*): and he may still adopt that course if he thinks fit, and so secure his poundage fees, &c. He is entitled to poundage upon the amount of rent levied and paid (*t*); but not to

Sheriff's Duty
on receiving
Notice of
Claim for
Rent.

(*i*) *Colyer v. Speer*, ante.

(*k*) *Arnitt v. Garnitt*, 3 B. & A. 440; *Yates v. Ratledge*, 5 H. & N. 249; *Bible v. Hussey*, 2 Ir. Com. L. R. 308; 16 W. R. 710.

(*l*) See *Augustein v. Challis*, 1 Exch. 279.

(*m*) See Form, Appendix D., No. 10.

(*n*) *Cocker v. Musgrove*, 9 Q. B. 223, 235.

(*o*) *Cocker v. Musgrove*, 9 Q. B. 235; *Calvert v. Jolliffe*, 2 B. & Adol. 421.

(*p*) Ante, 454.

(*q*) Per Parko, B., in *Riseley v. Ryle*, 11 M. & W. 21.

(*r*) 9 Q. B. 223, 235.

(*s*) 1 Chit. Arch. 640 (11th ed.).

(*t*) *Davies v. Edmonds*, 12 M. & W. 31; 1 D. & L. 395.

CH. XI. s. 11. deduct it from the landlord's rent (*u*). By proceeding to sell and remove with notice or knowledge that rent is due, he sometimes runs considerable risk: for instance, the property seized may belong to a third person (*x*); or to the trustees of the tenant who has become a bankrupt (*y*), or the goods when sold may not produce sufficient to satisfy the rent (*z*). The amount of rent claimed may be disputed, especially where a large sum is claimed for a penal rent of so much per acre (*a*). Moreover, when the landlord makes a claim for rent, the sheriff cannot obtain any relief against such claim under the Interpleader Act (*b*). And it was held, before the Judicature Act, that the tenant could not sustain a bill of interpleader in equity against his landlord, unless the title was affected by some act done by the landlord subsequently to the lease (*c*). All these difficulties may generally be avoided by the sheriff giving notice to the execution creditor, and proceeding as before suggested (*d*). But in such case he should carefully abstain from a removal of any of the goods from off the premises until the rent has been actually paid (*e*). He should also secure legal evidence of the tenancy, and of the arrears of rent due (*f*).

Satisfaction of
Arrears
by Execution
Creditor.

Sheriff's Duty
on receiving
Notice of
Claim for
Rent—*contd.*

Remedy
against
Sheriff.

The remedy which a landlord has in cases where the sheriff proceeds to levy the execution and remove the goods without payment of the rent, is by a summary application to the court or to a judge at chambers, founded upon affidavits, to compel the sheriff to pay the rent due (not exceeding one year's rent) and the costs of the application (*g*); or by a special action on the case against the sheriff, founded on the statute (*h*); but not an action for money had and received (*i*).

(b) Under County Court Process.

Where Goods
seized under
County Court
Warrant,
Rent may be
claimed in 5
Days by
Notice to
Bailliff.

If goods be taken in execution under a County Court Warrant, the statute 8 Ann. c. 14, s. 1, does not apply, but a special procedure is substituted for it by the County Court Act, 1856, under which the landlord may claim rent within five days from the execution, and so get the county court bailiff to distrain for him.

The words of the act (19 & 20 Vict. c. 108, s. 75) are these:—"Section

19 & 20 Vict.
c. 108, s. 75.

(*u*) *Gore v. Goston*, 1 Stra. 643.

(*x*) *Forster v. Cookson*, 1 Q. B. 419;
Beard v. Knight, 8 E. & B. 865; 27 L. J.,
Q. B. 369; *Foulger v. Taylor*, 5 H. & N.
202; *White v. Binthead*, 13 C. B. 304.

(*y*) *Duck v. Braddyll*, MClel. 217; 13
Price, 455; *Lee v. Lopes*, 15 East, 230.

(*z*) *Henchett v. Kimpson*, 2 Wils. 141;
Calvert v. Jolliffe, 2 B. & Adol. 418; *Groom-
bridge v. Fletcher*, 2 Dowl. 353.

(*a*) *Bateman v. Farnsworth*, 29 L. J.,
Ex. 365.

(*b*) 1 & 2 Will. 4, c. 58, s. 6; *Watson's
Sheriff*, 282—288 (2nd ed.); *Haythorn v.*

Bush, 2 Cr. & M. 869; 2 Dowl. 641;
Bateman v. Farnsworth, 29 L. J., Ex. 365.

(*c*) *Cook v. Earl Rosslyn*, 1 Giff. 167;
28 L. J., Ch. 833.

(*d*) Ante, 458.

(*e*) *Smallman v. Pollard*, 6 M. & G.
1001; 1 D. & L. 901; *White v. Binthead*,
13 C. B. 304.

(*f*) *Augustein v. Challis*, 1 Exch. 279;
Keightley v. Birch, 3 Camp. 621.

(*g*) Ante, 456 (*d*).

(*h*) Ante, 456 (*e*).

(*i*) *Green v. Austin*, 3 Camp. 260.

one of the act of the eighth year of the reign of Queen Anne, chapter fourteen, shall not apply to goods taken in execution under the warrant of a county court, but the landlord of any tenement in which any such goods shall be so taken *may claim the rent* thereof at any time within five clear days from the date of such taking, or before the removal of the goods, by delivering to the bailiff or officer making the levy any writing signed by himself or his agent, which shall state the amount of rent claimed to be in arrear, and the time for and in respect of which such rent is due (*k*); and if such claim be made, the bailiff or officer making the levy shall *in addition thereto distrain for the rent so claimed and the costs of such distress*, and shall not within five days next after such distress sell any part of the goods taken unless they be of a perishable nature, or upon the request in writing of the party whose goods shall have been taken; and the bailiff shall afterwards sell such of the goods under the execution and distress as shall satisfy, first, the costs of and incident to the sale, next the claim of such landlord not exceeding the rent of four weeks where the tenement is let by the week, the rent of two terms of payment where the tenement is let for any other term less than a year, and the rent of one year in any other case, and lastly, the amount for which the warrant issued; and if any replevin be made of the goods so taken, the bailiff shall, notwithstanding, sell such portion thereof as will satisfy the costs of and incident to the sale under the execution, and the amount for which the warrant issued: and in either event the overplus of the sale, if any, and the residue of the goods, shall be returned to the defendant; and the poundage of the high bailiff and broker for keeping possession, appraisalment and sale under such distress shall be the same as would have been payable if the distress had been an execution of the county court, and no other fees shall be demanded or taken in respect thereof.”

If the bailiff seize under a warrant of the county court, on the defendant's premises, goods belonging to a stranger, he cannot distrain such goods under this enactment for the rent of the landlord; and if he does so the true owner is entitled to have his goods back (*l*). The notice to the bailiff does not constitute him the landlord's agent to distrain: but in doing so he acts as an officer of the court pursuant to the statute (*m*). It seems that the Interpleader Act applies to a landlord's claim for rent; and that where the landlord appears upon the hearing of an interpleader summons in a county court, he as well as the execution creditor and the claimant, has a right of appeal (*n*).

CH. XI. s. 11.
*Satisfaction of
Arrears
by Execution
Creditor.*

County Court
Process under
19 & 20 Vict.
c. 108, s. 75—
continued.

(*k*) See Form, Appendix D., No. 11.
(*l*) *Beard v. Knight*, 8 E. & B. 865; 27 L. J., Q. B. 359; *Foulger v. Taylor*, 5 H. & N. 202; *White v. Binstead*, 13 C. B. 304.

(*m*) *Gage v. Collins*, L. R., 2 C. P. 381; 36 L. J., C. P. 144.

(*n*) *Wilcoxon v. Searby*, *In re Foulger v. Taylor*, 5 H. & N. 202; 29 L. J., Ex. 154; *Gage v. Collins*, *supra*.

CH. XI. s. 11.

*Satisfaction of
Arrears
by Execution
Creditor.**Notice of Rent
to Sheriff on
execution of
Admiralty
Process.*24 Vict.
c. 10, s. 16.(c) *Under Admiralty Process.*

If a claim for rent be made upon goods seized under Admiralty process, the judges of the Probate, Divorce and Admiralty Division will adjudicate upon the claim. It was enacted by the Admiralty Court Act, 1861 (24 Vict. c. 10), s. 16, as follows:—"If any claim shall be made to any goods or chattels taken in execution under any process of the High Court of Admiralty, or in respect of the seizure thereof, or any act or matter connected therewith, or in respect of the proceeds or value of any such goods or chattels, *by any landlord for rent*, or by any person not being the party against whom the process has issued, the registrar of the said court may, upon application of the officer charged with the execution of the process, whether before or after any action brought against such officer, issue a summons calling before the said court both the party issuing such process and the party making the claim, and thereupon any action which shall have been brought in any of her Majesty's superior courts of record, or in any local or inferior court, in respect of such claim, seizure, act or matter as aforesaid, shall be stayed, and the court in which such action shall have been brought, or any judge thereof, on proof of the issue of such summons, and that the goods and chattels were so taken in execution, may order the party bringing the action to pay the costs of all proceedings had upon the action after issue of the summons out of the said Admiralty Court, and the judge of the said Admiralty Court shall adjudicate upon the claim, and make such order between the parties in respect thereof and of the costs of the proceedings as to him shall seem fit, and such order shall be enforced in like manner as any order made in any suit brought in the said court. Where any such claim shall be made as aforesaid the claimant may deposit with the officer charged with the execution of the process either the amount or value of the goods claimed, the value to be fixed by appraisement in case of dispute, to be by the officer paid into court to abide the decision of the judge upon the claim, and the sum which the officer shall be allowed to charge as costs for keeping possession of the goods until such decision can be obtained, and in default of the claimant so doing the officer may sell the goods as if no such claim had been made, and shall pay into court the proceeds of the sale, to abide the decision of the judge." And by the Judicature Act of 1873, sect. 34, matters within the exclusive cognizance of the High Court of Admiralty before the passing of that act are assigned to the Probate, Divorce and Admiralty Division of the High Court of Justice.

CHAPTER XII.

REMEDIES FOR WRONGFUL DISTRESS.

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WE will now consider the remedies which the law provides for the tenant in cases where the distress levied by the landlord is illegal, irregular, or excessive. The peculiar remedy by the act of the party termed "rescue," which is only available before impounding, and, therefore, of little or no practical value, has been already considered (*a*).

SECT. 1.—*Replevin.*(a) *Nature of a Replevin and in what Cases applicable.*

Replevin is a remedy for the owner of goods or cattle which have been *wrongfully taken* under a distress for rent (*b*), whereby he obtains them back in a summary manner, through the registrar of the County Court of the district within which the goods or cattle were taken, upon giving security to try the validity of the distress or taking, in an action of replevin to be forthwith commenced by him against the

Nature of a
Replevin.

(a) Ante, Chap. XI., Sect. 10.

(b) Replevin has been said not to be confined strictly to distresses, but to extend to all wrongful takings of goods or cattle; *George v. Chambers*, 11 M. & W. 149; 7 Jur. 836; *Allen v. Sharp*, 2 Exch. 362;

17 L. J., Ex. 209; *Mellor v. Leather*, 1 E. & B. 619; 22 L. J., M. C. 76; but see *Mennie v. Blake*, 6 E. & B. 842; 25 L. J., Q. B. 399. It applies to distress damage feasant.

CH. XII. s. 1. distrainer and prosecuted with effect (*c*), and without delay (*d*), either in the County Court or in the High Court, and to return the goods or cattle, if such return shall be awarded (*e*).

Replevin (in what Cases applicable).

When Replevin lies.

The essence of proceedings in replevin being, that the tenant enjoys the subject-matter of the distress in specie pending the trial of the action, it is material to consider when this action lies. It may be said briefly that replevin lies in case of a distress which is wholly illegal, and not merely irregular or excessive. Thus, it lies where no rent is due, or where the rent was tendered in time, or where goods exempt by law from distress are seized (with the exceptions, however, of animals *feræ naturæ* (*f*), and perhaps fixtures (*g*)). The proceeding consists of two distinct parts, viz.: 1. The replevy, whereby the goods or cattle are obtained back; 2. The subsequent action of replevin to try the legality of the distress or taking. But it is in effect no remedy where the distress was originally lawful (*h*); unless it has become illegal by a sufficient tender of the rent or damage done, with expenses, being made before the impounding, and a subsequent wrongful detention which in effect and construction of law amounts to a new wrongful taking (*i*); and, therefore, the fact alone that the distress is for more than the sum due, does not entitle the tenant to replevy the goods, but only to bring an action for an excessive distress (*j*).

Replevin only an optional Remedy.

Replevin is only an optional remedy; the tenant may, in any case where replevin lies, waive his right to replevy, and bring his action for damages instead.

Within what time the Replevin must be made.

The tenant may avail himself of the right to replevy at any time, notwithstanding the goods have been removed after five days, and appraised, so long as they remain unsold (*k*).

Notice, &c. before Action unnecessary.

The stat. 24 Geo. 2, c. 44, s. 6, which enacts that no action shall be brought against a constable acting in obedience to the warrant of a justice of the peace till demand of a copy of the warrant and refusal thereof; and statutes 2 & 3 Vict. c. 93, s. 8, and 1 & 2 Will. 4, c. 41, s. 19, which require a calendar month's notice of action to be given to any constable for anything done in the execution of his office, and similar protecting statutes, do not apply to actions of replevin (*l*).

(*c*) This is to say, "with success;" *Morgan v. Griffith*, 7 Mod. 380; *Turnor v. Turner*, 2 Brod. & B. 107; *Perreau v. Beavan*, 5 B. & C. 284, 300; *Jackson v. Hanson*, 8 M. & W. 477; 1 Dowl., N. S. 69; *Tunnicliffe v. Wilmot*, 2 C. & K. 626; *Tummons v. Ogle*, 6 E. & B. 571; 25 L. J., Q. B. 403.

(*d*) That is to say, with "due diligence;" as to what is improper delay, see *Gent v. Cuths*, 11 Q. B. 288; *Harrison v. Wardle*, 5 B. & Adol. 146; *Axford v. Perrett*, 4 Bing. 586.

(*e*) 19 & 20 Vict. c. 108, ss. 63—71; 23 & 24 Vict. c. 126, s. 22.

(*f*) Bac. Abr. tit. *Replevin* (F.).

(*g*) *Niblet v. Smith*, 4 T. R. 504.

(*h*) See per Lord Campbell, C. J., in *Johnson v. Upham*, 28 L. J., Q. B. 256.

(*i*) Ante, Chap. XI.

(*j*) See 1 Chit. Pl. 184 (7th ed.).

(*k*) *Jacob v. King*, 5 Taunt. 451; *Griffiths v. Stephens*, 1 Chit. R. 196.

(*l*) *Fletcher v. Wilkins*, 6 East, 283; *Jones v. Johnson*, 6 Exch. 133; 20 L. J., M. C. 11; *Gay v. Matthews*, 33 L. J., M. C. 58; in Ex. Ch., 4 B. & S. 425. See, however, *Mellor v. Leather*, 1 E. & B. 619; 22 L. J., M. C. 76, as to the protection of constables.

If the replevy be made *per incuriam* or mistake of the officer, it by no means follows that the subsequent action of replevin cannot be maintained (*i*). *Quod fieri non debet, factum valet*. The remedy for such mistake is by a summary application to the court to set aside the replevy, or to attach the officer, or the party, or both, for the contempt (*j*). Where goods taken under a warrant of distress granted by Commissioners of Sewers were replevied, and the proceedings removed into the King's Bench, that court refused to quash them on a summary application, leaving the defendant in replevin to put his objection in a more formal manner upon the record (*k*). Where a replevin cannot legally be made, the registrar should on that ground refuse to act, but an action will lie against him for refusing to replevy in a proper case (*l*).

CR. XII. s. 1.

Replevin (in what Cases applicable.

Replevy made per incuriam.

(b) *Mode of Proceeding to Replevy.*

Before proceeding to replevy the following points should be considered, viz.: 1. Whether the distress or taking was wholly illegal, and not merely excessive or irregular, or taken for the wrong cause (as stated in the notice of distress) instead of the right one. 2. Whether it is practicable and expedient to make a tender of the rent or damage, with costs of the distress, which tender cannot be made after the impounding. 3. Whether, considering the value of the goods taken with reference to the amount of the rent or damage claimed, it is worth while to replevy, seeing that whatever may be the value of the goods, security must be given for such an amount as the registrar shall deem sufficient to cover the alleged rent or damage in respect of which the distress was taken, and the probable costs of the cause in the County Court, or in the High Court, as the case may be. 4. Whether the action of replevin should be commenced and prosecuted in the County Court for the district within which the distress was taken, or in the High Court, or in the court of the lord of any honor or franchise having exclusive jurisdiction to grant replevies (*m*). It is not optional to bring replevin in the High Court unless the rent or damage claimed exceeds 20*l.*, or the title to some corporeal or incorporeal hereditament, or to some toll, market, fair or franchise is in question. In all other cases the action must be brought in the County Court. Even where any title is in question the action may be brought in the County Court, subject to the power of removal by the defendant under 19 & 20 Vict. c. 108, s. 67 (*n*); and to an appeal

Preliminary Matters to be considered—

1. Whether Distress illegal.

2. Whether a Tender should be made.

3. Whether it is worth while to Replevy.

4. In what Court the Action should be brought.

(*i*) *Allen v. Sharp*, 2 Exch. 361; 17 L. J., Ex. 209.

(*j*) As to attachment, see *Res v. Burchet*, 8 Mod. 209; Willes, 673, n; *Res v. Monkhouse*, 2 Stra. 1184; *Res v. Oliver*, Bunbury, 14; Bull. N. P. 53; and as to setting aside the proceedings, *Rhymney R.*

Co. v. Price, 16 L. T. 394.

(*k*) *Pritchard v. Stephens*, 6 T. R. 522.

(*l*) *Sabourin v. Marshall*, 3 B. & Ad. 440.

(*m*) *Mounsey v. Dawson*, 6 A. & E. 752.

(*n*) *Re Fordham v. Ackers*, 4 B. & S. 578; 33 L. J., Q. B. 67; *S. C.*, nom. *Reg. v. Gurdon*, 12 W. R. 201.

CH. XII. s. 1
Replevin
(Preliminary
Procedure).

5. By whom
 Proceedings
 should be
 taken.

6. Against
 whom.

where the rent claimed exceeds 20/ (*o*). 5. By whom the replevy should be made and the action brought. It should be brought by the party whose goods have been distrained (*p*); i. e. by him who has the property, absolute or qualified, in the goods (*q*), a mere possessory right having been said to be not sufficient (*r*). It was, in the case of *Fenton v. Logan* (*s*), apparently assumed that replevin would lie at the instance of the real owner of the goods seized, although he was a person other than the tenant distrained upon; and if the point, whether replevin was a remedy open to others than tenants, were distinctly raised, it would be probably so decided. If goods of A. and B., the separate property of each, be unlawfully distrained, they cannot join in a replevin, but each may replevy his own goods (*t*). Joint owners and tenants in common may and should join in a replevin (*u*). Coparceners are joint owners (*u*). Executors may maintain replevin for goods of their testator wrongfully taken in his lifetime (*x*). If the goods of a feme sole be taken, and she afterwards marries, the husband alone may replevy (*y*) without joining his wife, and, indeed, if the goods are taken after the marriage, she ought not to sue either alone (*z*) or with her husband (*a*). 6. Against whom the proceedings should be adopted. It may be against him who took or commanded the taking, or both (*b*). The landlord or person who caused the distress to be made is generally best able to pay damages and costs; but to fix him with liability his authority to make the distress must be proved (*c*); and if only some of the goods or cattle were illegally taken (being privileged from distress), and the replevin is confined to them, it must be proved not merely that he signed a distress warrant in the usual form, but that he authorized the taking of those goods or cattle which were so illegally taken; or that, knowing what had been done in his behalf, he ratified and adopted such illegal act (*d*). He should always be made a defendant where the plaintiff intends to pay money into court (*e*). The agent who signed the distress warrant, or who directed the distress, may be made a defendant; as may also the

(*o*) This was done in *White*, app., *Greenish*, resp., 11 C. B., N. S. 209.

(*p*) 19 & 20 Vict. c. 108, s. 64.

(*q*) Com. Dig. tit. *Pleader* (3 K. 1); Co. Lit. 145 b; Bro. Repl. fol. 8, 20; 1 Chit. Pl. 182, 183 (7th ed.); 2 Selw. N. P. 1150 (13th ed.).

(*r*) *Templeman v. Case*, 10 Mod. 25. But see *Fell v. Whitaker*, L. R., 7 Q. B. 120, and p. 600, post.

(*s*) 9 Bing. 676.

(*t*) Co. Lit. 145 b; Bro. Abr. tit. *Replevin*, pl. 12; Gilb. Repl. 152; 2 Selw. N. P. 1150 (13th ed.).

(*u*) Year Bk. 3 Hen. 4, 16 a; Co. Lit. 145 b; Bull. N. P. 53; 1 Chit. Pl. 183 (7th ed.); 2 Selw. N. P. 1150 (13th ed.).

(*x*) Bro. Abr. tit. *Replevin*, pl. 59; *Arundell v. Trevill*, Sid. 82; Bull. N. P. 53; Gilb. Repl. 156.

(*y*) Fitz. N. B. 69 k; Gilb. Repl. 156; 2 Selw. N. P. 1150 (13th ed.).

(*z*) *Clarke v. Davies*, 7 Taunt. 72.

(*a*) *Bern v. Mattaire*, Cas. temp. Hardw. 119; 2 Selw. N. P. 1150 (13th ed.).

(*b*) Com. Dig. tit. *Pleader* (3 K. 1); 2 Roll. Abr. 431, l. 5; Gilb. Repl. 152; *Jones v. Johnson*, 5 Exch. 862.

(*c*) Ante, 425.

(*d*) Ante, 426.

(*e*) Pursuant to 23 & 24 Vict. c. 126, s. 23, which would appear to be still in force.

broker (*f*). But although they *may* be made defendants, it does not follow that they *should* be, in any particular case: that is matter of discretion, with reference to the acts done, and other incidental facts, including the evidence and the pecuniary ability of the parties. The pound-keeper, it seems, is not liable (*g*). It has been said that replevin cannot be maintained against a corporation aggregate, but only against their bailiff or agent (*h*), but this seems inconsistent with several recent cases (*i*). It has been long since decided that a corporation may appoint a bailiff to distrain, without a warrant under their common seal (*k*); and there seems no reason why they should not be responsible for acts so authorized; for otherwise they might, by appointing a pauper to act for them, avoid all liability direct or indirect. 7. It should further be considered whether *all* the goods or cattle should be replevied, or only some of them, on the ground that they were legally exempt from the distress (*l*). The value of such goods or cattle need not be ascertained, for whatever may be their value (whether more or less than the rent or damage claimed), the security must be for such an amount as the registrar of the County Court shall deem sufficient to cover the alleged rent or damage in respect of which the distress was made and the probable costs of the cause in the County Court, or in the High Court, as the case may be (*m*), and does not, as formerly, depend upon the value of the goods distrained, which had to be ascertained upon the oath of some competent person (*n*). 8. Whether a bond with two sufficient sureties shall be given pursuant to 19 & 20 Vict. c. 108, ss. 65, 66 (*o*), and who are competent and willing to become such sureties; or whether a deposit, with a memorandum, shall be made pursuant to sect. 71 (*p*).

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Replevin
(Preliminary
Procedure).

7. Whether
all or Part
only should
be replevied.
Value need
not be
ascertained.

8. Whether
the required
Security shall
be by Bond or
Deposit.

Formerly replevies were made by the sheriff of the county within which the distress was taken, or by his under-sheriff or deputy (*q*); and the sheriff of each county was bound to appoint four deputies at least, dwelling not above twelve miles from each other, for the purpose of making replevies (*r*). But by 19 & 20 Vict. c. 108, s. 63, "the powers and responsibilities of the sheriff with respect to replevin bonds and replevins shall henceforth cease; and the registrar of the County Court of the district in which *any distress subject to replevin*

Replevy made
by Registrar
of County
Court.

19 & 20 Vict.
c. 108, s. 63.

(*f*) Gilb. Repl. 152.

(*g*) *Badkin v. Powell*, 2 Cowp. 470.

(*h*) 1 Kyd on Corporations, 223; Bac. Abr. tit. Corporations (E. 2).

(*i*) See *Eastern Counties R. Co. v. Broom* (in error), 6 Exch. 314, which decides that trespass lies against a corporation aggregate for an act done by their agent within the scope of his authority; and see *Green v. London General Omnibus Co.*, 7 C. B., N. S. 290; 29 L. J., C. P. 13.

(*k*) *Cary v. Matthews*, cited 1 Salk. 191; 6 Vin. Abr. 287.

(*l*) Ante, 404.

(*m*) 19 & 20 Vict. c. 108, ss. 65, 66, 71.

(*n*) See 11 Geo. 2, c. 19, s. 23; *Middleton v. Bryan*, 3 M. & S. 155.

(*o*) Post, 477.

(*p*) Post, 469.

(*q*) 52 Hen. 3, c. 21; 2 Inst. 138.

(*r*) 1 P. & M. c. 12, s. 3; see *Faulkner v. Johnson*, 11 M. & W. 581; *Plumer v. Brisco*, 11 Q. B. 46.

CH. XII. s. 1. *shall be taken* shall be empowered, subject to the regulations herein-after contained, to approve of replevin bonds, and to grant replevins, and to issue all necessary process in relation thereto, and such process shall be executed by the high bailiff."

*Replevin
(Preliminary
Procedure).*

Sect. 64.

Replevin to be
granted on
Security to be
given.

By sect. 64, "such registrar shall, at the instance of the party whose goods shall have been distrained (s), cause the same to be replevied to such party, on his giving one or other of such securities as are mentioned in the next two succeeding sections." (See below.)

23 & 24 Vict.
c. 126, s. 22.

It may be here stated that by 23 & 24 Vict. c. 126, s. 22, the provisions of 19 & 20 Vict. c. 108, "which relate to replevin, shall be deemed and taken to apply to all cases of replevin, in like manner as to cases of replevin of goods distrained for rent or damage feasant."

The action of replevin is *prima facie* to be brought in the County Court, but under certain restrictions it may be brought also in the High Court of Justice.

19 & 20 Vict.
c. 108, s. 65.
Replevins in
High Court.
Conditions of
Security to be
given in such
Cases.

By 19 & 20 Vict. c. 108, s. 65, "an action of replevin may be commenced in any superior court in the form applicable to personal actions therein, and such court shall have power to hear and determine the same; and if the replevisor shall wish to commence proceedings in any superior court, he shall, at the time of replevying, give security, to be approved of by the registrar, for such an amount as such registrar shall deem sufficient to cover the alleged rent or damage in respect of which the distress shall have been made, and the probable costs of the cause in a superior court, conditioned to commence an action of replevin against the distrainer in such superior court as shall be named in the security, *within one week* from the date thereof, and to prosecute such action with effect (t) and without delay (u); and, unless judgment therein be obtained by default, to prove before such superior court that he had good ground for believing either that the title to some corporeal or incorporeal hereditament, or to some toll, market, fair or franchise was in question, *or that such rent or damage exceeded twenty pounds*, and to make return of the goods, if a return thereof shall be adjudged" (x).

Sect. 66.

Replevin in
County Court.
Conditions of
Security to be
given in such
Cases.

By sect. 66, "if the replevisor shall wish to commence proceedings in a County Court, he shall at the time of replevying give security, to be approved of by the registrar, for such an amount as such registrar shall deem sufficient to cover the alleged rent or damage in respect of which the distress shall have been made, and the probable costs of the

(s) A replevin can be had only by or on behalf of the actual or constructive owner of the goods; not by one who merely has the possession of them (without more); ante, 466; but see *Fell v. Whittaker*, post, 500.

(t) I. e. with success; ante, 464 (c).

(u) Ante, 464 (d).

(x) See Form of Bond, Appendix E., Sect. 1, No. 6; of Memorandum of Deposit in lieu of Bond, Id., No. 6.

cause in the County Court, conditioned to commence an action of replevin against the distrainer in the County Court of the district in which the distress shall have been taken, *within one month (u) from the date of the security, and to prosecute such action with effect (x) and without delay (y), and to make return of the goods, if a return thereof shall be adjudged" (z).*

CH. XII. s. 1.
*Replevin
(Preliminary
Procedure).*

By sect. 67, "any action of replevin brought in a County Court shall be removed into any superior court by writ of certiorari, if the defendant shall apply to such superior court or to a judge there for such writ, and shall give security, to be approved of by the master of such superior court, for such amount, not exceeding one hundred and fifty pounds, as such master shall think fit, conditioned to defend such action with effect (a); and unless the replevisor shall discontinue or shall not prosecute such action, or become nonsuit therein, to prove before such superior court that the defendant had good ground for believing, either that the title to some corporeal or incorporeal hereditament, or to some toll, market, fair or franchise was in question, or that the rent or damage in respect of which the distress shall have been taken *exceeded twenty pounds*; and every such superior court shall have power to determine the same action" (b).

SECT. 67.
Removal of
Replevins
into High
Court by Cer-
tiorari at
Instance of
Defendant.
Security in
such Cases.

By sect. 70, "where by this act, or any act relating to the County Courts, a party is required to give security, such security shall be at the cost of the party giving it, and in the form of a bond (c), with sureties, to the other party or intended party in the action or proceeding: provided always, that the court in which any action on the bond shall be brought, may, by rule or order, give such relief to the obligors as may be just, and such rule or order shall have the effect of a defeasance of such bond."

SECT. 70.
Security by
Bond with
Sureties.

It seems that a bond of the above nature may be entered into by a joint-stock company, or even by an infant, with sufficient sureties, and that the registrar cannot refuse to receive such bond, on the ground that the principal obligor is disqualified to execute it; for otherwise such parties would lose the benefit of the statute (d), and be thereby deprived of the right to replevy.

Joint-Stock
Companies
and Infants
may give
such Bonds.

By sect. 71, "where by this act, or any act relating to the County Courts, a party is required to give security, he may in lieu thereof deposit with the registrar, if the security is required to be given in a

SECT. 71.
Security by
Deposit with
a Memo-
randum.

(u) I. e. one calendar month; 13 Vict. c. 21, s. 4.

(x) I. e. with success; ante, 464 (c).

(y) Ante, 464 (d).

(z) See Form of Bond, Appendix E., Sect. 1, No. 7; of Memorandum of Deposit in lieu of Bond, Id., No. 8.

(a) I. e. with success: *Tummons v. Ogle*,

6 E. & B. 571; ante, 464 (c).

(b) See Form of Bond, Appendix E., Sect. 3, (b.) 4; Memorandum of Deposit in lieu of Bond, Id., No. 5.

(c) See Forms.

(d) See *Young v. Brompton, Chatham and Gillingham Waterworks Co.*, 1 B. & S. 675; 31 L. J., Q. B. 14; and dicta therein.

CH. XII. s. 1. County Court, or with a master of the superior court if the security is required to be given in such court, a sum equal in amount to the sum for which he would be required to give security, *together with a memorandum (e)*, to be approved of by such registrar or master, and to be signed by such party, his attorney or agent, setting forth the conditions on which such money is deposited, and the registrar or master shall give to the party paying a written acknowledgment of such payment; and the judge of the County Court, when the money shall have been deposited in such court, or a judge of the superior court, when the money shall have been deposited in a superior court, may, on the same evidence as would be required to enforce or avoid such bond, as in the last preceding section is mentioned, order such sum so deposited to be paid out to such party or parties as to him shall seem just."

Notices of proposed Sureties.

Notice by Registrar.

By the County Court Rules of 1875, Order XXX., it is provided that, "in all cases where a party proposes to give a bond by way of security, he shall serve by post, or otherwise, on the opposite party and the registrar, at his office, notice of the proposed sureties, according to the form in the schedule (*f*); and the registrar shall forthwith give notice to both parties of the day and hour on which he proposes that the bond shall be executed, and shall state in the notice to the obligee that should he have any valid objection to make to the sureties, or either of them, that it must then be made" (*r. 1*) (*g*).

Affidavit by Sureties of their Sufficiency.

"The sureties shall make an affidavit of their sufficiency according to the form in the schedule (*h*), unless the opposite party shall dispense with such affidavit" (*r. 2*).

Bond, how executed.

"The bond shall be executed in the presence of the judge or registrar, or a commissioner of the Supreme Court of Judicature" (*r. 3*).

Notice of Security by Deposit.

"Where a party makes a deposit of money in lieu of giving a bond, he shall forthwith give notice to the opposite party by post, or otherwise, of such deposit having been made" (*r. 4*).

Bond to be deposited with Registrar.

"In all cases where the security is by bond, the bond shall be deposited with the registrar until the action be finally disposed of" (*r. 5*).

"No registrar, deputy registrar, registrar's clerk, bailiff, broker, or other officer of the court shall become surety in any case where by the practice of the court security is required" (*r. 6*).

The sureties should be two freeholders or housekeepers.

The opposite party should make inquiries as to the sufficiency of

(e) See Form, Appendix E., Sect. 1, No. 8.

(f) See Form, Id., Sect. 1, Nos. 1 & 2.

(g) See Form, No. 301 in schedule to C. C. Rules.

(h) See Form, Appendix E., Sect. 1, No. 4.

the proposed sureties, in like manner as where bail is put in in a superior court; and if he has reason to think them insufficient, he should attend before the registrar at the time and place appointed, and object to them, and, if necessary, examine them before the registrar, who, after hearing all parties, will decide whether or not the sureties are sufficient. It seems that the registrar is not liable (as the sheriff formerly was) to an action for taking insufficient sureties on a replevy (*i*). Therefore the distrainer must, at his peril, avail himself of this opportunity to make any objections to them.

Ch. XII. s. 1.
*Replevin
(Preliminary
Procedure).*

It is to be observed, with reference to the foregoing enactments and rules, that *all* actions of replevin, without any exception, may be commenced and prosecuted to final judgment and execution in the County Court of the district within which the distress was taken, whatever may be the amount of rent or damage claimed, and notwithstanding the title to some corporeal or incorporeal hereditament, or to some toll, market, fair or franchise is in question (*k*). In many cases it may be expedient for the replevisor to sue in the County Court, rather than in the High Court, even where he has the option of suing in either court, and especially where there is any doubt whether he has such option; or where he expects to fail in the action, and to have to pay all the costs (which are much less in the County Court than in the High Court). It seems, however, that if successful in the County Court he will only recover costs as in an action for less than 5*l.*, which do not include any brief or fee to counsel, nor any solicitor's costs (*l*), notwithstanding the distress was taken for more than 20*l.* (or even 50*l.* or 500*l.*), and the value of the goods replevied was more than sufficient to satisfy the distress; or however important or difficult may be the question of law or fact involved in the pleadings, the damages recoverable in the action being always under 5*l.* (*m*). But it does not appear to be finally settled in the County Courts whether the value of the goods replevied ought not to be proved and taken into consideration, as part of the damages recovered, with a view to costs.

Where Action
may be
brought.

Costs in
County Court.

Supposing the distress to have been wholly illegal, the replevisor cannot safely bring replevin in the High Court, unless he can prove before such court that he has good ground for believing either that the title to some corporeal or incorporeal hereditament, or to some toll, market, fair or franchise is in question, or, that the rent or damage in respect of which the distress was made exceeded twenty pounds. In

When Action
should be in
High Court.

(*i*) Pollock & Nicol, C. C. Prac. (8th ed.), p. 21; Bullen & L. Pl. 235 (3rd ed.); see, however, 2 Chit. Arch. 904 (13th ed.); *Young v. Brompton, & Co.*, ante, 469 (*d*). Even the sheriff was not liable where the sureties were apparently responsible, and he exercised a reasonable discretion in accepting them; *Hindle v.*

Blades, 5 Taunt. 225; *Jeffery v. Bastard*, 4 A. & E. 823.

(*k*) *Reg. v. Raines*, 1 E. & B. 855; 22 L. J., Q. B. 223; *Re Fordham v. Ackers*, 4 B. & S. 578; 33 L. J., Q. B. 67.

(*l*) 9 & 10 Vict. c. 95, s. 91.

(*m*) *Pease v. Chaynor*, 3 B. & S. 631.

CH. XII. s. 1. *Replevin (Preliminary Procedure).* some cases, where the replevisor has good ground for so believing, he may not be able to prove it to the satisfaction of the High Court (*n*); and where there is any doubt on this point, it is safer to sue in the County Court. In many cases, where the replevisor clearly has the option to sue in either court, it may be expedient for him to sue in the County Court rather than in the High Court. But the point above mentioned as to costs should not be overlooked, as it may make a great difference.

Replevisor having once elected County Court, may not remove to High Court. After the replevisor has once elected to sue in a County Court, he cannot afterwards remove the action into the High Court. He might have done so under 9 & 10 Vict. c. 95, s. 121, but that section was repealed by 19 & 20 Vict. c. 108, s. 2. The defendant in replevin cannot safely remove the action from the County Court into the High Court by certiorari unless he can prove before the High Court that he has good ground for believing, either that the title to some corporeal or incorporeal hereditament, or to some toll, market, fair or franchise is in question, or that the rent or damage in respect of which the distress was taken exceeded twenty pounds (*o*); and even in such cases, he must give security for such amount not exceeding 150%, as the master shall think fit, conditioned to defend such action with effect (*p*).

Within what Time to be brought. Where the action of replevin is to be brought in the High Court, it must be commenced by a writ of summons in the usual form issued out of the proper court, within one week from the date of the replevin bond or of the memorandum of deposit (*q*).

Where the action of replevin is to be brought in the County Court, a plaint must be entered there within one calendar month from the date of the replevin bond, or of the memorandum of deposit (*r*).

The amount of the security, whether by bond or deposit, we have seen does not depend upon the value of the cattle or goods to be replevied, but upon the amount of the alleged rent or damage and the probable costs of the cause in the High Court or in the County Court, as the case may be (*s*).

Probably nearly all actions of replevin would be commenced and determined in the County Courts, but for the objection as to costs before mentioned (*t*). That however is so serious a drawback, as to render it generally unadvisable for the plaintiff to bring his action of replevin in the County Court where he can possibly avoid doing so, except where he knows that he is in the wrong, and will have to pay all the costs of the action.

(*n*) See the declaration in *Timmons v. Ogle*, 6 E. & B. 571, 575; 25 L. J., Q. B. 403.

(*o*) *Timmons v. Ogle*, *supra*.

(*p*) *Ante*, 464 (*c*); *Timmons v. Ogle*, *supra*.

(*q*) 19 & 20 Vict. c. 108, s. 55.

(*r*) *Id.* s. 66.

(*s*) *Ante*, p. 467.

(*t*) *Ante*, p. 471.

The fees payable at the County Court, on making a replevy, are as follows (u) :

	£	s.	d.	Ch. XII. s. 1. <i>Replevin (Preliminary Procedure).</i>
// For a warrant to replevy	0	2	6	
For a replevin bond, where the alleged rent or damage (x) does not exceed 20%.	0	10	6	Fees payable on a Replevy.
For a replevin bond, where the alleged rent or damage (x) exceeds 20%.	1	1	0	
For notice to the distrainer	0	2	6	
For delivering the goods	1	1	0	
Together with 6d. a mile from the court house to the place where the goods are.				
For making a return to a writ of certiorari, 6d. in the pound, so long as total does not exceed	0	10	0	Other Fees in Replevin.
For costs out of pocket in the same	0	15	0	

The fees payable in an action of replevin in the County Court are the same as those in other actions (y).

In replevins all poundage, except as aforesaid, shall be estimated on the amount of the alleged rent or damage, to be fixed by the registrar.

The poundage is 1s. in the pound; fractions of a pound are to be reckoned as one pound.

In every case where the poundage would, but for this direction, be estimated on an amount exceeding 20%, it shall be estimated at 20% only.

(c) *Action of Replevin in the County Court.*

By the County Court Act (9 & 10 Vict. c. 96), s. 119, "all actions of replevin in cases of distress for rent in arrear, or damage feasant (z), which shall be brought in the County Court, shall be brought *without writ* in a court held under this act."

By sect. 120, "in every such action of replevin the *plaint* shall be entered in the court holden under this act for the district wherein the distress was taken."

By 19 & 20 Vict. c. 108, s. 66, the action must be brought within one [calendar] month from the date of the security (whether by bond or memorandum of deposit), and must be prosecuted with effect (a), and without delay (b).

(u) 19 & 20 Vict. c. 108, s. 78, Sched. (C.), as altered by Treasury Order of October, 1875; Pollock & Nicol, C. C. Prac. 26—35 (8th ed.).

(x) The words "or damage" apply to a claim for damage feasant.

(y) See Pollock & Nicol, C. C. Prac.

(z) Extended to all cases of replevin whatever by 23 & 24 Vict. c. 126, s. 22.

(a) I. e. with success; ante, 464 (c).

(b) Ante, 464 (d).

CH. XII. s. 1.
*Replevin (in
County Court).*

Entry of
Plaint.

C. C. Rules,
Order XXII.

No other
Cause of
Action to be
joined.

Particulars of
the Cattle or
Goods to be
replevied.

Fees.

Summons to
Defendant,
with Particu-
lars annexed.

Trial and
Judgment in
a summary
Way.

Right to
Jury.

Evidence for
the Plaintiff.

The action is commenced by entering a plaint in the usual form at the office of the registrar of the County Court, which is generally open from ten till four, except on *Saturday (c)*, when the office closes at one o'clock.

By the County Court Rules of 1875, Order XXII., provision is made for the regulation of actions of replevin.

By Rule 1 of that order, "in an action of replevin no other cause of action shall be joined in the summons" (*d*). This operates as a great protection to landlords and their bailiffs (*e*), and also prevents confusion in the subsequent proceedings, wherein both parties are considered as actors, or plaintiffs, and the judgment differs from other actions, being frequently for the defendant *with damages* for the amount of the rent, or damage done, and costs.

By Rule 2, "on entering a plaint in replevin the plaintiff must specify and describe in a statement of particulars the cattle, or the several goods and chattels taken and of the distress, or other taking of which he complains" (*f*). Such particulars must have been prepared when an application was made to the registrar to replevy (*g*), because the particular cattle or goods intended to be replevied are mentioned in the warrant to the bailiff (*h*). The registrar, or his clerk, enters the plaint upon being furnished with such particulars, and upon payment of the usual fees (*h*).

Upon the plaint being entered a summons issues in the usual form, with particulars annexed, and a copy is served on the defendant by the bailiff, in like manner as in other actions (*i*).

By Rule 3, "all actions of replevin in cases of distress for rent in arrear, or for damage feasant (*k*), shall be tried in a summary way as other actions in the courts holden under the authority of the County Courts Act, 1846, and the judgment therein, in ordinary cases, whether for plaintiff or defendant, shall be according to the forms set forth in the schedule" (*l*).

By Order XVI., Rule 3, cases of replevin may, at the instance of either party, be tried by jury.

The plaintiff must prove the distress or taking of which he complains, and that the defendant was the person who took it or caused it to be taken (*m*); and that the defendant, or his bailiff or agent, took

(c) When Saturday is the market-day of the town in which the court is holden some other day is fixed by order of the judge.

(d) See per Pollock, C. B., in *Muneean v. Wheatley*, 6 Exch. 88; 20 L. J., Ex. 106.

(e) As to practice in High Court, see 477, post.

(f) See Form, App. E., Sect. 3, (a) 1, post.

(g) Ante, 467.

(h) Id.

(i) Pollock & Nicol, C. C. Prac. 205 (8th ed.).

(k) See 23 & 24 Vict. c. 126, s. 22.

(l) See Forms, App. E., Sect. 3, (a) 2, 3.

(m) Ante, 425.

or had the goods or cattle at the place within the jurisdiction of the court mentioned in the plaint. In replevin the alleged place at which the goods were taken is material (*n*); but the plaint may be amended, by leave of the judge, whenever it can be done without prejudice to the real question intended to be tried upon the merits (*o*). The plaintiff must prove that at the time of the taking he had an absolute or qualified property in the cattle or goods taken (*p*). He should also state the amount of expenses incurred in making the replevy; but where no evidence on that point is given the usual amount will be awarded if the plaintiff obtain the verdict. No special damage can be recovered unless it be expressly mentioned in the plaint, and sufficiently proved. The plaintiff may either anticipate by evidence and negative the defendant's right to distrain, or he may reserve his evidence on that point until after the defendant has adduced his evidence (*r*). -

CH. XII. s. 1.
Replevin (in County Court).

The defendant may contend that the plaintiff's evidence is insufficient on some material point; ex. gr.—1. That he, the defendant, was the person who took or caused to be taken the goods or cattle. He may dispute or deny any alleged authority given by him for the distress. If a distress warrant be put in evidence by or on behalf of the plaintiff, the landlord may contend that it was not signed by him, nor by any person authorized to sign it as his agent—and that he has never adopted or ratified it in any manner. He may contend (if the fact be so) that the warrant was expressly confined to the goods of the tenant, and did not extend to the goods of any other person (where a sub-tenant or lodger or third person sues)—or that the warrant expressly prohibited the taking of anything not legally liable to be taken as a distress for rent (where the replevin is for cattle or goods legally exempt from such a distress). 2. That he neither took nor had the goods or cattle at the place, within the jurisdiction of the court, mentioned in the plaint; although this may sometimes be cured by an amendment, where the defendant took or had the goods at some other place within the jurisdiction. 3. That the goods or cattle were not at the time of the taking the property of the plaintiff (*s*). Upon any of these points he may produce contradictory evidence. He may also prove a right to distrain, either on his own behalf or as the bailiff or agent of any other person (*t*), for all or any part of the rent claimed (*u*), or for damage feasant, or for any other lawful cause. He need not prove a

Evidence for
the Defend-
ant.

(*n*) *Potter v. North*, 1 Wms. Saund. 347;
Potten v. Bradley, 2 Moo. & Payne, 78.

(*o*) 19 & 20 Vict. c. 108, s. 57; C. C.
Rules, 1875, Order XVII.; Pollock &
Nicol, C. C. Prac. 170—173 (8th ed.).

(*p*) *Ante*, 466.

(*r*) See evidence in reply, post, 476.

(*s*) *Ante*, 466.

(*t*) See *Trevillian v. Pine*, 11 Mod. 112;
1 Wms. Saund. 347 d, note; *Trent v. Hunt*,
9 Exch. 14; 22 L. J., Ex. 318; *Snell v.*
Finch, 13 C. B., N. S. 651; 32 L. J., C.
P. 117.

(*u*) See *Cobb v. Bryan*, 3 B. & P. 348;
Roskrige v. Caddy, 7 Exch. 840; 22 L. J.,
Ex. 16; *White v. Greenish*, 11 C. B., N. S.
209; 8 Jur., N. S. 563.

CH. XII. s. 1. Replevin (in County Court). right to distrain for the particular cause alleged at the time of the taking; because, as we have seen, a man may distrain for one thing and afterwards avow or justify for another (*x*). It is therefore sufficient if he prove a legal right to distrain for any cause whatever. The amount of rent in arrear, and the value of goods distrained, should also be proved (*y*).

The plaintiff may in reply dispute and disprove anything attempted to be proved by the defendant in justification of the act complained of, but the usual practice (where the lease or agreement is duly stamped) is for the plaintiff to produce all his evidence in the first instance, rather than as evidence in reply.

The Judgment in ordinary Cases.

The judgment in replevin in ordinary cases, whether for plaintiff or defendant, is in the usual form, as in other actions. Where the plaintiff succeeds he is only entitled to a verdict for the expenses of the replevy (*z*) as proved or as estimated on the usual scale (*a*). His solicitor's charges (if any) connected with the replevy must be proved, otherwise nothing will be allowed in respect of them, but only the fees paid to the registrar (*b*). As to the plaintiff's costs of the action it is provided by County Court Rules, Order XXXVI., Rule 10, that "costs in actions of replevin may, where the fees of court are paid on 5*l.* and upwards, be allowed to solicitors upon the scale applicable to actions on contract where the amount claimed exceeds 20*l.* if the judge shall so order." Unless the fees be so paid on 5*l.* or upwards, the plaintiff it seems is still left to his position under 9 & 10 Vict. c. 95, s. 91, and can get no costs of professional assistance, as the damages will be always or nearly always under 5*l.* (*c*).

Judgment for Defendant on Distress for Rent.

By Order XXII., Rule 4, of the Rules of 1875, "where the distress is for rent, or for any other claim for which a distress may be lawfully taken and the defendant succeeds in the action, if the defendant require, the court shall, if the action be tried without a jury, and the jury shall, if the action be tried with a jury, find the value of the goods distrained, and if the value be less than the amount of rent or otherwise of money in arrear, judgment shall be given for the amount of such value, but if the amount of the rent or such other sum of money in arrear be less than the value so found, judgment shall be given for the amount of such rent or other sum of money, and may be enforced in the same manner as any other judgment of the court" (*d*).

Execution.

A judgment for either party in replevin is enforced in the same manner as in other actions (*e*).

* (*x*) Ante, 444 (*e*).
 (*y*) See *Sheape v. Culpeper*, 1 Lev. 255; see, too, C. C. Rules, 1875, Order XXII., Rule 4, *infra*.
 (*z*) Ante, 471.
 (*a*) Ante, 473.

(*b*) Ante, 471.
 (*c*) See ante, 471.
 (*d*) See Form of such Judgment, *post*, Appendix E., Sect. 3, (*a*) 3.
 (*e*) Pollock & Nicol, C. C. Prac. p. 191 *et seq.* (8th ed.).

Either party to an action of replevin, “where the amount of rent or damage exceeds twenty pounds” (*f*), who is dissatisfied with the determination or direction of the said court, “in point of law, or upon the admission or rejection of any evidence” (but not on any question of fact), may appeal from the same to any of the superior courts of common law at Westminster, upon the same terms and conditions and in like manner as in other actions (*g*). The party desiring to appeal must *within ten days* after the decision give notice of appeal to the other party or his attorney, and also give security, to be approved by the registrar, for the costs of the appeal, whatever be the event of the appeal, and for the amount of the judgment, if he be the defendant (*h*). The court cannot entertain any such appeal where the condition of giving security for costs, &c., imposed by 13 & 14 Vict. c. 61, s. 14, has not been strictly complied with (*i*). The appeal may be either in the form of a special case settled and transmitted pursuant to 13 & 14 Vict. c. 61, s. 15, or by motion under the County Courts Act, 1875, s. 6 (*k*), in which case the motion will be for a rule nisi in the first instance. In either mode of appeal the matter will be heard by the Divisional Court of Queen’s Bench, Common Pleas, or Exchequer Division, as may be appointed, at such times as they sit to hear appeals from inferior courts (*l*). When the appeal is by motion, the application for a rule nisi may, when no court is sitting for the hearing of such matters, be made to a judge at chambers (*k*).

CH. XII. s. 1.
Replevin (in
County Court).

Appeal on
Question of
Law to High
Court.

(d) *Action of Replevin commenced in the High Court.*

By 19 & 20 Vict. c. 108, s. 65, “an action of replevin may be commenced in any superior court in the form applicable to personal actions therein, and such court shall have power to hear and determine the same; and if the replevisor shall wish to commence proceedings in any superior court, he shall, at the time of replevying, give security, to be approved by the registrar, for such an amount as such registrar shall deem sufficient to cover the alleged rent or damage in respect of which the distress shall have been made, and the probable costs of the cause in a superior court, conditioned to commence an

19 & 20 Vict.
c. 108, s. 65.
Jurisdiction
of High
Court in
Replevin.

Security to be
given by the
Replevisor.

(*f*) As a general rule, the right to appeal depends upon the amount of the plaintiff’s claim for rent and not on the amount for which judgment is given; Pollock & Nicol, C. C. Prac. 236 (8th ed.); *Dreeman v. Harris*, 9 Exch. 485; 23 L. J., Ex. 210; *Mayer v. Burgess*, 4 E. & B. 655; 24 L. J., Q. B. 67; *Fallance v. Nash*, 2 H. & N. 712.

(*g*) 13 & 14 Vict. c. 61, ss. 14, 15, 16; 19 & 20 Vict. c. 108, ss. 68, 71; C. C. Rules, Order XXIX.; Pollock & Nicol,

C. C. Prac. chap. XII. (8th ed.). In *White*, app., *Greenish*, resp., 11 C. B., N. S. 209, the appellants succeeded on an appeal, although they were entitled to distrain for only one moiety of the rent for which the distress was taken.

(*h*) 13 & 14 Vict. c. 61, s. 14.
(*i*) *Norris v. Carrington*, 16 C. B., N. S. 10.

(*k*) 38 & 39 Vict. c. 50, s. 6.
(*l*) Jud. Act, 1873, s. 45; R. S. C. Order LVIII., Rule 19.

CH. XII. s. 1 *Replevin (in High Court).* action of replevin against the distrainer in such superior court as shall be named in the security, *within one week from the date thereof*, and to prosecute such action *with effect* (m), and *without delay* (n); and, unless judgment therein be obtained by default, to prove before such superior court that he had *good ground for believing* either that the title to some corporeal or incorporeal hereditament, or to some toll, market, fair or franchise was in question, or that such rent or damage *exceeded twenty pounds*, and to make return of the goods, if a return thereof shall be adjudged."

Commence-
ment of Ac-
tion within
one Week. The action must be commenced *within one week* from the date of such security, excluding the day of such date. And it must be prosecuted "with effect" (o), and "without delay" (p), otherwise the bond or deposit will be forfeited.

Writ of Sum-
mons. The action is commenced by writ of summons as in other cases, which will be indorsed thus—"The plaintiff's claim is in replevin for goods wrongfully distrained" (q).

Joinder of
other Causes
of Action. Under the Common Law Procedure Acts no other cause of action could be joined with replevin, but this restriction is no longer in force, although separate trials may be ordered if the court or a judge think the various causes of action cannot conveniently be disposed of together (r).

Old Declara-
tion. The declaration used to be, as a rule, in a technical form, which, after alleging the taking of the goods, &c., in a certain place by the defendant, went on to allege that he "unjustly detained the same against sureties and pledges, until, &c., whereby the plaintiff has sustained damage." This form has been used by some practitioners since the Judicature Acts, but it would seem very doubtful whether a statement of claim in such form would be held good on a summons to set it aside or amend it, as the statement ought to be a narrative of facts and not a mere technical form (s).

What
Damages
recoverable. The only damages recoverable in this action are the expenses to which the plaintiff has been put to replevy his goods (t).

1. Non pros.
at Common
Law. The common law judgment of non pros. in replevin was that the defendant should have a return of the goods (u) with costs (v); which judgment was final at once as to the return, and for the costs after taxation (x).

2. By Statute. By 7 Hen. 8, c. 4, s. 3, and 21 Hen. 8, c. 19, s. 3, if the distress

(m) I. e. with success; ante, 464 (c).
(n) I. e. with due diligence; ante, 464 (d).
(o) Ante, 464 (c).
(p) Ante, 464 (d).
(q) R. S. C. Appendix A., Part II., s. 4.
(r) R. S. C. Order XVII., Rule 1.
(s) See R. S. C. Order XIX.

(t) *Pease v. Chaytor*, 3 B. & S. 634; 32 L. J., M. C. 121; *Connor v. Bentley*, 1 Jebb & S. 246. See, too, *Wilkinson on Replevin*, 85.
(u) 2 Chit. Arch. 890, 13th ed. The procedure now would seem to be under R. S. C. Order XXIX., Rule 1 (Id.).
(v) *Davies v. James*, 1 T. R. 371.
(x) *Wright v. Lewis*, 9 Dowl. 183.

was for rent, customs, services or damage feasant, and the plaintiff is non-pressed, the defendant is entitled to his damages and costs, to be assessed by a jury under a writ of inquiry (*y*). To obtain them after the entry of the judgment of non pros. on the roll, it must have been followed by an award of a writ of inquiry of damages (*z*), and then a writ of inquiry must have been sued out (*a*).

Ch. XII. s. 1.
Replevin (in High Court).

By 17 Car. 2, c. 7, s. 2, "whosoever any plaintiff in replevin shall be nonsuited before issue joined, in any suit of replevin by plaint or writ lawfully returned, removed or depending in any of the king's courts at Westminster (*b*), the defendant making a suggestion in nature of an avowry or cognizance for such rent (*b*) to ascertain the court of the cause of the distress, the court upon his prayer shall award a writ to the sheriff of the county where the distress was taken, to inquire, by the oaths of twelve good and lawful men of his bailiwick, touching the sum in arrear at the time of such distress taken, and the value of the goods or cattle distrained; and thereupon notice of fifteen days shall be given to the plaintiff or his attorney (*c*) in court, of the sitting of such inquiry; and thereupon the sheriff shall inquire of the truth of the matters contained in such writ, by the oaths of twelve good and lawful men of his county, and upon the return of such inquisition the defendant shall have judgment to recover against the plaintiff the arrearages of such rent (*b*) in case the goods or cattle distrained shall amount unto that value; and in case they shall not amount unto that value, then so much as the value of the said goods and chattels so distrained shall amount unto, together with his full costs of suit, and shall have execution thereupon by fieri facias or elegit, or otherwise as the law shall require" (*d*).

17 Car. 2,
c. 7, s. 2.
Writ of In-
quiry after
Non pros. in
Replevin on
a Distress for
Rent.

This statute did not take away or alter the judgment at common law; it only gave a further remedy to the defendant, and it was always in his option whether he would proceed under the statute or not (*e*). It was often advisable to do so, because a writ of second deliverance after it would be inoperative, the goods still remaining with the plaintiff (*f*).

Or, instead of executing a writ of inquiry under this statute, the defendant having signed judgment of non pros., might proceed upon the replevin bond against the plaintiff and his sureties (*g*).

In some cases the court would, under special circumstances, set

Setting aside
Judgment of
Non pros.

(*y*) *Wright v. Lewis*, 9 Dowl. 153.

(*z*) See Form, Chit. Forms, 601 (9th ed.).

(*a*) See Form, Id. 602.

(*b*) This act only applies to actions of replevin depending in one of the superior courts on distresses for arrears of rent; *Davis v. James*, 1 T. R. 373, Buller, J.

(*c*) *Barton v. Hickey*, 6 Taunt. 67.

(*d*) See forms of proceeding under this

enactment, Chit. Forms, 593—597 (9th ed.). Judgment should be entered for a return; *Cooper v. Sherbrooke*, 2 Wils. 116; *Barnes*, 127; *Baker v. Lade*, Carth. 253.

(*e*) *Cooper v. Sherbrooke*, *Baker v. Lade*, supra; *Rees v. Morgan*, 3 T. R. 350.

(*f*) *Playlers v. Sheering*, 1 Vent. 64; Bull. N. P. 58; *Cooper v. Sherbrooke*, supra.

(*g*) 2 Chit. Arch. 892, 13th ed.

CH. XII. s. 1.
*Replevin (in
High Court).*

Present Prac-
tice as to
Dismissal of
Action.

Defences,
Avowry and
Cognizance.

Other De-
fences.

Limitation.

Not guilty by
Statute.

Reply.
Plea in Bar.

aside a regular judgment of non pros., &c., and let in the plaintiff to declare upon payment of costs (*h*).

Under the present practice there is no special provision for the case of a judgment of non pros. in replevin. The defendant may get the action dismissed for want of prosecution under Order XXIX., Rule 1, of the Rules of the Supreme Court, which, however, would not give him a return of the goods or damages, and the court or judge, guided by the old practice, would probably make an order for an inquiry, or other mode of assessing damages (*i*), under the same rule.

The defences to an action of replevin were formerly distinguished as pleas, avowries and cognizances, the two latter of which terms were used when the defendant justified the taking of the goods, &c. under a right to distrain, and also claimed their return and damages; the former being used when the person having such right, was the defendant, the latter when the defendant was bailiff or agent of the person having the right. These terms no longer exist as technicalities, a defence now being a statement of facts, and the defendant being able to counter-claim the return and damages; but they will probably be still frequently used for the sake of convenience.

The other most usual defences are (1) a denial of the taking, under which the defendant would not be entitled to anything but his costs (*k*); (2) a denial of the plaintiff's property in the things taken, under which the same result will follow; (3) an allegation that the things are the property of the defendant or a third party, in which case the defendant if successful will be entitled to a return of the goods (*l*); (4) a justification of the taking (without any claim for return), when the defendant will get costs only (*m*); or (5) an allegation that the cause of action did not accrue within six years (*n*). In some cases the defendant may plead not guilty "by statute" and give any special matter of defence in evidence; as in the case of a distress for poor rates (*o*), or for sewers rates (*p*), or where a constable is acting under the Municipal Corporation Act (*q*), but not in the case of distress for rent.

When the plaintiff denied the right to distrain as set up by the defendant, his replication was formerly called "a plea in bar to the

(*h*) *Playters v. Sheering*, 1 Vent. 64; 2 Chit. Arch. 892 (13th ed.).

(*i*) See R. S. C. Order XIII., Rule 6.

(*k*) *Bullythorpe v. Turner*, Willes, 475; Barnes, 353; Bull. N. P. 53; 1 Wms. Saund. 347, n. (1).

(*l*) Com. Dig. tit. *Pleader* (3 K. 13); *Butcher v. Porter*, Carth. 243; 1 Salk. 94; *Freegrave v. Saunders*, 6 Mod. 81; 1 Salk. 5; *Wildman v. Norton*, 1 Vent. 249; *S. C.* sub nom. *Wildman v. North*, 2 Lev. 92; *Crosse v. Bilson*, 6 Mod. 103; *Parker v.*

Meller, 1 Ld. Raym. 217.

(*m*) *Aylebury v. Harvey*, 3 Lev. 204; Com. Dig. tit. *Pleader* (3 K. 12); Lev. Entr. 152.

(*n*) 21 Jac. 1, c. 16, s. 3; 2 Selw. N. P. 1153 (13th ed.).

(*o*) 43 Eliz. c. 2, s. 19; 1 Wms. Saund. 347 c. (n.).

(*p*) 23 Hen. 8, c. 5, s. 11.

(*q*) 5 & 6 Will. 4, c. 76, ss. 76, 133; *Mellor v. Leather*, 1 E. & B. 619.

avowry (or cognizance)," but the term "reply" will now cover all matters pleaded by the plaintiff in answer to a defence or counter-claim (*r*).

CH. XII. s. 1.
Replevin (in High Court).

From the somewhat peculiar nature of the defence formerly known as avowry, it will be well to consider the state of the law, statutory and otherwise, upon the subject of avowry and cognizance.

Former Law
of Avowry.

Under 21 Hen. 8, c. 19, s. 2, the lord of a manor or the owner of a freehold rent, or his bailiff, may avow or make cognizance for a distress "within his fee or seignory," without naming the tenant or person liable to the payment thereof. But the title of the person by whom or on whose behalf the distress was made must be shown (*s*).

21 Hen. 8,
c. 19, s. 2.
Avowry or
Cognizance
for Quit-
rents, &c.

By 11 Geo. 2, c. 19, s. 22, after reciting, that "great difficulties often arise in making avowries or conuzance upon distresses for rent, quit-rents, reliefs, heriots and other services:" it is enacted, "That it shall and may be lawful to and for all defendants in replevin to avow or make conuzance generally, that the plaintiff in replevin or other tenant of the lands and tenements whereon such distress was made, enjoyed the same under a grant or demise at such a certain rent, during the time wherein the rent distrained for incurred, which rent was then and still remains due; or, that the place where the distress was taken was parcel of such certain tenements held of such honour, lordship or manor, for which tenements the rent, relief, heriot or other service distrained for was at the time of such distress, and still remains due: without further setting forth the grant, tenure, demise or title of such landlord or landlords, lessor or lessors, owner or owners of such manor; any law or usage to the contrary notwithstanding (*t*); and if the plaintiff or plaintiffs in such action shall become nonsuit, discontinue his, her or their action, or have judgment given against him, her or them, the defendant or defendants in such replevin shall recover double costs of suit" (*u*).

11 Geo. 2,
c. 19, s. 22.
Avowry or
Conuzance
for Rent;

or for Scr-
vices, &c.;

without spe-
cially setting
forth the
Title, &c.

The defendant may avow in the general manner allowed by this act, whether the plaintiff be tenant or not, for the words of the statute are in the disjunctive, "plaintiff in replevin or other tenant." But the enactment does not apply to an avowry where the defendant had no reversion (*x*); nor does it extend to avowries or cognizances for rent-charges (*y*); nor to an avowry for a heriot by custom (*z*), but

When inap-
plicable.

(*r*) See R. S. C. Orders XIX., XXIV.

(*s*) See *Banks v. Angell*, 7 A. & E. 843.

(*t*) See Chit. Forms, 600 (9th ed.).

(*u*) Now, in lieu of such double costs, a full and reasonable indemnity as to all costs, charges and expenses; 5 & 6 Vict. c. 97, s. 2. And see R. S. C. Order LV.; *Garnett v. Bradley*, 453, (*n*), ante.

(*x*) *Pluck v. Digges*, 2 Dow. & Cl. 180; *Roberts v. Mayne*, Cas. temp. Napier, 175, 196.

(*y*) *Dulpit v. Clarke*, 1 Bos. & P., N. R. 56; *Leominster Canal Co. v. Norris*, 7 T. R. 500; *Same Co. v. Cowell*, 1 Bos. & P. 213; see, too, *Neuenham v. Bever*, 8 C. B. 560; 7 D. & L. 253.

(*z*) *Blayd v. Winton*, 2 Wils. 28; see Form of Justification in Trespass for a Heriot Custom, *Price v. Woodhouse*, 16 M. & W. 1; 4 D. & L. 286; 1 Exch. 669; 3 Exch. 610, S. C.

CH. XII. s. 1. only to reservations in the nature of "services." An avowry for a rent-charge ought therefore to state a seisin in fee of the person who created it, and deduce the title link by link to the person by whom or on whose behalf the distress was made (*a*). No demand of the amount due need be alleged, the distress itself being a sufficient demand (*b*). In an avowry under the statute the defendant must show a privity existing between himself and the tenant on the land; and where the defendant avowed that certain persons to the defendant unknown held the close as tenants to the defendant, under a demise from A. to B. for a term unexpired, and that the interest of B. in the term had vested in these persons unknown, and that the rent was in arrear to the defendant; it was held, that the avowry was not good under 21 Hen. 8, c. 19, nor under 11 Geo. 2, c. 19 (*c*). The latter statute was made for the benefit of landlords, so that after the tenant had enjoyed the land, he should not be allowed to pry into the lessor's title: the terms of the contract must, however, be truly stated in the avowry (*d*).

Allegation of
Amount of
Rent due.

Where, in an avowry for rent, it turned out that less rent was due than was avowed for, Lord Ellenborough stated that there had been no case since the statute 11 Geo. 2, c. 19, s. 22, in which the avowant had not been holden to be entitled to recover for so much rent as was due: and, therefore, where the defendant in replevin avowed for two years and a quarter's rent, and proved a tenancy for two years only, he had a judgment *pro rata* (*e*): and similarly the defendant had judgment *pro rata* when he avowed for half-a-year's rent, but was unable to prove that more than one quarter was due (*f*); for an avowant may at any time before judgment abate his own avowry for part of the rent distrained for, but not after judgment (*g*). But an avowry for rent in arrear for one year, ending on the 29th of September, 1851, it has been held, is not supported by proof that no rent was due for the year ending the 29th of September, 1851, but that a portion of the previous year's rent was due (*h*). It may be added that, generally speaking, an avowry for part of a rent or penalty is bad, unless it show how the remainder was discharged, for otherwise there might be another distress and avowry for the residue (*i*). It is not necessary to aver that the rent still remains due (*k*).

(*a*) See *Pinhorn v. Souster*, 8 Exch. 138; 3 Chit. Pl. 305 (7th ed.); as to avowries for rent-charges, see also *Vigers v. Dean of St. Paul's* (in error), 14 Q. B. 909, 928; *Long v. Buckridge*, 1 Stra. 106; *Bradby*, 22, 35; *Rivis v. Watson*, 5 M. & W. 256.
(*b*) *Kind v. Ammery*, Hutton, 23.
(*c*) *Banks v. Angell*, 7 A. & E. 843.
(*d*) *Sylvian v. Stradling*, 2 Wils. 208.
(*e*) *Forty v. Imber*, 6 East, 434; 2 Selw.

N. P. 1157 (13th ed.).

(*f*) *Harrison v. Barnby*, 5 T. R. 246, 248.

(*g*) See notes (*e*) and (*f*); and see also Bac. Abr. tit. *Replevin* (C); *Richards v. Cornforth*, 2 Salk. 680; *Comyn*, 42.

(*h*) *Roakrugs v. Caddy*, 7 Exch. 840; 22 L. J., Ex. 16.

(*i*) *Holt v. Sambach*, Cro. Car. 103.

(*k*) *Clarke v. Davies*, 7 Taunt. 72.

The fact of being bailiff should be correctly stated, as it has been decided to be traversable (*l*). A cognizance as bailiff of an executor is proved by a distress made in the name of the testator and by his command, but shortly after his death, with a subsequent recognition of it by his executor (*m*).

CH. XII. s. 1.
Replevin (in High Court).

Allegation of Authority in a Cognizance.

Where one is not sole seised, or has not sole title to the entire rent, he cannot avow alone, for such avowry would be bad: therefore parceners must join in an avowry or cognizance for rent; for they make but one heir, and the rent is an entire inheritance (*n*). Joint-tenants also should join (*o*). One of several tenants in common may avow for his undivided portion of the rent (*p*), but not for the whole rent (*q*). An assignee of the reversion of part, may avow for an apportioned part of the rent (*r*). An avowry by one of several co-heirs in gavelkind, in his own right, with a cognizance as bailiff of the other co-heirs, is sufficient, without averring an authority to distrain from the other co-heirs (*s*). And if in replevin against two such persons, they make several avowries, each in his own right, both avowries will be abated; for if both the issues should be found for the avowants, the court could not give judgment severally for the same thing.

Avowries by Persons jointly interested.

An avowry by a husband alone in his own name, for rent due in right of his wife, is good, if it appear upon the record that *he* was entitled to make the distress (*t*). If there be a lessee for years, and the reversion descend on a married woman, and afterwards the rent be in arrear, and the husband distrain, and the lessee bring replevin; the husband ought to avow in the name of himself and his wife, and not in his own name only, for the avowry is to be made according to the reversion, which is in the wife (*u*). Where husband and wife demise the wife's land, reserving rent to them and the heirs and assigns of the wife, and the wife dies without issue, in the lifetime of her husband, he cannot avow for the subsequent rent (*x*). So where the husband lets the wife's freehold land on her behalf, and she dies in his lifetime, without issue, he is not entitled to distrain for the subsequent rent (*y*): but it is otherwise where the husband grants a lease in his own name of the wife's land, because the tenant is thereby estopped from denying the husband's title (*y*).

Avowries by Husband and Wife.

(*l*) *Trevillian v. Pine*, 11 Mod. 112; 1 Salk. 107; 1 Saund. 347 c. n. (2); *Chambers v. Donaldson*, 11 East, 65; *Trent v. Hunt*, 9 Exch. 14; 22 L. J., Ex. 318; 2 Selw. N. P. 1164 (13th ed.).

(*m*) *Whitehead v. Taylor*, 10 A. & E. 210.
(*n*) *Stedman v. Page*, 1 Salk. 390; *S. C.*, *Stedman v. Bates*, 1 Ld. Raym. 64.

(*o*) 2 Selw. N. P. 1168 (13th ed.).

(*p*) *Harrison v. Barnby*, 5 T. R. 246, 249.

(*q*) *Philpott v. Dobbinson*, 6 Bing. 104.

(*r*) See *Harrison v. Barnby*, *supra*. See further as to avowries by tenants in common, Bac. Abr. tit. *Replevin* (K).

(*s*) *Leigh v. Shepherd*, 2 Brod. & B. 465.

(*t*) *Wise v. Bellent*, Cro. Jac. 442; see also *Gravenor v. Woodhouse*, 1 Bing. 38.

(*u*) Bac. Abr. tit. *Replevin* (K).

(*x*) *Hill v. Saunders*, 2 Bing. 112; *S. C.* (in error), 4 B. & C. 529.

(*y*) *Howe v. Scarrott*, 4 H. & N. 723; 28 L. J., Ex. 325.

CH. XII. s. 1.
*Replevin (in
High Court).*

Avowries by
Executors
and Adminis-
trators.

By 3 & 4 Will. 4, c. 42, s. 37, executors or administrators of any lessor or landlord may distrain upon the lands demised for any term, or at will, for arrears due to such lessor or landlord in his lifetime, as he might have done. This enactment is merely an extension of the previous right which was given to personal representatives by 32 Hen. 8, c. 37, under which it was held, that where to a declaration of replevin for taking the plaintiff's goods, the defendant made cognizance as a bailiff of an executrix under the statute, for arrears of rent incurred in the lifetime of the testator; such cognizance need not set out the title of the testator, nor show that the executrix was entitled to distrain under that statute; and that at all events it could not be objected to after verdict (z). Where the avowry was as administratrix, of rent to which the defendant was entitled in her own right, she nevertheless had judgment, that part respecting the claim as administratrix being rejected as surplusage (a).

Avowries for
Rent Nomine
Pœnne.

An avowry or cognizance for an increased or penal rent should carefully avoid calling it a "penalty" (b). An avowry on a demise at an increased rent, for every acre of the land which should be converted into tillage, is supported by evidence of a lease for a term of years, with a covenant to pay the increased rent for every acre which should be so converted "during a part of the term," ex. gr. for the last three years (c).

These points which have been noticed in regard to avowries and cognizances have, however, lost much of their weight, when it is considered, first, that the principle of the new system of pleading is that pleadings should be merely a plain statement of facts, and, secondly, that the power of amendment is now almost unlimited.

Payment into
Court.

Payment into
Court as to
Part, and
Avowry or
Cognizance as
to the Resi-
due.

Money may be paid into court by a defendant in replevin, in like manner as in other actions; but this is seldom done. There appears, however, to be no reason why it should not be done, even where part of the goods only have been rightly seized, in which case payment into court may be made as to the rest, and an avowry made as to those rightly taken (d). Whenever the defendant can justify the distress as to some of the goods only, and not as to the residue, this course should be pursued.

Demurrer to
Avowry or
Cognizance.

If an avowry or cognizance was bad in substance, the plaintiff might demur to it (e) as he may still do to the statement of defence (f). To which might be added a suggestion, in the nature of an avowry

(z) *Martin v. Burton*, 1 Brod. & B. 279.

(a) *Broune v. Dummery*, Hob. 208; Bac. Abr. tit. *Replevin* (K).

(b) See *Pollitt v. Forrest*, 11 Q. B. 949; *Bowers v. Nixon*, 12 Q. B. 546, 558.

(c) *Roulston v. Clarke*, 2 H. Blac. 563.

(d) *Lambert v. Hepworth*, 2 Q. B. 729.

(e) 15 & 16 Vict. c. 76, ss. 51, 52, 89; see, for instance, in *Hunt v. Brainer*, 4 Mod. 402; *Weeks v. Speed*, 1 Salk. 94; *Humberstone v. Dubois*, 10 M. & W. 765; 2 Dowl. N. S. 506.

(f) R. S. C. Order XXVIII., Rule 1.

or cognizance, praying a return (*h*), and this will probably be usually allowed by way of counter-claim under the Judicature Acts (*i*). If the judgment on demurrer be for the defendant, it was that he should have a return of the goods irreplevisable (*k*). But if the distress were for rent, customs, services or damage feasant, an inquiry of damages and costs was awarded (*k*). And upon the return of the writ of inquiry final judgment was given to recover the damages and costs as assessed by the jury, with costs of increase as assessed by the court (*l*). Or, if the distress were for rent, judgment might be given for the defendant pursuant to 17 Car. 2, c. 7, s. 3 (*l*). The present practice on demurrer will be found in the Rules of the Supreme Court, Order XXVIII.

CH. XII. s. 1.
Replevin (in High Court).

The plaintiff's pleading in answer to an avowry or cognizance was called a plea in bar, but this term is no longer used, the plaintiff's pleading in answer being in all cases termed a reply (*m*).

In addition to denying, by joinder of issue or otherwise, any allegations of the defendant, the plaintiff may reply what was called *riens in arrere* (*n*), which means that *all* the rent claimed had been paid or satisfied before the distress was taken: if any part thereof then remained unpaid and unsatisfied, the verdict on this reply should be for the defendant for the amount of such part (*o*). But the plaintiff may of course plead *riens in arrere* as to part, and a tender of the residue before the distress was taken; or a tender of the residue with expenses before the impounding; or the Statutes of Limitations, or a release (*p*), or payment of rent in so many words (*q*), or any other valid defence as to such residue.

Riens in Arrere.

There is no provision for the payment of money into court by a plaintiff in answer to a counter-claim, but it would probably be held that sect. 23 of the Common Law Procedure Act, 1860, which allowed a plaintiff in replevin to pay money into court is still in force; such payment, by virtue of sect. 24 of the same act, will not, nor will the acceptance of it by the defendant, work a forfeiture of the replevin bond.

Payment into Court to Counter-claim.

The sum mentioned in a reply of tender in bar to an avowry or cognizance need not be paid into court; because if the distress were not rightfully taken, the defendant must answer the plaintiff his damages (*r*): the action is not brought to recover the rent or damage done, but to try the validity of the distress: and, at common law, the

(*h*) *Serres v. Dodd*, 2 Bos. & P., N. R. 406.

(*i*) R. S. C. Order XXVIII., Rule 5.

(*k*) See 2 Chit. Arch. 894 (13th ed.).

(*l*) Id. 896.

(*m*) R. S. C. Orders XIX., XXIV.

(*n*) See *Hill v. Wright*, 2 Esp. 670; 2

Selw. N. P. 1161 (13th ed.); Bullen & L. Pl. 781 (3rd ed.).

(*o*) See *Cobb v. Bryan*, 3 B. & P. 348.

(*p*) *Cooper v. Robinson*, 10 M. & W. 694.

(*q*) See *Jones v. Morris*, 3 Exch. 742.

(*r*) Bull. N. P. 60.

CH. XII. s. 1. judgment for the defendant was and is for a return of the goods or cattle, and not for recovery of the rent, &c.

Replevin (in High Court).

Set-off.

A set-off could not, prior to the Judicature Act, be replied to an avowry or cognizance for rent, because the statutes of set-off (s) only apply where an action is brought to recover a debt, and not where a distress is made for rent, and a subsequent action of replevin is brought to try the validity of the distress (t). Nor does such a reply fall within that rule of the Supreme Court which deals with set-off and counter-claim (u), as that rule, which is otherwise wide enough, applies to defendants only; but as other causes of action may now be joined with replevin, the plaintiff can avail himself in the action of any set-off or counter-claim which would answer the avowry or cognizance, by an additional claim in his statement of claim.

Discontinu-
ance.

The plaintiff may discontinue the action as in other cases (x); but he will thereby forfeit his bond or other security conditioned to prosecute the action with effect and without delay.

Nonsuit.

The plaintiff may be nonsuited in replevin as in other actions; and the judgment at common law in such case is, that the defendant have a return of the goods or cattle (not saying "irreplevisable for ever") with costs (y). But if the defendant avowed or made cognizance under a distress for rent, customs, services, or damage feasant, the jury might inquire of the defendant's damages and costs (z), and the same may now be done on a counter-claim (a); and the judgment thereon is, not only for a return of the goods or cattle, but also that the defendant recover such damages and his costs. If the defendant has avowed or made cognizance for rent, the jury are, at the prayer of the defendant, to inquire concerning the sum of the arrears and the value of the goods or cattle distrained, under 17 Car. 2, c. 7, s. 2 (b), in like manner as where they find a verdict for the defendant.

Judgment for
Plaintiff,—
Damages
recoverable.

If a verdict be found for the plaintiff he is not entitled to damages for the value of the goods or cattle taken, if they were returned to him when the replevin was made (as is usually the case); nor to any special damage for their wrongful taking or detention; nor to any compensation for the insult, annoyance and inconvenience to the plaintiff and his family by the distress; nor for any injury thereby occasioned to his trade or business, credit or reputation; but only the costs and expenses incurred by him on obtaining the replevy, in-

(s) 2 Geo. 2, c. 22, s. 13; 8 Geo. 2, c. 24, ss. 4, 5.

(t) *Absolem v. Knight*, Bull. N. P. 181; Barnes' Notes, 454; *Andrew v. Hancock*, 1 Brod. & B. 46, 47; per Holroyd, J., *Stubbs v. Parsons*, 3 B. & A. 521.

(u) R. S. C. Order XIX., Rule 3. But see Judicature Act, 1873, s. 24, sub-s. 7.

(x) R. S. C. Order XXIII.

(y) See Form, Chit. Forms, 613 (9th ed.).

(z) Under 7 Hen. 8, c. 4, s. 3, and 21 Hen. 8, c. 19, s. 3, post, 487; see form of postea and judgment thereon, Chit. Forms, 614 (9th ed.).

(a) R. S. C. Order XXII., Rule 10.

(b) Post, p. 488.

cluding the fees paid at the County Court (*c*). Now, however, as other causes of action may be joined with replevin, the plaintiff should claim further damages in the first instance as for a substantive cause of action (*d*). The expenses of the replevy were formerly 2*l.* 2*s.* in London and Middlesex, and in some other places, and 2*l.* 10*s.* elsewhere, being the supposed expense of the replevin bond; but now the amount varies according to the sum distrained for. And if the plaintiff incurred further expenses than the fees paid at the County Court (his own solicitor's charges for instance) he should prove them and also the fees so paid; otherwise the lowest usual amount will be awarded.

CH. XII. s. 1.
Replevin (in High Court).

If the goods or cattle have not been delivered to the plaintiff on the replevy, he is entitled to recover the value of the goods or cattle distrained (*e*), and also his damages for their detention, &c. (as in an action of detinuo), together with the costs and expenses of the replevy; and perhaps also any special damage occasioned by the distress, which is properly alleged in the declaration and sufficiently proved. In such case the jury should by their verdict separate the damages, and find so much for the value of the goods or cattle, and so much for their detention, &c. (*f*). The jury may find a special verdict in an action of replevin (*g*).

By the condition of the replevin bond, where the action is brought in the High Court, unless judgment be obtained by default, the plaintiff must "prove before such superior court that he had good ground for believing either that the title to some corporeal or incorporeal hereditament, or some toll, market, fair or franchise was in question, or that such rent or damage exceeded 20*l.*" (*h*). It would seem that the plaintiff should apply upon affidavit to the court or a judge at chambers (*i*) for leave to enter a suggestion on the roll, that the plaintiff has proved before this court that, &c. And when the rule absolute or order for such leave is obtained to make an entry accordingly on the roll; otherwise, perhaps, the plaintiff and his sureties may be troubled with an action on the replevin bond, notwithstanding he obtained a verdict and judgment in his favour.

Proof of special Reason for suing in the High Court.

By 7 Hen. 8, c. 4, s. 3, and 21 Hen. 8, c. 19, s. 3, every avowant and other person making avowry, justification or cognizance as bailiff, in any replegiare or second deliverance for any rents, customs, services, or for damage feasant, upon any distress taken in any lands

Judgment for Defendant.
Under 7 Hen. 8, c. 4, s. 3;
21 Hen. 8, c. 19, c. 3.

(*c*) Willk. Repl. 85; *Gibbs v. Cruikshank*, L. R., 8 O. P. 464; and 489, post.

(*d*) R. S. O. Order XVII., Rule 1.

(*e*) 2 Chit. Arch. 1082 (11th ed.).

(*f*) *Ash v. Wood*, Cro. Eliz. 59.

(*g*) See the case of *Jones v. Johnson*, 5 Exch. 862; 7 Exch. 452.

(*h*) 19 & 20 Vict. c. 108, s. 65; ante, 477.

(*i*) Not to the judge at nisi prius; *Tunncliffe v. Wilmot*, 2 C. & K. 626, but in this case a certificate was refused because the plaintiff had not obtained the verdict.

CH. XII. s. 1.
*Replevin (in
High Court).*

or tenements, if the avowry, cognizance or justification be bound for him, or the plaintiff be nonsuit, or otherwise barred, shall recover his damages and costs against the plaintiff, as the plaintiff should have done if he had recovered therein.

The damages given by these statutes are inconsiderable, being merely such as the defendant has sustained by the delay of his remedy in consequence of the replevin (*l*). If the jury omit to assess them on finding a verdict for the defendant, the omission may be supplied by a writ of inquiry (*m*); or they may be remitted, as is frequently done (*n*). But it seems that if the damages be remitted the defendant will lose his right to costs, because the right to costs is dependent upon the damages, which must be assessed by a jury (*n*).

Under
17 Car. 2,
c. 7, s. 2.

By 17 Car. 2, c. 7, s. 2, in case the plaintiff in replevin on a distress *for rent* shall be nonsuit after cognizance or avowry made and issue joined; or if the verdict shall be given against such plaintiff, then the jurors that are impannelled or returned to inquire of such issue shall, at the prayer of the defendant, inquire concerning the sum of the arrears and the value of the goods or cattle distrained; and thereupon the avowant, or he that makes cognizance, shall have judgment for such arrearages, or so much thereof as the goods or cattle distrained amount unto, together with his full costs (*o*), and shall have execution for the same by *feri facias* or *elegit*, or otherwise as the law shall require.

Sect. 4.
Subsequent
Distress.

Sect. 4 provides "that in all cases aforesaid (*p*) where the value of the cattle (*q*) distrained as aforesaid shall not be found to be the full value of the arrears distrained for, that the party to whom such arrears were due, his executors or administrators, may from time to time distrain again for the residue of the said arrears."

This act only applies to replevins on distresses for rent (*r*). A penal rent avowed for as a "penalty" is not within the statute (*r*); but a rent-charge is (*s*). It is optional with the defendant whether he will avail himself of the statute by praying the jury to inquire concerning the sum of the arrears and the value of the goods or cattle distrained. He should not do so without being prepared with evidence on those points. He is not entitled to recover the costs of making the distress (*s*). If the jury do not find the amount of the arrears of rent and also the value of the goods or cattle distrained, the defect cannot be supplied by a subsequent writ of

(*l*) 2 Chit. Arch. 1083 (11th ed.).

(*m*) Id. 1083, 1084.

(*n*) Per Patteson, J., *Wright v. Lewis*, 20 Dowl. 187, 188.

(*o*) This means ordinary costs as between party and party, and not costs as between solicitor and client; *Jamieson v. Trevelyan*, 10 Exch. 748; 24 L. J., Ex. 74.

(*p*) This includes actions wherein the defendant obtains judgment of non pros., or upon demurrer.

(*q*) Not "or goods."

(*r*) *Pollitt v. Forrest*, 11 Q. B. 949.

(*s*) *Jamieson v. Trevelyan*, 10 Exch. 748; 24 L. J., Ex. 74.

inquiry, because the act requires the jury who try the issues to make those inquiries (*t*). But the defendant may upon such defective verdict enter up judgment as at common law (*u*): or if the jury have assessed the damages, but not the amount of rent, and the value of the goods or cattle, the defendant may have leave to enter up his judgment, as under 21 Hen. 8, c. 19, s. 3 (*x*). This distinction should be observed, that by 17 Car. 2, c. 7, in case of nonsuit or non pros. before issue joined, the defendant may issue a suggestion upon the record in the nature of an avowry or cognizance, and thereupon sue out a writ of inquiry; but in the case of a nonsuit at the trial, or of a verdict for the defendant, the jury must then and there inquire of the rent in arrear and the value of the goods distrained; and if they omit to do so the defect cannot afterwards be remedied by a writ of inquiry (*y*), unless the distress was taken for something else than rent (*z*).

CH. XII. s. 1.
Replevin (in High Court).

In replevin, where the verdict is for the plaintiff, the court will not in general grant a new trial, even on payment of costs, without very clear grounds; for the landlord has other remedies for his rent, and a new trial would renew the liability of the sureties, and the plaintiff's risk of paying full costs, charges and expenses (*a*).

New Trial.

A judgment for the plaintiff in replevin is a bar to an action for damages for the same taking of the goods in respect of which the replevin was brought (*b*).

When Judgment a bar to other Action.
Gibbs v. Cruikshank.

Under 11 Geo. 2, c. 19, s. 22, where a defendant avowed or made cognizance upon any distress for rent, quit-rents, reliefs, heriots or other services, and the plaintiff became nonsuit, discontinued his action, or had judgment against him, the defendant in replevin recovered double costs. But now in lieu of such double costs he is entitled to receive such full and reasonable indemnity as to all costs, charges and expenses incurred in and about the suit as shall be taxed by the proper officer in that behalf (*c*).

Costs.

Under 17 Car. 2, c. 7, a successful defendant in replevin is not entitled to the costs of making the distress (*d*); and the term "full costs" in that statute has been held to mean ordinary costs as between party and party, and not costs as between solicitor and client (*d*).

Costs of Distress not recoverable.

(*t*) See *Ward v. Culpeper*, Sir T. Raym. 170; 1 Sid. 380; 1 Lev. 255; *Freeman v. Archer*, 2 H. Blac. 763.

(*u*) *Rees v. Morgan*, 3 T. R. 349.

(*x*) *Gamon v. Jones*, 4 T. R. 509; 2 Chit. Arch. 896 (13th ed.).

(*y*) *Rees v. Morgan*, supra; 2 Selw. N. P. 1165 (13th ed.).

(*z*) See *Herbert v. Walters*, 1 Ld. Raym. 59; *Valentine v. Faucett*, 2 Stra. 1021.

(*a*) *Parry v. Duncan*, 7 Bing. 243. But see *Edgson v. Cardwell*, L. R., 8 C. P. 647; 28 L. T. 819.

(*b*) *Gibbs v. Cruikshank*, L. R., 8 C. P. 454; 42 L. J., C. P. 273; 28 L. T. 735; 21 W. R. 734.

(*c*) 5 & 6 Vict. c. 97, s. 2. But see *Garnett v. Bradley*, ante, 453 (*n*).

(*d*) *Jamieson v. Trevelyan*, 10 Exch. 748; 24 L. J., Ex. 74.

CH. XII. s. 1. The execution for the plaintiff is the same as in other actions, viz., by fi. fa. or elegit (*e*).

Replevin (in High Court).

Execution for Plaintiff.

Execution for Defendant.

If the defendant have judgment at common law, he has execution by a writ de retorno habendo, to have a return of the goods or cattle distrained, and a fi. fa. for his costs (*f*). It seems that the writ of retorno habendo and a fi. fa. for the damages and costs may be included in one writ (*f*).

If the defendant had judgment under 21 Hen. 8, c. 19 (*g*), he had a writ de retorno habendo for a return of the goods or cattle distrained, and also a fi. fa. for his damages and costs (*h*); but will now in the former case have what is called a writ for delivery of the property as in an action of detinue (*i*).

If the defendant have judgment under 17 Car. 2, c. 7 (*k*), to recover the arrears of rent or value of the distress, he has execution by fi. fa. or elegit (*l*).

Writ de Retorno Habendo—how executed.

Capias in Withernam.

The sheriff, under the writ of retorno habendo, might cause the goods or cattle which were replevied to be taken from the plaintiff and re-delivered to the defendant; but this was seldom done. The usual practice was for the sheriff to return *elongata*, viz., that the goods or cattle were eloigned and removed to places unknown (*m*). Upon this return being filed the defendant might have a “capias in withernam,” by which the sheriff was commanded to take the cattle, goods, and chattels of the plaintiff, to the value of the cattle, goods, and chattels before taken, to be delivered to the defendant, to be kept by him till the sheriff can cause to be returned the cattle, goods, and chattels before taken, &c. (*n*). If this was returned nihil the defendant might sue out an alias, and after that a pluries (*o*): but if these all proved unsuccessful he had to sue the plaintiff and his sureties on the replevin bond.

The sheriff was not bound to execute a writ de retorno habendo by actually delivering the goods or cattle therein mentioned to the defendant, unless the defendant or some person on his behalf attended to point out the particular goods or cattle, and to receive the same. If that were not done the sheriff might make a return to the writ that no person did so attend (*p*).

The writ of retorno habendo was generally sued out for the purpose of founding proceedings on the replevin bond; but this is un-

(*e*) 2 Chit. Arch. 1085 (12th ed.).

(*f*) Id. 1086; forms, Chit. Forms, 590, 601, 606, 610, 613 (9th ed.).

(*g*) Ante, 489.

(*h*) 2 Chit. Arch. 1086 (12th ed.); forms, Chit. Forms, 601, 602, 606, 611, 614.

(*i*) See R. S. C. Order XLII. Rule 4; Order XLIX.

(*k*) Ante, 488.

(*l*) 2 Chit. Arch. 1085 (12th ed.); Chit. Forms, 597, 605, 609, 613, 615 (9th ed.).

(*m*) Watson, Sheriff, 420 (2nd ed.); form, Id. 539; Chit. Forms, 591.

(*n*) The meaning of “in withernam” seems to be “by way of reprisal.” See Steph. Com. (7th ed.), Vol. III., p. 423.

(*o*) 2 Chit. Arch. 1086 (11th ed.).

(*p*) 2 Wms. Saund. 74 b, c; 2 Chit. Arch. 1086.

necessary, for as such bond is conditioned to prosecute the suit “with effect,” and also to make a return, if return be awarded, the bond is forfeited by the plaintiff not prosecuting his suit *with success* (q). The bond is considered as a further and better security for such return, &c. (r). CH. XII. s. 1.
Replevin (in High Court).

The jury will now probably always find the value of the goods, and the judgment, if for the defendant on his counter-claim, will be the same as that for the plaintiff in an ordinary action for detention of goods. Jury to find
Value.

(e) *Action of Replevin removed by Certiorari from County Court into the High Court.*

A plaintiff who has elected to bring an action of replevin in the County Court cannot afterwards remove it into the High Court (s). Not by Plaintiff.

The defendant in an action of replevin commenced in the County Court may sometimes cause such action to be removed by writ of certiorari into the High Court, pursuant to 19 & 20 Vict. c. 109, s. 67 (t). The application for such writ should generally be made to a judge at chambers, and not to the court, except under special circumstances (u). It should be supported by an affidavit entitled in the court to which, or to the judge of which the application is made; but not in any cause or matter (x). It must show the special facts on which the defendant relies in support of the application, and particularly that he has good ground for believing either that the title to some corporeal or incorporeal hereditament, or to some toll, market, fair or franchise is in question, or that the rent or damage in respect of which the distress was taken *exceeded* 20*l.* (y). The judge may in his discretion order the writ to issue upon an *ex parte* application; but more frequently only a summons to show cause is granted in the first instance (z). The court or judge may direct that the rule nisi or summons shall operate as a stay of proceedings (a). It should be drawn up and served, without delay, on the opposite party and on the registrar of the County Court. If not so served two clear days before the day fixed for the hearing of the cause the judge of the County Court may, in his discretion, order the party who obtained the rule or summons to pay all the costs of the day, or so much thereof as he shall think fit, unless the High Court or a judge thereof shall By Defendant.

Application for Certiorari.

Affidavit in support.

Order or Summons,

with a Stay of Proceedings.
Service thereof.

(q) *Watson, Sheriff*, 421.

(r) *Turnor v. Turner*, 2 Brod. & B. 107.

(s) *Ante*, 472.

(t) See *Mungson v. Wheatley*, 6 Exch. 583; 20 L. J., Ex. 106.

(u) *Bowen v. Evans*, 3 Exch. 111; 6 D.

& L. 193.

(x) 2 Chit. Arch. 1088 (11th ed.).

(y) See forms of affidavit, Chit. Forms, 583 (9th ed.).

(z) 2 Chit. Arch. 1088.

(a) 19 & 20 Vict. c. 108, s. 40.

CH. XII. s. 1. have made some order respecting such costs (*b*). Where the writ has been granted on an ex parte application, and the party who obtained it shall not lodge it with the registrar, and give notice to the opposite party, two clear days before the day fixed for hearing the cause to which it shall relate, the judge of the County Court may, in his discretion, order the party who obtained the writ to pay all the costs of the day, or so much thereof as he shall think fit, unless the High Court or a judge thereof shall have made some order respecting such costs (*c*).

No renewed Application; unless on Appeal; or on different Grounds. By 19 & 20 Vict. c. 108, s. 44, "when any superior court or a judge thereof shall have refused to grant a writ of certiorari" [&c.] "no other superior court or judge thereof shall grant such writ" [&c.]: "but nothing herein shall affect the right of appealing from the decision of the judge of the superior court to the court itself, or prevent a second application being made for such a writ" [&c.] "to the same superior court or a judge thereof, on grounds different from those on which the first application was founded."

Order or Rule absolute. Writ of Certiorari. The summons or rule nisi is heard and determined in like manner as in other cases. When an order or rule absolute is obtained, the writ of certiorari may be issued (*d*). The defendant must thereupon give security, to be approved of by one of the masters, for such amount, not exceeding 150%, as such master shall think fit, conditioned as pointed out in 19 & 20 Vict. c. 108, s. 67 (*e*). The security is in the form of a bond, with two sureties, to the plaintiff (*f*). Or instead of a bond, a deposit may be made with a memorandum (*g*). The writ is then delivered to the judge or registrar of the County Court, with such bond or memorandum annexed, who will thereupon make a return to the writ (*h*); and when such writ and return are filed at the master's office the proceedings are removed into the superior court.

Appearance. The defendant should then enter an appearance in the High Court in the usual form (*i*), and give notice thereof to the plaintiff or his attorney. It seems, however, that if the defendant will not enter an appearance, there may be considerable difficulty in compelling him to do so, but it will probably be always possible to obtain an order at chambers for the purpose (*k*); and, on the other hand, the defendant could not non pros. the plaintiff for not declaring, because no day is given by the writ of certiorari to the parties to appear in the superior court (*l*), but this will not now prevent an order being made to dismiss

(*b*) 19 & 20 Vict. c. 108, s. 40.

(*c*) Id. s. 41.

(*d*) Form, Chit. Forms, 584 (9th ed.).

(*e*) Ante, 469.

(*f*) Sect. 70, ante, 469.

(*g*) Sect. 71, ante, 469.

(*h*) For Forms of bond, deposit, and return, see post, Appendix E., Sect. 3, (*b*), 4, 5, 7.

(*i*) See Appendix to Rules of Supreme Court.

(*k*) See 2 Chit. Arch. 1089 (11th ed.); Chit. Forms, 587 (9th ed.).

(*l*) See *Clerk v. Mayor, &c. of Berwick*, 4 B. & C. 649; *Garton v. Great Western R. Co.*, 1 E. & E. 258; 28 L. J., Q. B. 103; 2 Chit. Arch. 1316.

for want of prosecution under Order XXIX. of the Rules of the Supreme Court. And it must not be forgotten that if the plaintiff do not proceed in the action with due diligence he will forfeit the condition of his bond given when the goods or cattle were replevied, notwithstanding the removal of the cause into a superior court: at all events, this was so when the proceedings were removed by *re. fa. lo.*, in which the parties had a day given them to appear in the superior court (*m*).

CH. XII. s. 1.
Replevin (Removed to High Court by Cartiorari).

The subsequent proceedings are in all respects similar to those where the action is commenced in the High Court (*n*). If the defendant succeed in the action, he must (unless the plaintiff discontinues, or does not prosecute the action, or becomes nonsuited therein) prove before the High Court that he, the defendant, had good ground for believing either that the title to some corporeal or incorporeal hereditament, or to some toll, market, fair or franchise was in question, or that the rent or damage in respect of which the distress was taken exceeded 20*l.* (*o*). The mode of doing this has been already suggested (*p*).

Subsequent Proceedings.

(f) *Writs of Recaption and Second Deliverance.*

The return of the chattels distrained to the defendant, in case of an avowry for rent, is awarded on the principle that they should be detained as a pledge only until the rent or duty for which they were taken be paid or satisfied. As the defendant, whilst the suit is pending to determine the legality of the caption, has security to have a return made, if he make out his claim, it was found necessary to protect the tenant's property from further distresses, for the same cause, whilst the action of replevin was going on. For this purpose the writ of recaption was framed; in which, if the defendant be convicted, he shall be fined to the Queen; because, by the second caption, the defendant takes upon himself to determine the justice and legality of the first, while that very point is under the consideration of the court in which the replevin depends; for if the distress were lawful, he should have a return of it, and therefore the second is unreasonable; and if the first were unlawful, much more is the second; so that the recaption lies even where the cause of the first caption is just (*q*). If, however, the same cattle, or other cattle of the same proprietor, come on to the land damage feasant, they may

Writ of Recaption.

(*m*) *Morris v. Matthews*, 2 Q. B. 293;
Genl v. Cutts, 11 Q. B. 288; *Evans v.*
Bowen, 7 D. & L. 320.

(*n*) *Ante*, 477.

(*o*) 19 & 20 Vict. c. 108, s. 67; *ante*, 469.
(*p*) *Ante*, 477.

(*q*) *Imp. Gilb. Repl.* 224; *Fitz. N. B.*
71 E.

CH. XII. s. 1.

*Replevin (Recap-
tion and
Second De-
liverance).**Writ of
Second De-
liverance.*

be distrained again, because each distress is for a distinct or several injury (*r*). In the writ of recaption there can be no avowry, but the defendant must justify as in trespass.

At common law, if the plaintiff had been nonsuited, either before or at the trial, the defendant who distrained should have had return, but not irreplevisable; so that the plaintiff after nonsuit might have had as many replevins as he chose. To remedy this evil, the Statute of Westminster 2 (13 Edw. 1, st. 1), c. 2, restrains the plaintiff from any more replevins after nonsuit; but in lieu thereof gives a writ of second deliverance. The writ issues out of the Petty Bag Office (*s*). It must be made returnable in the same court in which the previous action of replevin was pending (*t*). It would seem that it may be directed to the proper County Court, for such courts are now courts of record. If in such writ the plaintiff be nonsuited, or if the plea be discontinued, or the writ abate, or if he prevail not in his suit, a return irreplevisable shall be awarded (*u*). Upon a nonsuit, either before or after evidence, this writ will lie, because there is no determination of the matter; but no second deliverance lies after a judgment upon demurrer, or after a verdict, or confession of the avowry. In all these cases judgment must be entered with a return irreplevisable; for in the case of a demurrer and verdict, the matter is determined by the law, and in that of a confession, it is determined by the confession of the party. The writ of second deliverance must not vary in substance from the declaration in replevin, or it shall be abated; but although the writ cannot vary from that in year, day, place or number of beasts, yet if the first writ was of a hoifer, the second may be of a cow, as by presumption it may in that distance of time grow to such. Where a writ of second deliverance is awarded, it is a supersedeas of the execution of a retorno habendo, and closes the sheriff's hand from making any return thereon; but where the defendant had avowed, and the plaintiff being nonsuited, brought this writ, it was held, that this was not a supersedeas of the writ of inquiry of damages; for these damages were not for the thing avowed for, but were given by the statute 21 Hen. 8, c. 19, as a compensation for the expense and trouble the avowant has been at. The proceeding in second deliverance is exactly the same as in replevin, except that in the declaration it is stated that A. B. was summoned by her Majesty's writ of second deliverance to answer, &c. (*x*). If the sheriff will not execute the writ of second deliverance, the party has his remedy against him.

(*r*) Fitz. N. B. 71 E.

(*s*) In the Rolls Yard, Chancery Lane.

(*t*) 13 Edw. 1, stat. 1, c. 2.

(*u*) Bac. Abr. tit. *Replevin* (E 3). When the distress has been for rent, the writ of

second deliverance is, it would seem, taken away by statute 17 Car. 2, c. 7; Wilk. Repl. 138.

(*x*) Co. Entr. 589 a.

Return irreplevisable is a judicial writ directed to the sheriff, for the final restitution of the cattle unjustly taken by another, and so found by verdict, or after nonsuit on a second deliverance (y). If the plea be to the writ, or any other plea be tried by a verdict, or judged upon demurrer, a return irreplevisable shall be awarded, and no new replevin shall be granted, nor any second deliverance by the Statute of Westminster 2, but only upon a nonsuit; but if upon issue joined the plaintiff do not appear on the trial, being called for that purpose, a return irreplevisable shall not be awarded, but the party may have a writ of second deliverance. If a man has a return irreplevisable, and a beast dies in the pound, he may distrain anew; so, if the beast dies before judgment. The owner, however, may tender the arrears, with all costs (including the expenses of the distress); and if the defendant then refuse to deliver the distress—it being only in the nature of a pledge—the plaintiff may bring an action for the detention.

CH. XII. s. 1.
*Replevin (Recap-
tion and
Second De-
liverance.*

Nature of a
Return irre-
plevisable.

(g) *Proceedings on the Replevin Bond.*

The condition of a replevin bond varies according to the court in which the action of replevin is to be commenced and prosecuted (z).

An action on the bond may be brought immediately on the condition being broken (a). It must be brought in the name of the obligee, his executors or administrators. It may be brought against all the obligors jointly, or against any one of them separately; but not against any two, unless the other be dead. The court in which the action is brought may by rule or order give such relief to the obligors as may be just, and such rule or order shall have the effect of a defeasance of such bond (b). The obligees are liable only to the amount of the penalty on the bond and the costs of the action thereon (c). Therefore proceedings in such suit may be stayed on payment of the penalty and costs, though the plaintiff's costs in the replevin suit much exceed the penalty (d). A judge at chambers may order the stay of proceedings (d). The sureties are liable only to the amount of the rent in arrear at the time of the distress, and the costs of the action of replevin and of the action on the bond; but not for any subsequent rent (e).

(y) Bac. Abr. tit. *Replevin* (E 6).

(z) Ante, 463.

(a) Gilb. Repl. 225; see *Waterman v. Yea*, 2 Wils. 41; *Turnor v. Turner*, 2 Brod. & B. 107; 2 Chit. Arch. 1101 (12th ed.).

(b) 19 & 20 Vict. c. 108, s. 70; ante, 469.

(c) *Hefford v. Alger*, 1 Taunt. 218; *Dranscombe v. Scarborough*, 6 Q. B. 13.

(d) *Ward v. Henley*, 1 Y. & J. 286.

(e) Ante, 478.

CH. XII. s. 1.

*Replevin
(Proceedings to
obtain Deposit
in lieu of
Bond).*

(h) *Proceedings to obtain Sum deposited in lieu of a Bond.*

Where a sum of money has been deposited with a memorandum pursuant to 19 & 20 Vict. c. 108, s. 71 (f), "the judge of the County Court, when the money shall have been deposited in such court, or a judge of the superior court, when the money shall have been deposited in a superior court, may, on the same evidence as would be required to enforce or avoid such bond, order such sum so deposited to be paid out to such party or parties as to him shall seem just" (f). The application should be founded on a sufficient affidavit or affidavits of the facts, showing a breach or breaches of the condition or full performance thereof, as the case may be.

SECT. 2.—*Damages for Wrongful Distress.*(a) *Summary Remedy within the Metropolitan Police District.*

2 & 3 Vict.
c. 71, s. 39.
Summary
Remedy for
unlawful, ex-
cessive and
irregular
Distresses
within the
Metropolitan
Police Dis-
trict.

By 2 & 3 Vict. c. 71, "An Act for regulating the Police Courts in the Metropolis," it is enacted (sect. 39), "That on complaint made to any of the said magistrates by any person who shall, *within the metropolitan police district*, have occupied any house or lodging *by the week or month*, or whereof the rent does not exceed the rate of *fifteen pounds by the year*, that his goods have been taken from him by an unlawful distress, or that the landlord, or his broker or agent, has been guilty of any irregularity or excess in respect of such distress, it shall be lawful for such magistrate to summon the party complained against: and if upon the hearing of the matter it shall appear to the magistrate that such distress was improperly taken, or unfairly disposed of, or that the charges made by the party having distrained, or having attempted to distrain, are contrary to law, or that the proceeds of the sale of such distress have not been duly accounted for to the owner thereof, it shall be lawful for the magistrate to order the distress so taken, if not sold, to be returned to the tenant on payment of the rent which shall appear to be due at such time as the magistrate shall appoint; or if the distress shall have been sold, then to order payment to the said tenant of the value thereof, deducting thereout the rent which shall so appear to be due, such value to be determined by the magistrate; and such landlord or party complained against, in default of compliance with any such order, shall forfeit to the party aggrieved the value of such distress, not being greater than fifteen pounds, such value to be determined by the magistrate."

This enactment (which is permissive only, and does not prevent a

tenant suing for double value where he can) is confined to distresses for rent made within the metropolitan police district, the limits whereof are defined in the schedule to 10 Geo. 4, c. 44; also to cases where the rent does not exceed 15*l.* per annum, or the tenancy was by the week or month. It would seem that it might be very beneficially extended to the whole kingdom, and to larger tenancies, and also to be made applicable to distresses for damage feasant, &c.

CN. XII. s. 2.
*Remedy for
Wrongful
Distress in
Metropolis.*

(b) *Action for Double Value under 2 Will. & Mary, sess. 1, c. 5.*

In cases where no rent was owing, and the distress has been sold, the owner may recover double the value of the goods distrained. This very full remedy is given by 2 Will. & Mary, sess. 1, c. 5, s. 5 (*g*), which provides that “in case any such distress or sale as aforesaid [i. e. sale after five days, failing a replevy] shall be made by virtue and colour of this present act for rent pretended to be in arrear and due, where in truth no rent is in arrear and due to the person or persons distraining, or to him or them in whose name or names or right such distress shall be taken as aforesaid, then the owner of such goods or chattels distrained and sold as aforesaid, his executors or administrators, shall and may, by action of trespass, or upon the case, to be brought against the person or persons so distraining, any or either of them, his executors or administrators, recover double of the value of the goods or chattels so distrained and sold, together with full costs of suit (*h*). If such an action be brought, the jury must be directed to give double value as damages, and cannot give nominal damages (*i*).

Double
Damages in
case of Sale
where no
Rent owing.

(c) *Ordinary Action for Damages.*

Under the system of procedure in the superior courts of law under the Common Law Procedure Acts, the action differed according as the act of the landlord in distraining was (1) wrongful and illegal, or (2) excessive only, or (3) merely irregular. In the first case the tenant might have recourse to an action of trespass or trover or detinue; in the second to an action on the case for damages under the statute of Marlebridge, 52 Hen. 3, c. 4, unless the distress was plainly excessive on the face of it, in which case it was illegal, and the tenant might bring an action of trespass (*k*); or in the third case the tenant might

Ordinary
Action for
Wrongful
Distress.

(*g*) See the main section of the statute, ante, 443.

(*i*) *Masters v. Farris*, 1 C. B. 715.

(*h*) As to costs, see now R. S. C. Order LV., and 453 (*n*), ante.

(*k*) *Moir v. Munday*, cited in 1 Burr. 582, 590.

CH. XII. s. 2.
*Recovery of
 Damages for
 Wrongful
 Distress.*

maintain an action on the case against the landlord, or trover against a purchaser of the goods. But it must be remembered that, where the distress is only irregular and does not amount to a trespass, and is not excessive, the right of action depends upon the fact of the tenant having suffered actual damage, and he cannot maintain any action answering to the old actions of trespass or trover (*l*).

One Form of
 Indorsement
 of Writ for
 all Claims.

By the Judicature Acts and the Rules of the Supreme Court these distinctions are for the most part swept away. There is now one form of endorsement of writ provided for all claims for damages arising from wrongful distress, whether illegal, excessive, or only irregular (*m*). The statements of claim and defence must set out the facts so far as they are necessary to show that the plaintiff has a good cause of action and that the defendant has a good defence respectively, care being taken to set out such circumstances as will make the distress wrongful in some of the ways pointed out in the earlier part of this chapter. There is, however, no technical distinction between the forms of action. There is no specimen statement given in the Appendix to the Rules of the Supreme Court.

Against
 whom Action
 should be
 brought.

It is, however, still material to distinguish the various kinds of wrongful distress in relation to the question against what persons a tenant can proceed. In the case of an illegal distress, the action should be brought against the person actually committing the illegal act, and not against the landlord, unless it can be shown that he expressly authorized the act or adopted and ratified it afterwards (*n*), of which his presence on the premises immediately after the committal of the wrongful act is evidence (*o*), though the mere receipt of the proceeds without proof of knowledge of the illegal act is not so (*p*).

Damages.

When the distress is illegal, and therefore void from the commencement, the tenant is entitled to recover the full value of the goods distrained (or of such part of them as were not subject to distress (*q*)), and any damages sustained by him, nor need any deduction be made for the rent due from him (*r*). If, however, the landlord seize, among others, things not liable to distress, and on payment of rent and costs withdraws, the tenant can only recover the actual damage sustained by him by the seizure of the particular privileged goods (*s*). If no

(*l*) *Robinson v. Waddington*, 13 Q. B. 753; *Lucas v. Turlerton*, 3 H. & N. 116; 27 L. J., Ex. 246; *Whitworth v. Smith*, 5 C. & P. 260; *Carter v. Carter*, 5 Bing. 406.

(*m*) R. S. C. App. A., Part II., s. 4; post, App. D.

(*n*) *Lewis v. Read*, 13 M. & W. 834; *Freeman v. Rosher*, 13 Q. B. 780; 6 D. & L. 517; *Gauntlett v. King*, 3 O. B., N. S. 59; *Haseler v. Lemoyne*, 5 O. B., N. S. 630; but see *Hurry v. Rickman*, 1 Mood. & Rob. 128.

(*o*) *Moore v. Drinkwater*, 1 F. & F. 134.

N. S. 479; 34 L. J., C. P. 150.

(*r*) *Attack v. Bramwell*, 3 B. & S. 520; 32 L. J., Q. B. 146; *Edmondson v. Nuttall*, 17 C. B., N. S. 280. See, too, *Sutton v. Dorko and Nizon v. Freeman*, 5 H. & N. 647.

(*s*) *Hurry v. Pocock*, 11 M. & W. 740; 12 L. J., Ex. 434.

rent be in arrear and the goods have been sold, the tenant may recover double the value of the goods and full costs of suit (*t*). CH. XII. s. 2.
*Recovery of
Damages for
Wrongful
Distress.*

In addition to proceeding for damages for the illegal distress, the tenant may, if he prefer it, proceed in what may still be called an action of trover or detinue against the person who has by purchase or otherwise come into possession of the goods; for which cases forms of indorsement of writs are provided (*u*). The tenant will have the same rights as to the amount of damages he may recover as in the former mode of action (*x*).

Action of
Trover, &c.

Similar actions may be maintained by others whose goods are taken who are not tenants of the landlord purporting to distrain, but those cases would not be properly noticed here, as, in regard to them, there could be no relation of landlord and tenant.

Where the only complaint against the landlord is that the sale has produced more than the amount due, and the overplus has not been left in the hands of the sheriff, under-sheriff or constable, as directed by 2 Will. & Mary, sess. 1, c. 5, the tenant should sue in tort, as for a breach of the statute, and not for a return of the balance as money received to his use (*y*). Action for
Overplus.

Prior to 11 Geo. 2, c. 19, any irregularity in a distress made the distress unlawful, so that the full value of the rent for which the distress was taken might be recovered by action (*z*). But this hardship upon landlords was remedied by sect. 19 of that statute, which enacts that, "where any distress shall be made for any kind of rent justly due, and any irregularity or unlawful act shall be afterwards done by the party or parties distraining or by his, her or their agents, the distress itself shall not be deemed to be unlawful, nor the party or parties so making it be therefore deemed a trespasser or trespassers ab initio; but the party or parties aggrieved by such unlawful act or irregularity shall or may recover full satisfaction for the special damage he, she or they shall have sustained thereby, and no more, in any action of trespass, or on the case at the election of the plaintiff or plaintiffs; provided always, that where the plaintiff or plaintiffs shall recover in such action, he, she or they shall be paid his or their full costs of suit, and shall have all the like remedies for the same as in other cases of costs." Excessive or
Irregular
Distress.
11 Geo. 2,
c. 19, s. 19.

By sect. 20 of the same statute, "no tenant," &c. "shall recover in any action for any such unlawful act or irregularity, if tender of amends hath been made by the party distraining, or his agent, before action brought." If amends be tendered under this section, the land-

(*t*) 1 W. & M., sess. 1, c. 5, s. 4.

L. J., Ex. 303; *Evans v. Wright*, 2 H. &

(*u*) R. S. C. App. A., Part II., s. 2.

N. 527.

(*x*) Ante, p. 498.

(*z*) See preamble of 11 Geo. 2, c. 19,

(*y*) *Yates v. Eastwood*, 6 Exch. 805; 20 s. 19, *Six Carpenters' case*, 1 Sm. L. C.

CH. XII. s. 2. lord need not in the case of action pay the 'money into court (a). Nor can the person in possession of the goods be sued for a conversion of them (b). Whether the distress was excessive is for the jury (c).
*Recovery of
 Damages for
 Wrongful
 Distress.*

A right of action for an excessive distress will not be defeated by a subsequent arrangement made by the tenant with the landlord to prevent a sale of the goods (d); but a recovery in replevin is a bar to any subsequent action for an excessive distress (e).

Property of
 Plaintiff.

*Fell v.
 Whitaker.*

The plaintiff must of course show that he has such a property in the goods as will allow him to maintain an action, and it has been held that the mere enjoyment of the use of the goods by a person who is neither legal nor equitable owner will entitle him to sue (f).

"Not Guilty
 by Statute."

With regard to the defences to actions for illegal, excessive or irregular distresses, the statement of defence must contain such matters as will show the defendant's action to have been lawful, and the only matter to be particularly noticed is that by 11 Geo. 2, c. 19, s. 21, the defendant was allowed to plead not guilty by statute, and give the special matter in evidence (g), a right in all cases in which it existed, preserved under the Judicature Acts (h), subject only to this that no other defence can be pleaded with it except by leave of the court or a judge (h); and it may be as well to point out that in one case at least a plea of not guilty by statute, together with a special plea of justification, under a right to distrain, was, under the old practice, disallowed, as setting up matters which could be disposed of under the one defence of the general issue (i).

Section 21 of 11 Geo. 2, c. 19, is as follows:—

"In all actions of trespass, or upon the case, to be brought against any person or persons entitled to rents or services of any kind, his, her or their bailiff or receiver, or other person, relating to any entry by virtue of this act, or otherwise, upon the premises chargeable with such rents or services, or to any distress or seizure, sale or disposal, of any goods or chattels thereupon, it shall and may be lawful to and for the defendant or defendants in such actions to plead the general issue and give the special matter in evidence, any law or usage to the contrary notwithstanding; and in case the plaintiff or plaintiffs shall

(a) See *Jones v. Gooday*, 9 M. & W. 736 (decided on a local act).

(b) *Whitworth v. Smith*, 5 C. & P. 250; 1 Moo. & R. 193.

(c) See *Smith v. Ashforth*, 29 L. J., Ex. 259.

(d) *Willoughby v. Backhouse*, 2 B. & C. 821; *Fells v. Hoare*, 1 Bing. 401; 1 C. & P. 28; and see this case commented on in *Glyn v. Thomas*, 11 Exch. 370, 876.

(e) *Phillips v. Berryman*, 3 Doug. 286;

White v. Willis, 2 Wils. 87; *Pease v. Chaytor*, 1 B. & S. 658, 662; 3 B. & S. 620; 32 L. J., M. C. 121.

(f) *Fell v. Whitaker*, L. R., 7 Q. B. 120; 41 L. J., Q. B. 73; 25 L. T. 880; 20 W. R. 317.

(g) 11 Geo. 2, c. 19, s. 21. See *Nash v. Lucas*, L. R., 2 Q. B. 590.

(h) R. S. C. Order XIX., Rule 16.

(i) *Neale v. Mackenzie*, 1 C. M. & R. 61; 2 Dowl. 702.

become nonsuit, discontinue his or their action, or have judgment against him, her or them, the defendant or defendants shall recover double costs of suit.”

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*Recovery of
Damages for
Wrongful
Distress.*

This section is very wide, but it would seem to include cases of irregular and excessive distress only, and not to apply to unlawful distress.

The defendant is not bound to avail himself of the section, but may, it is conceived without leave, enter a defence in the ordinary form. If the defendant has not previously so tendered and pays money into court, the plaintiff is entitled only to his ordinary costs of suit, and not to the full costs, &c., which are given by 5 & 6 Vict. c. 97, s. 1, in lieu of the double costs given by 11 Geo. 2, c. 19, s. 21 (k).

Under the defence of “not guilty by statute” the tenancy and ownership of the goods, as well as other matter of justification, is put in issue (l).

The measure of damages appears to be, in cases of excessive distress, the fair value of the goods (not merely what they would have fetched at a broker’s sale), minus, however, the rent due and the cost of the distress (m); and although the plaintiff fail to prove that he has sustained actual damage, yet on proof only that the distress was excessive he is entitled to recover some damages (n). If, however, the distress be merely irregular the defendant must succeed, unless actual damage be proved (o).

*Measure of
Damages.*

(k) *Handcock v. Foulkes*, 9 M. & W. 431; 1 Dowl., N. S. 658. 11 Geo. 2, c. 19, s. 21, is repealed by 5 & 6 Vict. c. 97, s. 1, so far as costs are concerned.

(l) *Williams v. Jones*, 11 A. & E. 643; *Ross v. Clifton*, Id. 631.

(m) See *Biggins v. Goode*, 2 C. & J. 364; *Knight v. Egerton*, 7 Exch. 407; *Piggott v. Birtles*, 1 M. & W. 441; and *at nisi prius*,

Knotts v. Curtis, 5 C. & P. 322; *Wells v. Moody*, 7 C. & P. 59; *Whitworth v. Madden*, 2 C. & K. 517.

(n) *Chandler v. Doulton*, 3 H. & C. 553; 34 L. J., Ex. 89.

(o) *Lucas v. Tarleton*, 3 H. & N. 116; 27 L. J., Ex. 246; *Rodgers v. Parker*, 18 C. B. 112; 25 L. J., C. P. 220.

CHAPTER XIII.

RECOVERY OF RENT BY ACTION.

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WE have now fully considered the landlord's peculiar remedy to recover rent by distress; but rent, like other debts, can be recovered by ordinary process of law, if the landlord prefer that to a distress. Formerly the process was distinguished according as it was based upon covenant or simple contract, express or implied, but these distinctions, weakened by the Common Law Procedure Acts, have (as technicalities) ceased to exist since the Judicature Acts have come into operation. It will, however, be convenient to maintain the distinctions (as regards terminology), as the terms may still be popularly used, and also because they are necessary to some extent when considering who are the persons who can sue and be sued, and how the right of action is affected by the Statute of Limitations. Rent, then, may be recovered by proceedings based on—

- (1) Some express covenant in the instrument of demise, if under seal;
- (2) Some express agreement contained in an instrument not under seal, or made by parol only;
- (3) An agreement which the law will imply from the conduct of the parties.

SECT. 1.—*Recovery of Rent on the Covenant to pay it.*

Early Law.

Previous to the year 1845, no one could sue on a covenant unless he was a party thereto, or, at furthest, a legal representative or assign of a party (a); but by 8 & 9 Vict. c. 106, s. 5, it was enacted, that “under an indenture executed after the 1st day of October, 1845, an immediate estate or interest in any tenements or hereditaments, and the benefit of a condition or covenant respecting any tenements or hereditaments, may be taken, although the taker thereof be not named a party to the same indenture” (b). The law, however, remains the same as before with regard to a deed poll (c).

(a) *Green v. Horne*, 1 Salk. 197; *Berkeley v. Hardy*, 5 B. & C. 355; *Ld. Southampton v. Brown*, 6 B. & C. 718; *Bushell v. Bevan*, 1 Bing. N. C. 103, 120.

(b) *Reeves v. Watts*, 7 B. & S. 523; L. R., 1 Q. B. 412; 35 L. J., Q. B. 171.

(c) *Green v. Horne*, *supra*.

And even before the act an action might have been (and still may be) maintained by a party to an indenture against one who was not a party, but executed the deed (*d*); and where B. assigned the lease of a house to A. by deed subject to certain covenants, and A. took possession, it was doubted whether B.'s remedy for a breach of the covenants was not by an action of covenant, although A. never executed the deed (*e*).

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*Action on Cove-
nant for Rent.*
Early Law.

Where a deed is void, any covenant therein contained is void also, and no action can be maintained for its infraction (*f*); but if the deed be merely voidable, an action may be maintained for any breaches of covenant which happened before the deed was avoided (*g*). And we have already seen that the rule for construing leases is, that a proviso that the lease shall be void on breach of the covenants means that the lease shall be void at the election of the lessor (*h*).

On Cove-
nants in a
void or void-
able Deed.

We have also seen that if the right to take legal proceedings on a covenant depends on the performance of a condition precedent, such condition must be shown to have been performed (*i*).

An action for breach of covenant may be maintained by or against the parties to the contract or their personal representatives, whether the covenant be one which runs with the land or be merely a personal covenant. With regard to the position of assignees, we have already seen to what extent they have privity of contract or estate such as will enable them to sue (*k*). And it is only necessary to note this, that when there is a right of action against both the lessee and his assignee, he can proceed to execution only against one (*l*). When there are two or more persons binding or bound by the covenant it must not be forgotten that where the words of a covenant are clearly joint, and not several, it will be so construed, although the interest may be several; and so vice versâ (*m*); but where the words admit of two constructions, they will be construed to be joint or several, according to the interest (*n*); and joinder or non-joinder of parties to any proceeding must be regulated accordingly. Thus tenants in common and their representatives ought to join in an action for a covenant to pay rent (*o*), and to be so sued (*o*). Where the interest of the covenantees is joint, although the covenant is in terms joint and

By or against
whom the
Action may
be maintained
generally.

Proper Par-
ties in case of
joint Cove-
nants.

(*d*) *Salter v. Kidgley*, Carth. 76; Holt, R. 211; Shower, 58; 2 Prest. Conv. 396.

(*e*) *Hawkins v. Sherman*, 3 C. & P. 459; but see *Burnett v. Lynch*, 5 B. & C. 589, 602; 1 Chit. Pl. 129, 133 (7th ed.).

(*f*) *Smith v. White*, L. R., 1 Eq. 626; 35 L. J., Ch. 454.

(*g*) *Harishorne v. Watson*, 4 Bing. N. C. 178; *Selby v. Browne*, 7 Q. B. 620; *Lead v. Green*, 15 M. & W. 216, 223.

(*h*) See ante, Chap. V., Sect. 18.

(*i*) Ante, Chap. VI., Sect. 7.

(*k*) Ante, Chap. VI., Sects. 1—3.

(*l*) Cro. Jac. 523; 1 Chit. Arch. 544 (11th ed.).

(*m*) Ante, 146; 1 Lush Prac. 22 (3rd ed.); Ros. Ev. 680 (13th ed.); and see *Levy v. Sale*, 37 L. T. 709.

(*n*) Ante, 146; Bac. Abr. tit. Cove-
nant (D); 1 Lush Prac. 22 (3rd ed.).

(*o*) *Thompson v. Hakevill*, 19 C. B., N. S. 713; 35 L. J., C. P. 18.

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*Action on Cove-
nant for Rent.*

Proper
Parties
(continued).

several, the action follows the nature of the contract, and must be brought in the names of all the covenantees (*p*). For example, in a lease of a colliery the two lessees covenanted "jointly and severally in manner following," viz. that, &c.; then followed several covenants, after which was a covenant that monies due should be accounted for and paid by the lessees, their executors, &c. (not saying and each of them): this and the former covenants were held to be several as well as joint (*q*). But the legal niceties to be found in the decisions are now of little importance, as by the rules of the Supreme Court, Order XVI., Rule 13, ample means are provided for amendments in regard to parties.

And the same remark will apply to their representatives in case of decease, unless, of course, the covenant be specially made as a several covenant also (*r*).

Proper Parties
in case of
Death of
Landlord or
Tenant.

As to the persons who may sue or be sued if the landlord or tenant die, the matter has been sufficiently discussed already (*s*); and it may suffice to notice that when the landlord has died, if the rent was due before his death, his legal personal representative, and not his heir or devisee, has a right to sue on a covenant to pay rent, although such personal representative is not named in the covenant (*t*); but if the rent became due after the landlord's death the action must be brought by his heir or devisee (*u*), that is, if the landlord was seised in fee; for if he had only a chattel interest, of course in all cases the rent must be recovered by his personal representative. And it must also be remembered that where the breach is after the death of landlord or tenant, the executor or administrator may be sued either as representative or assignee upon any covenant which runs with the land (*r*).

The subject of the right of parties to sue on a covenant in the case of assignment has been fully treated already (*y*).

Indorsement
of Writ.

The plaintiff in an action for rent based upon a covenant may endorse his writ specially under Order III., Rule 6, of the Rules of the Supreme Court, with the benefit of the various advantages in regard to speedy judgment on such a form of writ given by Order XIV. of those Rules: if that is not done, the indorsement "the plaintiff's claim is for £. . . for arrears of rent" will probably cover all claims for rent, strictly so called, however reserved or payable (*z*).

(*p*) *Pugh v. Stringfield*, 3 C. B., N. S. 2; 27 L. J., C. P. 34.

(*q*) *Duke of Northumberland v. Errington*, 5 T. R. 524; *Copland v. Laporte*, 3 A. & E. 517; 1 Selw. N. P. 402 (13th ed.).

(*r*) *Thompson v. Hakewill*, 19 C. B., N. S. 713; 35 L. J., C. P. 18; *Foley v. Addenbrooke*, 4 Q. B. 107; Bullen, 49.

(*s*) Ante, Chap. VII., Sect. 10.

(*t*) Esp. N. P. 295; *Lucy v. Levington*, Vent. 175; 2 Lev. 26; *Dollen v. Batt*, 4 C. B., N. S. 760; 27 L. J., C. P. 281.

(*u*) Bac. Abr. tit. *Covenant* (E. 2).

(*x*) See ante, Chap. V., Sect. 8; Chap. VII., Sect. 10; and see *Gorton v. Gregory*, 3 B. & S. 90; 31 L. J., Q. B. 302.

(*y*) Ante, Chap. VII., Sects. 2, 3.

(*z*) R. S. C. App. A., Part II., sect. 2.

The statements of claim and other pleadings will be subject to the same rules as in other actions, and must, to speak generally, set out such facts as will give the plaintiff a clear right of action. The action will be tried where the plaintiff proposes or where the preponderance of convenience suggests, as all local venues are abolished by the Rules of the Supreme Court under the Judicature Acts (*a*).

CH. XIII. s.1.
Action on Cove-
nant for Rent.

By the Common Law Procedure Act of 1852 (15 & 16 Vict. c. 76), Sched. B, No. 23, a short form of declaration was provided for actions on covenants in a lease. The Rules of the Supreme Court under the Judicature Act provide a specimen statement of claim applicable to a simple case (*b*). Under the former practice it was unnecessary to state the details of the deed (*c*), or the locality of the premises (*d*), nor any fixtures, furniture, &c., as the rent is supposed to issue out of the realty (*e*), or the time when the rent became due. But as the pleadings now are to be statements of facts, such matters as the locality and the date when rent is due should be inserted for the defendant's information (*f*).

Pleadings.

It is sufficient to "state the effect" of the covenant "as briefly as possible, without setting out the whole or any part thereof, unless the precise words" of the covenant "or any part thereof are material" (*g*). The defendant may easily obtain inspection of the whole lease if he chooses (*h*).

The lessor need not set out his title (*i*), for the lessee cannot deny it if he set it out (*k*), although if the plaintiff's title be a derivative one only, he must show how he derives his title and from whom (*l*), and in the case of an executor or administrator suing those arrears of rent only which accrued due during the lifetime of the deceased can be recovered without showing the plaintiff's title (*m*).

Setting out
Lessor's Title.

If the statement of claim omits to state the lessor's title where that ought to be stated, the defendant may get it struck out or amended under R. S. C., Order XXVII., Rule 1 (*n*); otherwise it will be sufficient, at least after verdict (*o*). In many cases—such, for example, as actions by husbands (or their assignees) in right of their wives, in which there were certain special rules—it is not now necessary to

(*a*) R. S. C. Order XXXVI., Rule 1.
(*b*) See Appendix E, Sect. 2, (b.) 1, post.

(*c*) Sect. 55 of the Common Law Procedure Act, 1852.

(*d*) *Davis v. Edwards*, 3 M. & S. 380.

(*e*) *Farewell v. Dickenson*, 6 B. & C. 261; see, too, *Ward v. Smith*, 11 Price, 19.

(*f*) See, further, *Walker v. Hatton*, 10 M. & W. 249; 2 Dowl., N. S. 263; *Hill v. Saunders*, 1 C. & P. 80.

(*g*) R. S. C. Order XIX., Rule 24.

(*h*) R. S. C. Order XXXI., Rule 14.

(*i*) *Aleberry v. Walby*, 1 Stra. 230, 231;

1 Wms. Saund. 233 *a*, n. (2).

(*k*) *Beckett v. Bradley*, 7 M. & G. 994; 2 D. & L. 586; 4 Doug. 213.

(*l*) See, for example, 2 Wms. Saund. 751, 826; Bullen & L. Pl. 209 (3rd ed., 1871); *Wild v. Baxter*, 11 Exch. 816; 1 H. & N. 568; *Cuthbertson v. Irving*, 4 H. & N. 742; 6 Id. 135.

(*m*) *Dollen v. Batt*, 4 C. B., N. S. 760, 771; 1 Chit. Pl. 337 (7th ed.); 2 Id. 406, 408.

(*n*) See *Cuthbertson v. Irving*, 4 H. & N. 742; 6 Id. 135.

(*o*) *Harris v. Beavan*, 4 Bing. 646.

CH. XIII. s. 1 follow any technical form so long as the facts pleaded show a right to bring the action (*p*).

Action on Covenant for Rent.

Statement of derivative Title of Defendant.

Where the action is against an assignee of the lessee, it has never been necessary for the plaintiff to set out the several mesne assignments to the defendant, for they do not lie within his knowledge, provided that he state the original demise, and that all the estate and interest of the lessee came to and vested in him (the defendant) by assignment (*q*). It must, however, be shown that the defendant is the assignee of the term as well as of the premises, for otherwise it might be an assignment of another estate than the term of the lessee. And if the defendant be assignee of part only of the demised premises he should be charged accordingly, and not as assignee of the whole (*r*).

Defences of Tenant.

With regard to any defence which the tenant may set up, it must be borne in mind that he cannot deny that his landlord had a good title at the time of the demise (*s*), but he may show that his landlord's title has ceased since the demise (*t*), and may dispute the title of a plaintiff whose claim is derivative only, as in such case there is no estoppel operating against the tenant (*u*). Any set-off or counter-claim may be pleaded as in ordinary actions. Entry and eviction may be set up in answer to an action for rent due under a covenant (*x*); provided there be really an eviction (*y*), for which (it may be remarked) no physical expulsion is required (*z*), and eviction by a stranger, if lawful, may also be set up as a defence (*a*). Any tender of the rent must, to be an answer to the action, be made on the day when it is due (*b*). It appears to have been formerly held that a plea that the demand had been satisfied by distress was a bad plea when the action was on a covenant (*c*), but it would now be in any case probably upheld under the equitable jurisdiction possessed by all courts (*d*).

(*p*) See, for example, *Fryer v. Coombs*, 11 A. & E. 403; *Polyblank v. Hawkins*, 1 Doug. 329; *Major v. Talbot*, Cro. Car. 285; *Wood v. Day*, 1 Moore, 389; *Noke v. Auder*, Cro. Eliz. 373, 436.

(*q*) Bullen & L. Pl. 214 (3rd ed.).

(*r*) *Grattan v. Wall*, 2 I. R., Com. L. 484, Exch.

(*s*) See *Parker v. Manning*, 7 T. R. 537; *Langford v. Selmes*, 3 K. & J. 220; 2 Jur., N. S. 859; *Duke v. Ashby*, 7 H. & N. 600; *Blake v. Foster*, 8 T. R. 487; *Wilkins v. Wingate*, 6 T. R. 62.

(*t*) *Langford v. Selmes*, *Duke v. Ashby*, supra; see, too, *Simons v. Farren*, 1 Bing. N. C. 126, 272; *Cuthbertson v. Irving*, 4 H. & N. 742; 6 Id. 135.

(*u*) *Carrick v. Blagrove*, 1 B. & B. 531; *Weld v. Baxter*, 11 Exch. 816; 1 H. & N. 568; 26 L. J., Ex. 112; *Dollen v. Batt*, 4 C. B., N. S. 76; *Cuthbertson v. Irving*,

4 H. & N. 742; 6 Id. 135; 1 Wms. Saund. 233 a; 2 Bing. N. C. 420, n (2).

(*x*) *Dalston v. Reeve*, 1 Ld. Raym. 77; *Walker's case*, 3 Co. R. 22 b; *Morrison v. Chadwick*, 7 C. B. 266; 13 L. J., C. P. 189.

(*y*) *Dunn v. Di Nuovo*, 3 M. & W. 106; 3 So. N. R. 487.

(*z*) *Upton v. Townsend*, 17 C. B. 30, 64; 25 L. J., C. P. 44.

(*a*) *Simons v. Farren*, supra; *Cuthbertson v. Irving*, supra; *Jordan v. Twells*, Cas. temp. Hard. 172; see, too, 1 Wms. Saund. (ed. 1871) 208, n. (2); *Hill v. Saunders*, 4 B. & C. 529.

(*b*) *Brownlow v. Hewley*, 1 Ld. Raym. 83; *Hume v. Peploe*, 8 East, 168; *Pool v. Tunbridge*, 2 M. & W. 223; *Dobie v. Larkin*, 10 Exch. 776; but see *Johnson v. Clay*, 1 Moo. 200; 7 Taunt. 486.

(*c*) *Aldridge v. Howard*, 4 M. & G. 921.

(*d*) Judicature Act, 1873, sect. 24.

By 3 & 4 Will. 4, c. 42, s. 3, "all actions of debt for rent upon an indenture of demise, all actions of covenant or debt upon any bond or other specialty, shall be commenced and sued within twenty years after the cause of such actions or suits, but not after." The 3 & 4 Will. 4, c. 27, s. 42, takes away from an incumbrancer upon land in all cases the right of recovery as against the land for more than six years' arrears of rent or interest. The 3 & 4 Will. 4, c. 42, s. 3, however, restores the personal remedy against the debtor on the covenant (e). Therefore, an action on a covenant for rent may be brought within twenty years, and is not limited to six years (f).

CH. XIII. s. 1.
Action on Covenant for Rent.
Statute of Limitations.
Paget v. Foley.

It is now well established that so long as the relation of landlord and tenant subsists as a legal relation the landlord's right to rent is not barred by non-payment of rent for any length of time (g), although there be a limit on the amount of arrears recoverable.

Any illegality in the contract will be an answer to the action, as, for instance, that the premises were knowingly let contrary to the Public Health Act, or for the purpose of carrying on a trade prohibited by statute (h), or for a brothel (i), or for purposes of prostitution (k), or for blasphemous lectures (l).

Defence of illegality.

Interest may be recovered on rent due on a fixed day as damages (m).

The importance formerly attaching to debts due under covenant, by reason of their priority over simple contract debts, in ranking against the assets of deceased persons, has been put an end to as regards the estates of all persons dying after the 1st of January, 1870, by the act 32 & 33 Vict. c. 46.

Specialty Debt ranks with Simple Contract Debts.

SECT. 2.—Action on Simple Contract for Rent.

Where the rent is payable under an express contract to pay it, but not under seal, the principles governing ordinary actions for the recovery of money under a simple contract will apply, as will most of the rules already noticed in reference to covenants to pay rent, except in so far as they are peculiar to matters of specialty.

But it must be particularly noticed that no rent under a simple contract promise to pay it can be recovered except within six years next

(e) *Hunter v. Nockold*, 1 Mac. & Gord. 640; 1 Hall & Tw. 644; *Hunfrey v. Gery*, 7 C. B. 567.

(f) *Paget v. Foley*, 2 Bing. N. C. 679; *Strachan v. Thomas*, 12 A. & E. 536; *Manning v. Phelps*, 10 Exch. 59.

(g) *Archbold v. Scully*, 9 H. L. Cas. 360; 7 Jur., N. S. 1169; see, too, *Re Turner*, 11 Irish Ch. Rep. 304.

(h) *Gaslight Co. v. Turner*, 6 Bing. N. C. 324; *Flight v. Clarke*, 13 M. & W.

(i) *Smith v. White*, L. R., 1 Eq. 626.

(k) *Girard v. Richardson*, 1 Esp. 13; *Crisp v. Churchill*, cited in 1 B. & P. 340; *Howard v. Hodges*, 1 Selw. N. P. 80 (13th ed.); *Jennings v. Throgmorton*, R. & Moo. 251; *Pearce v. Brooks*, L. R., 1 Ex. 213; 4 H. & C. 358; 35 L. J., Ex. 134; but see *Appleton v. Campbell*, 2 C. & P. 317.

(l) *Cowan v. Milbourn*, L. R., 2 Ex. 230; 36 L. J., Ex. 124.

(m) See *Skerry v. Preston*, 2 Chit. R.

CH. XIII. s. 2. *Action on Simple Contract for Rent.* after it has become due or has been acknowledged in writing (*n*). It is undoubtedly a good defence that the landlord has distrained, and from the distress has *satisfied* his claim for rent (*o*).

A mere oral agreement to reduce the rent reserved will not create a new demise, and the full rent will still be recoverable (*p*).

SECT. 3.—*Implied Contract for Rent.*

An action may also be maintained for the recovery of rent where there is no express contract to pay it, but the law will imply such a contract from some privity either of contract or of estate between the parties in relation to the subject-matter of the demise (*q*), and it is immaterial whether, if there be a demise, it be by deed, written contract not under seal, or parol only. It will be convenient in treating of this implied contract to distinguish between that which arises when there has been an actual demise in some form, and that which arises from use and occupation only, as in the latter case it is not strictly rent which is recovered, and the subject therefore is best treated separately.

Any words in a demise which are sufficient to create a privity of contract between the parties will enable the landlord to maintain an action on an implied contract to pay the rent named, as, for example, where the words “yielding and paying” so much occur (*r*), and as between lessor and lessee an action can be maintained before any entry (*s*). The rules with regard to the necessity of setting out the titles of the parties (*t*) and other matters in the pleadings will be the same as in an action for rent due under a covenant. The limitation on actions on a contract implied from the demise will be twenty or six years according as the demise is under seal or not (*u*).

(*n*) 21 Jac. 1, c. 16.

(*o*) *Lear v. Edmonds*, 1 B. & Ald. 157; *Lees v. Wright*, 1 D. & R. 391; see also *Kifford v. Burgess*, 1 Moo. & R. 23.

(*p*) *Crowley v. Fitty*, 7 Exch. 319; 21 L. J., Ex. 135; see *Kelly v. Patterson*, L. R., 9 C. P. 681.

(*q*) *Ward v. Lumley*, 5 H. & N. 87, 656; 29 L. J., Ex. 322.

(*r*) See *Bower v. Hughes*, 13 C. B. 766, 744; and see ante, Chap. IV., Sect. 5, and Chap. IX., Sect. 2.

(*s*) *Bellasis v. Burbrick*, 1 Salk. 209; 1 Ld. Raym. 170; *Bull v. Sibbs*, 8 T. R. 327; and per Willes, J., in *Smith v. Scott*, 6 C. B., N. S. 781.

(*t*) Ante, 505.

(*u*) 3 & 4 Will. 4, c. 42, s. 3; 21 Jac. 1, c. 16.

CHAPTER XIV.

COMPENSATION FOR USE AND OCCUPATION.

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SECT. 1.—*What it is, and when it arises.*

WE have now to consider the case of a relation of landlord and tenant existing without any arrangement at all for the payment of rent properly so called, and the case in which the law implies from the conduct of the parties a promise to compensate the landlord for his loss by reason of the tenant's occupation of his premises. The action which can in such case be maintained is not to recover rent, but for damages due on an implied agreement to pay for the use of the landlord's property (*a*), and arises rather out of what may be called a quasi-tenancy than from the strict relation of landlord and tenant. To quote the words of Lord Ellenborough in *The Dean and Chapter of Rochester v. Pierce* (*b*), "The action for use and occupation does not necessarily suppose any demise; it is enough that the defendant used and occupied the premises by the permission of the plaintiff." This form of action is at common law inadmissible where there has been an actual demise (*c*), but by virtue of the statute 11 Geo. 2, c. 19, s. 14, the proof at the trial of a demise does not nonsuit the plaintiff, unless it be by deed (*d*), the rent reserved being used as a measure of the *quantum* of damages payable to the plaintiff (*e*); and now the *form* of action is of little importance, especially as the powers of amendment at all stages of an action are now very large (*f*). It is, however, of importance to consider in what cases this compensation is payable when there is no contract of demise. It has been not

Definition.

May be recovered, though special Contract.

(*a*) See *Smith v. Eldridge*, 15 C. B. 236; *Smith v. Twoart*, 2 M. & G. 841.

(*b*) 1 Camp. 466.

(*c*) See per Bramwell, B., in *Churchward v. Ford*, 2 H. & N. 446; see, too, *Reade v. Johnson*, Cro. Eliz. 242; *Clerk v.*

Polady, Id. 809.

(*d*) See also *Dungay v. Angove*, 2 Ves., jun. 307.

(*e*) See 6 A. & E. 839, n. (*a*).

(*f*) R. S. C. Ord. XXVII. See *Lord Hammer v. Flight*, 24 W. R. 346 (C. P.).

CH. XIV. s. 1. uncommonly said that an action for use and occupation is always founded on some contract or promise, express or implied (*g*), but this is not strictly correct, as all that the law says is, that the proof of an express contract of demise is not to put an end to an action for use and occupation. It may be more correct to say that the defendant must have held or occupied the premises as tenant thereof to the plaintiff, or by his permission or sufferance (*h*). In the absence of an express lease or agreement for a lease at a fixed rent, where the premises have been used or occupied by the defendant by the permission or sufferance of the plaintiff, the law will imply a contract or promise by the defendant to pay to the plaintiff a reasonable sum for such use and occupation (*i*). This is so notwithstanding there is a lease in writing containing a condition precedent which has not been performed by the plaintiff (*k*).

Not strictly
founded on
Contract
proper.

Although not properly based on a demise, the claim for this compensation may be based on a mere agreement for a lease, coupled with proof of possession thereunder (*l*), notwithstanding such agreement be under seal; for, as was pointed out in *Elliott v. Rogers* (*m*), the tenancy is created by the entry with the plaintiff's permission, and not by the deed (*n*). The statute 11 Geo. 2, c. 19, s. 14, already referred to, is at first sight somewhat ambiguous. The words of the section are as follows: "To obviate some difficulties that many times occur in the recovery of rents where the demises are *not by deed*, be it enacted that it shall and may be lawful to and for the landlord or landlords, where the agreement is *not by deed*, to recover a reasonable satisfaction for the lands, tenements or hereditaments *held or occupied* by the defendant or defendants, in an action *on the case*, for the use and occupation of what was *so held or enjoyed*; and if in evidence on the trial of such action any parol demise or any agreement (not being by deed) whereon a certain rent was reserved shall appear, the plaintiff in such action shall not therefore be non-suited, but may make use thereof as an evidence of the *quantum* of the damages to be recovered." It is clear after the decision in *Elliott v. Rogers* that "agreement" here must be read as equivalent to "instrument of demise," and not to an agreement for a demise as the term would now be used. A landlord will also be entitled to sue

11 Geo. 2,
c. 19, s. 14.
Plaintiff not
to be non-
suited al-
though Spe-
cial Contract
appear.

(*g*) See *Birch v. Wright*, 1 T. R. 378; 387; see, too, the judgment in *Beverley v. Lincoln Gaslight and Coke Co.*, 6 A. & E. 829, p. 839 n.; and *Gibson v. Kirk*, 1 Q. B. 850, 855; *Churchward v. Ford*, 2 H. & N. 446; 26 L. J., Ex. 354.

(*h*) See *Marquis of Camden v. Batterbury* 6 C. B., N. S. 808; 7 Id. 864; 28 L. J., C. P. 335; *Levi v. Lewis*, 6 C. B., N. S. 766; 9 Id. 872.

(*i*) *Hellier v. Silkear*, 19 L. J., Q. B. 295,

explained in *Churchward v. Ford*, 2 H. & N. 446, 449, 450; see also *Hyde v. Morkes*, 5 C. & P. 42; *Holford v. Hatch*, 1 Dougl. 183; *Marwood v. Waters*, 13 C. B. 280; *Hall v. Burgess*, 5 B. & C. 332.

(*k*) *Smith v. Eldridge*, 15 C. B. 236; *Smith v. Twoart*, 2 M. & G. 841.

(*l*) See, for example, *Hickman v. Machin*, 4 H. & N. 716.

(*m*) 4 Esp. 59; see, too, *Bannister v. Osborne*, Peake Ev. 242.

for compensation for the use and occupation of his property where a lease is not executed by the lessor, but the lessee enters and enjoys the property during the term, as there is in such a case in truth no demise (*n*). Even a lease under seal, delivered formally as a deed but not intended to operate as such until the tenant pays 100% for fixtures, &c., or performs some other condition, will be considered only as an escrow, and will not prevent an action for use and occupation (*o*).

CH. XIV. s. 1.
Use and Occupation (what it is, and when it arises).

To entitle a man to this compensation there must have been some tenancy, express or implied, between the plaintiff and the defendant during the period in respect whereof the compensation is claimed, and it is not enough that the plaintiff was really entitled to the property (*p*). For example, where the defendant occupied as tenant to another person, from whom he obtained the possession (*q*), or as a mere wrongdoer or wilful trespasser (*r*), no such action could be maintained.

Action not maintainable where Defendant occupied as Tenant to another Person, or as Wrongdoer.

A lessee who has never entered to take possession as tenant (*s*), or an assignee of the term who has never entered to take possession as such, will not be liable to an action for use and occupation (*t*), as the tenant in such cases has a mere *interesse termini*. Entry, however, by one of several persons jointly entitled will suffice to render all liable (*u*). So a husband is not liable in an action for use and occupation to pay for the enjoyment of a house by his wife *dum sola*; such occupation not having been by him, nor at his request (*x*).

Nor before Entry by the Lessee or Assignee.

It has once been held, that an action for use and occupation will not lie where the title is in dispute, ejectment being the proper remedy. This was decided in a case before the Court of King's Bench by Lord Kenyon, C. J., wherein the action was brought against the tenant for rent, while the heir at law and a devisee were contesting their right to the premises (*y*). But it is to be observed that an ejectment could not be maintained in such case, either by the heir or the devisee, because the outstanding term in the defendant would afford a complete defence to such action, and it may be now taken to be the law that

When the Title is in dispute.

(*n*) See *Pitman v. Woodbury*, 3 Exch. 4; *Sweatman v. Ambler*, 8 Exch. 72; *How v. Greek*, 3 H. & C. 391; 34 L. J., Ex. 4.

(*o*) *Gudden v. Bessett*, 6 E. & B. 986; *Millership v. Brooks*, 5 H. & N. 797.

(*p*) *Marquis of Camden v. Batterbury*, *supra*.

(*q*) *Cripps v. Blank*, 9 D. & R. 480; *Marquis of Camden v. Batterbury*, 5 C. B., N. S. 808; *Id.* 864; 28 L. J., C. P. 335; *Churchward v. Ford*, 2 H. & N. 446.

(*r*) *Tew v. Jones*, 13 M. & W. 12; *Turner v. Cameron's Coalbrook Steam Coal Co.*, 5 Exch. 932; *Churchward v. Ford*, *supra*. See, too, *Levi v. Lewis*, 6 C. B.,

N. S. 706; 9 Id. 872.

(*s*) *Edge v. Strafford*, 1 C. & J. 391, 398; *Lowe v. Ross*, 5 Exch. 553. See, also, *Towne v. D'Illenrich*, 13 C. B. 892; 22 L. J., C. P. 219. See, too, *Woolley v. Walling*, 7 C. & P. 610; *Jones v. Reynolds*, *Id.* 335; 4 A. & E. 805.

(*t*) *How v. Kennett*, 3 A. & E. 659; *Lowe v. Ross*, 5 Exch. 556; *Jones v. Reynolds*, 7 C. & P. 335.

(*u*) *Electric Telegraph Co. v. Moore*, 2 F. & F. 363. See, too, *Glen v. Dungey and Another*, 4 Exch. 61.

(*x*) *Richardson v. Hall*, 1 Brod. & B. 50.

(*y*) MS. Hil. T. 37 Geo. 3.

CH. XIV. s. 1. the proper remedy is by distress (z), or by action for rent, or for use and occupation (according to the nature of the demise) for the rent (a). *Use and Occupation (what it is, and when it arises).* Indeed it not unfrequently happens in actions for use and occupation that the plaintiff's title to the rent, as reversioner or otherwise, is the very point to be decided (b).

SECT. 2.—*By whom an Action is maintainable.*

By "the Landlord or Landlords."

The 11 Geo. 2, c. 19, s. 14, authorized "the landlord or landlords" to maintain an action on the case for use and occupation (c), and this agrees with the common law in actions of debt, and now applies to all actions for use and occupation. In order, therefore, to recover this compensation the plaintiff must show that he is landlord of the defendant in respect of the premises held or occupied by him. It is not sufficient that the plaintiff has a good legal title to the property which would enable him to maintain ejectment; but some possession or enjoyment, such as to amount to a letting at least by implication, must be proved (d). Therefore the owner of land cannot recover this compensation against a mere wrongful trespasser (e), nor against a person who occupied as tenant to another person from whom he obtained the possession (e). But any tenancy, or agreement for a tenancy, as between the plaintiff and the defendant (coupled with entry or possession thereunder) is sufficient, ex. gr. a mere tenancy at will (f), or even a tenancy on sufferance (g). But a mortgagor who remains in possession by the permission or sufferance of the mortgagee is not a tenant to the mortgagee (even at will or at sufferance), so as to render him liable to an action for use and occupation (h). A mere agreement for a lease, whether oral or in writing, coupled with proof of an entry thereunder by the defendant, is sufficient (i), notwithstanding it may be void and inoperative as a lease in regard to the term of years therein mentioned (k).

Any Tenancy sufficient.

(z) *Lloyd v. Davies*, 2 Exch. 103; *Moss v. Gallimore*, 1 Doug. 279; 1 Smith's L. C. 629 (7th ed.).

(a) See, for instance, *Rawson v. Eicke*, 7 A. & E. 451; *Voller v. Carter*, 4 E. & B. 173.

(b) See *Hickman v. Machin*, 4 H. & N. 716; *Fursdon, executrix, &c. v. Clogg*, 10 M. & W. 572; *Cornish v. Searell*, 8 B. & C. 471; *Phillips v. Pearce*, 5 B. & C. 433; *Steele v. Mart*, 4 B. & C. 272; *Rawson v. Eicke*, 7 A. & E. 451; *Selby v. Browne*, 7 Q. B. 620.

(c) Ante, 510.

(d) *Cripps v. Blank*, 9 D. & R. 480; *Marquis of Camden v. Batterbury*, 5 C. B., N. S. 808; 7 Id. 864; 28 L. J., C. P.

335; *Turner v. Cameron's Coalbrook Steam Coal Co.*, 5 Exch. 932; *Churchward v. Ford*, 2 H. & N. 446.

(e) *Tew v. Jones*, 13 M. & W. 12; *Turner v. Cameron's Coalbrook Steam Coal Co.*, and *Churchward v. Ford*, *supra*.

(f) *Howard v. Shaw*, 8 M. & W. 118.

(g) *Alford v. Vickery*, 1 Car. & M. 280; per Parke, J., *Jenner v. Clegg*, 1 Moo. & Rob. 213; *Bayley v. Bradley*, 6 C. B. 396.

(h) *Ex parte Wilson*, 2 V. & B. 252; *Moss v. Gallimore*, 1 Doug. 283; 1 Smith, L. C. 629 (7th ed.); *Trent v. Hunt*, 9 Exch. 14, 22; *Jolly v. Arbuthnot*, 28 L. J., Ch. 547, 550.

(i) Ante, 206.

(k) *De Medina v. Polson*, Holt, N. P. C. 47.

A surviving lessor may sue in his own name for use and occupation had subsequent to the death of his co-lessor (*l*), and to recover any rent which became due in the lifetime of his co-lessor he may sue as survivor (*m*). CH. XIV. s. 2.
Use and Occupation (by whom maintainable).

We have seen that rent is strictly incident to a reversion, but where a tenant has sublet at a rent for his whole term, and therefore has in effect, though not in words, assigned his term, he may still recover the amount agreed as rent from the subtenant as a compensation for the use and occupation of the premises (*n*), as may also his legal personal representative (*o*). And this was extended in *Levi v. Lewis* (*p*) to a case where the tenant subletting was himself only liable to his landlord for use and occupation. In that case a lessee had sublet for his whole term, and upon the expiration of both demises, the sub-lessee applied to the superior landlord to become his tenant, but such landlord declined, and referred him to the lessee as being his tenant; and the sub-lessee continued to occupy as before. It was held, in an action by lessee against subtenant for the subsequent use and occupation, that there was evidence to go to the jury from which they might infer an agreement by the defendant to pay the plaintiff for such use and occupation; especially as after the commencement of such action the superior landlord had received rent from the plaintiff for the occupation subsequent to the expiration of his lease (*p*). And a similar decision was come to in the case of *Green v. London Cemetery Co.* (*q*). There, a person having an agreement for a lease to himself, sublet part of the premises, and then agreed that the lease should be granted to another person, instead of himself, which was accordingly done: it was held, that the substituted lessee might maintain an action for use and occupation against the subtenant for the current quarter's rent which afterwards became due. By a surviving Lessor.
By Lessee who has sublet for his whole Term.
By substituted Lessee.

The right to compensation will not be defeated by a subsequent mortgage of the landlord's interest (*r*), nor by the existence of a previous mortgage, unless the mortgagee has compelled the tenant under threat of ejectment to pay to him the sum which would have been due (*s*), in which case, however, he still remains tenant to the mortgagor (*t*). Effect of subsequent Mortgage by Landlord.

If a landlord has taken proceedings to eject his tenant and recovered judgment, the after attornment creates a new relation of landlord Effect of Landlord having ejected.

(*l*) *Wheatley v. Boyd*, 7 Exch. 20.
(*m*) *Israel v. Simmons*, 2 Stark. R. 356;
see also *Cox v. Knight*, 18 C. B. 645; 25 L. J., C. P. 314.

(*n*) *Baker v. Gosling*, 1 Bing. N. C. 19;
Pollock v. Stacey, 9 Q. B. 1033; *Levi v. Lewis*, 6 C. B., N. S. 766; and see *Beardmore v. Wilson*, L. R., 4 C. P. 57.

(*o*) *Baker v. Gosling*, supra.
(*p*) 6 C. B., N. S. 766; 28 L. J., C. P. 304; 9 C. B., N. S. 872.

(*q*) 9 C. & P. 6.
(*r*) See ante, 47.

(*s*) Id.
(*t*) See *Wheeler v. Branscombe*, 5 Q. B. 373.

CH. XIV. s. 2 and tenant between the parties, and the landlord will thenceforth
Use and Occu- be entitled to compensation for the use and occupation of the
pation (by premises (*u*).
whom main-
tainable).

Corporations
 aggregate.

Where a corporation aggregate has demised by parol or by instrument not under seal, it cannot recover rent on the demise, as it has no power to demise except by deed; but if the tenant has entered into possession of the property, the corporation may recover compensation for the use and occupation of the same (*x*).

Incumbent.

An incumbent whose living has been duly sequestered cannot recover anything for the subsequent use and occupation of the glebe lands, because such occupation is not by his permission or sufferance, but by that of the bishop (*y*). The sequestrator holds merely as bailiff of the bishop (*z*).

By Church-
 wardens and
 Overseers.

Churchwardens and overseers may recover compensation for the use and occupation of parish property demised by their predecessors, but vested in them as a quasi body corporate by 59 Geo. 3, c. 12, s. 17 (*a*), unless the property be vested in trustees (*b*); and this will apply to all the buildings, lands and hereditaments *belonging to the parish*, not merely where the rents and profits are applicable to the relief of the poor, but where they are applicable to those purposes for which church rates are levied (*c*). It does not extend to copyholds (*d*).

If the occupation took place partly in the time of the plaintiff's predecessors in office, and by their permission, the statement of claim should be framed accordingly (*e*).

By Trustees
 or Cestui quo
 Trust.

Prior to the Judicature Act, it was clear that a *cestui que trust* who did not actually demise, or let the tenant into possession, could not maintain an action for use and occupation, as no tenancy would be *implied* under a party who has not the legal estate. Thus, where A. was soised in trust for B. and C., it was held the latter could not maintain an action for use and occupation in their own names, treating A. as their agent (*f*). On the other hand, where the *cestui que trust* himself demised to the defendant, he and not the trustee was considered the proper party to sue, and it was held that the trustee

(*u*) *Newport v. Hardy*, 2 D. & L. 921.

(*x*) Per Lord Ellenborough in *Dean and C. of Rochester v. Pierce*, 1 Camp. 466; see, too, as to other actions on implied contracts, *Mayor, &c. of Stafford v. Till*, 4 Bing. 75; *Beverley v. Lincoln Gaslight and Coke Co.*, 6 A. & E. 838, 839; *Mayor, &c. of Thetford v. Tyler*, 8 Q. B. 95; *Doe d. Birmingham Canal Co. v. Bodd*, 11 Q. B. 128; *Drury Lane Theatre Co. v. Chapman*, 1 C. & K. 14.

(*y*) *Powell v. Hibbert*, 15 Q. B. 129.

(*z*) *Harding v. Hall*, 10 M. & W. 42.

(*a*) *Ward v. Clarke*, 12 M. & W. 747; 1 D. & L. 1027; see also *Hardon v. Hes-*

keth, 4 H. & N. 175; 28 L. J., Ex. 137.

(*b*) See *Doe d. Jackson v. Hiley*, 10 B. & C. 885; explained in *Allison v. Stark*, 2 A. & E. 255; see, too, *Cantrell v. The Windsor Union*, 4 Bing. N. C. 348.

(*c*) *Doe d. Jackson v. Hiley*, *supra*.

(*d*) *Doe d. Bailey v. Foster*, 3 C. B. 215; *In re Paddington Charities*, 8 Sim. 629. As to the law before the act, see 30 (*z*), ante.

(*e*) *Hardon v. Hesketth*, 4 H. & N. 175.

(*f*) *Morgell v. Paul*, 2 Man. & R. 308; and see *Cobb v. Carpenter*, 2 Camp. 13, n.; *Howe v. Scarrott*, and *Sharp v. Scarrott*, 4 H. & N. 723; *Sloper v. Saunders*, 29 L. J., Ex. 275.

could not make himself landlord merely by giving the tenant notice to pay the rent to him (*g*). CH. XIV. s. 2.
Use and Occupation (by whom maintainable).

In *Howe v. Scarrott* (*h*), real estates were conveyed by marriage settlement to trustees, in trust to permit the wife to receive the rents to her separate use, independently of her husband. After the marriage the husband let the premises to tenants, speaking of them as property in which his wife was interested. The wife received the rents during her life. It was held, that it was a question of fact in what character the husband let the premises, whether as agent for the trustees or as dealing with his wife's property, and that after the death of the wife the tenants were not estopped from denying that the husband had any interest, *unless it was found that he let in his own name* (*i*).

Now, however, when all equitable interests are recognized, a cestui que trust could sue, but it is not likely that it is a course that will be often followed, as it is specially provided (*k*) that trustees represent their beneficiaries.

If the original lessor be dead, but the tenant has recognized the title of a cestui que trust named in his will, and paid rent to him, the tenant cannot afterwards dispute the title of the cestui que trust, supposing the attornment not to have been procured by any fraud (*l*).

An auctioneer cannot generally maintain an action for the use and occupation of lands let by auction on behalf of the owner, but the action should be brought in the name of the owner (*m*); although if a contract of letting be made with him individually, he may sue for the rent as agreed (*n*). By an Auctioneer.

SECT. 3.—*Against whom Action of Use and Occupation maintainable.*

It is to be observed that the words of the statute 11 Geo. 2, c. 19, s. 14, are in the alternative "held or occupied"—"held or enjoyed" (*o*). This has frequently been specially noticed (*p*). If, therefore, the lessee has once *entered to take possession as tenant*, and the term has commenced, he will be deemed "to hold" during the continuance of the term, and until it be *legally determined* by effluxion of time, notice to quit, surrender, merger or otherwise, whether he continue "to occupy" by himself or his subtenants, or not (*q*). The Lessee who has ceased to occupy during the Term.

(*g*) *Churchward v. Ford*, 2 H. & N. 446.

(*h*) 4 H. & N. 729.

(*i*) *Howe v. Scarrott, and Sharp v. Scarrott*, 4 H. & N. 723.

(*k*) R. S. O., Ord. XVI. Rule 7.

(*l*) *Dolby v. Ile*, 11 A. & E. 335; see, too, *Doe d. Marlow v. Wiggins*, 4 Q. B. 367.

(*m*) *Evans v. Evans*, 3 A. & E. 132.

(*n*) *Fisher v. Marsh*, 6 B. & S. 411; 34 L. J., Q. B. 177.

(*o*) *Ante*, 512.

(*p*) *Pinero v. Judson*, 6 Bing. 206, 211; *Smith v. Twaart*, 2 M. & G. 842.

(*q*) See *Bessell v. Landsberg*, 7 Q. B. 638; *Cannan v. Hartley*, 9 C. B. 634; 19 L. J., C. P. 323; *Pollock v. Stacey*, 9 Q. B. 1033.

CIT. XIV. s. 3. principle is, that a *constructive holding or occupation as tenant is sufficient after entry*, without actual occupation or enjoyment (*r*). For example, where a tenant from year to year under a parol demise assigned all his term and interest, but the landlord did not accept such assignee as his tenant: held, that the tenant might be sued for use and occupation (*s*). But it would be a misdirection to tell the jury that a constructive occupation is sufficient, before an actual entry to take possession, and without explaining the meaning of “a constructive occupation” (*t*).

Lessee who has sublet.

In accordance therefore with this principle of constructive occupation, it has been decided that a lessee who has sublet the demised premises may be sued for use and occupation, for he holds the premises as tenant, and occupies them by his subtenant (*u*). In such case the subtenant is not liable to the original lessor (*v*). But if the landlord, with the consent of the tenant, accept of the subtenant, or a new tenant (*x*), as his tenant, and receive rent from him or distrain upon him for rent due from him, he cannot afterwards sue the original tenant for use and occupation (*y*). If the landlord merely consent to accept of the subtenant without exonerating the original tenant, it has been held by Erle, J., that that is not sufficient (*z*).

Lessee who holds over.

A lessee, or his assignee, who holds over after his term or tenancy has expired or been duly determined, is liable for subsequent use and occupation, provided the landlord has acted so as to raise a presumption of a continued tenancy, and not an intention to treat the tenant as a mere trespasser (*a*). But if a party takes premises for a certain time and holds over, he does not thereby necessarily become tenant from year to year, unless something occurs to show the existence of such new contract (*b*). For instance, where a tenancy from year to year has been determined by a regular notice to quit, the mere accidental detention of the key by the tenant (who has quitted the premises and removed his goods) for two days beyond the expiration of the term, does not amount to any evidence of use and occupation, so as to make him liable for another quarter (*c*). It is a question for the

(*r*) *Pinero v. Judson*, 6 Bing. 206, 211; *Smith v. Twoart*, 2 M. & G. 841; *Atkins v. Humphrey*, 2 C. B. 654; 3 D. & L. 612; *Pollock v. Stacey*, 9 Q. B. 1033; *Cannan v. Hartley*, *supra*.

(*s*) *Shine v. Dillon*, 1 Ir. Com. L. R. 277; 15 W. R. 847.

(*t*) *Towne v. D'Heinrich*, 13 C. B. 892; 22 L. J., C. P. 219.

(*u*) *Bull v. Sibbs*, 8 T. R. 327; see also *Waring v. King*, 8 M. & W. 571; *Ilyde v. Moakes*, 5 C. & P. 42.

(*v*) See *Holford v. Hatch*, 1 Doug. 183.

(*x*) *Walls v. Atcheson*, 3 Bing. 462;

Hall v. Burgess, 5 B. & C. 332.

(*y*) *Thomas v. Cook*, 2 B. & A. 119; and see *Harding v. Crethorn*, 1 Esp. 57; and note (*z*).

(*z*) *Dawson v. Lamb*, 3 C. & K. 269.

(*a*) *Harding v. Crethorn*, 1 Esp. 57; *Bayley v. Bondley*, 5 C. B. 396; *Bishop v. Howard*, 2 B. & C. 100; *Davis v. Morgan*, 4 B. & C. 8; *Waring v. King*, 8 M. & W. 571; and see *Hellier v. Silcox*, 19 L. J., Q. B. 295.

(*b*) *Waring v. King*, 8 M. & W. 571.

(*c*) *Gray v. Bompas*, 11 C. B., N. S. 520; post, Chap. XX.

jury whether a mere holding over, or the creation of a new tenancy between the parties, was intended (*d*).

It is the duty of a tenant on the expiration of his term to deliver up possession of the demised premises to his landlord, free from incumbrances created by the tenant (*e*). Therefore, if any subtenant refuse to quit possession at the end of the term, the tenant will continue liable for use and occupation so long as his subtenant holds over, but no longer (*f*). When premises are let for a certain term to A. and B., and A. holds over after the expiration of the term, with B.'s assent, both are liable in an action for use and occupation so long as A. continues to occupy, but no longer (*g*); but if either of them holds over without the other's assent, the latter will not be liable (*h*). It may be well to call attention to one case, that of *Waring v. King* (*i*), in which the decision was based on the ground that the conduct of the defendants amounted to an exercise of the option (given them by their lease) to continue tenants for a longer period than the original term for which the property was leased. In that case the defendants took certain premises of the plaintiff for nine months, at a certain rent, with the option at the end of that time of taking a lease for seven, fourteen, or twenty-one years; but before the expiration of the nine months the defendants let the premises to a company for six months, who actually occupied them for that period: held, that, at the end of a year from the expiration of the nine months, the defendants were liable to the plaintiff in an action for use and occupation for a year's rent.

By issuing and serving a writ in ejectment, the claimant elects to treat the defendants therein named as trespassers, on and from the day mentioned in the writ: and he cannot sue them as tenants for use and occupation subsequent to that day (*k*). But the rent which became due *before* the day mentioned in the writ of ejectment may be recovered in an action for use and occupation (where the demise was not by deed), notwithstanding the proceedings in ejectment (*l*). The remedy for the occupation, &c. on and subsequent to the day mentioned in the writ is by an action for mesne profits, &c. (*m*), or for double value under 4 Geo. 2, c. 28 (*n*), but not for double rent under 11 Geo. 2, c. 19, s. 18 (*o*). A lessee who has been turned out of possession by the landlord is not liable for subsequent use and

CH. XIV. s. 3.

Use and Occupation (against whom maintainable).

Tenant liable for holding over of Subtenant.

Ilbs v. Richardson.

Lessee, after an Ejectment or Eviction, not liable.

(*d*) Per Lord Denman, *Jones v. Shears*, 4 A. & E. 832.

(*e*) Per Lord Kenyon, in *Harding v. Crethorn*, 1 Esp. 57, and see post, Chap. XX.

(*f*) *Ilbs v. Richardson*, 9 A. & E. 849.

(*g*) *Christy v. Taucrad*, 7 M. & W. 127; 9 Id. 438; 12 Id. 316, *S. C.*

(*h*) *Draper v. Crofts*, 16 M. & W. 166.

(*i*) 8 M. & W. 571.

(*k*) *Birch v. Wright*, 1 T. R. 378; *Jones v. Carter*, 15 M. & W. 718; *Franklin v. Carter*, 1 C. B. 750; 3 D. & L. 213.

(*l*) *Birch v. Wright*, 1 T. R. 378.

(*m*) Id. 378, 387; and see Rules of the Supreme Court, App. A., Part II., sect. 4.

(*n*) *Soulsby v. Neving*, 9 East, 310; post, Chap. XX.

(*o*) *Soulsby v. Neving*, *supra*.

CH. XIV. s. 3.
*Use and Occu-
 pation (against
 whom main-
 tainable).*

Nor against
 Tenant after
 Ejectment.

occupation (*p*); but where the landlord of apartments forcibly ejected an offensive man left in possession by the tenant, it was held, that it was a question for the jury whether it was done for the purpose of depriving the tenant of his possession, or merely to get rid of the offensive person who had misconducted himself (*q*). A tenant who has been evicted from part of his premises, and who has not exercised his right to give up the residue, remains liable for the use and occupation of such residue (*r*). A lessee, against whom a judgment in ejectment has been obtained by a third person, and who has been turned out of possession under a writ of habere facias possessionem, or who, to avoid being so turned out, has attorned and become tenant to the claimant in the ejectment, is not liable to his lessor for use and occupation subsequent to such eviction or attornment, for the occupation is then by permission of the ejector and not of the original lessor (*s*). But with respect to any rent which became due and payable after the day named in the action of ejectment, before such eviction or attornment, and which has been actually paid, it would seem to be necessary for the defendant to plead specially such facts as will show a payment (*s*).

Substituted
 Tenant.

When a new tenant has been substituted with the mutual consent of all parties, the landlord may sue such new tenant for his subsequent use and occupation (*t*). But unless such substituted tenancy has been created, or there has been an assignment of the lease, the landlord should sue the original tenant, and not another person who has entered into possession during the continuance of the lease (*u*). After paying the rent the original tenant will have a remedy over against his subtenant either for use and occupation or for money paid to his use (*x*).

Assignee of
 Term.

Assignees of a void lease (not duly granted pursuant to a power) who have paid the rent reserved during the term therein expressed to be granted, and have subsequently held over, are liable to an action for use and occupation (*y*).

Executors or
 Administra-
 tors.

The legal personal representatives of a deceased tenant are not liable personally as assignees of the term, unless they have entered as such to take possession of the demised premises, the purpose for which they have entered being a question of fact for the jury (*z*); and for all such use and occupation subsequent to the testator's or intes-

(*p*) *Prentice v. Elliott*, 5 M. & W. 606; 7 Dowl. 819; *Selby v. Browne*, 7 Q. B. 620.

(*q*) *Henderson v. Mears*, 1 F. & F. 636; 28 L. J., Q. B. 305.

(*r*) Per Lord Ellenborough in *Smith v. Raleigh*, 3 Camp. 514, and per Dallas, J., in *Stokrs v. Cooper*, id. note.

(*s*) *Newport v. Hardy*, 2 D. & L. 921.

(*t*) *Phipps v. Sculthorpe*, 1 B. & A. 50;

Dawson v. Lamb, 3 C. & K. 269. But not the original tenant; *Laurance v. Fauz*, 2 F. & F. 435.

(*u*) *Hyde v. Moakes*, 5 C. & P. 42.

(*x*) *Dawson v. Lamb*, 3 C. & K. 269.

(*y*) *Reale v. Sanders*, 3 Bing. N. C. 850.

(*z*) *Remnant v. Bremridge*, 8 Taunt. 191; *Krarsley v. Oxley*, 2 H. & C. 896; see also ante, 267.

tate's death, they must be charged personally and not in their representative capacity (a). CIV. XIV. s. 3.
Use and Occu-
pation (against
whom main-
tainable).

Further, the case differs from that of assignees, for an entry by one of several executors will not enure as an entry by all of them so as to render them jointly liable *de bonis propriis* in an action for use and occupation (b). When an executor who has entered is sued personally for use and occupation, he may show that his occupation was as executor, and that he entered in that character, and that he has no assets, and that the value of the land is not equal to the rent. If the land yields some profit, but less than the rent, he may tender before action such amount of profit, and plead the tender, or he may plead payment of the amount into court (c).

With regard to the liability of a trustee in bankruptcy and the position of a bankrupt tenant, the question will be found discussed in an earlier chapter (d). Trustee in
Bankruptcy.

We have seen that corporations aggregate may recover compensation for the use and occupation of their property; they may also be liable for the same as tenants (e), where they have actually used and occupied land, for a corporate purpose, by the permission of the owner (f). But as they cannot bind themselves by an executory contract, not under their common seal, they will be liable for use and occupation during such period as they actually occupy, and not afterwards under any implied tenancy from year to year (g). Corporations
aggregate.

Churchwardens and overseers, if in occupation of land not rented for parochial purposes alone (and therefore not protected by 59 Geo. 3, c. 12, s. 12), will be liable personally to pay for the same (h). Churchward-
ens and Over-
seers.

We have seen that a person who has *entered into possession* under a mere agreement for a lease, which has never been granted, is liable to be sued for use and occupation (i); therefore, where the defendant in expectation of a lease by indenture, which he had agreed to take from the plaintiff, procured attornments from some of the tenants and received rents from others, it was held, that he was liable for use and occupation (j). Where the defendant was let into possession of premises provisionally, with a view to an agreement for occupying them, which he afterwards refused to sign, he was held liable to pay for the period of his occupation (k). But where the defendant entered Intended
Lessee.

(a) *Nixon v. Quinn*, 2 Ir. Com. L. R. 248.

(b) *Nation v. Tozer*, 1 C., M. & R. 172; cited 3 A. & E. 667.

(c) *Patten v. Reid*, 6 L. T. 281, Q. B.; ante, 268.

(d) Ante, 252.

(e) *Beverley v. Lincoln Gaslight and Coke Co.*, 6 A. & E. 839, 843; and the right seems to have been assumed in *Green v. London Cemetery Co.*, 9 C. & P. 6.

(f) *Lowe v. London and North Western*

R. Co., 18 Q. B. 632; 21 L. J., Q. B. 361; *Markham v. Stanford*, 14 C. B., N. S. 380; Willes, J.

(g) *Finlay v. Bristol and Exeter R. Co.*, 7 Exch. 409; see, too, *Copper Miners Co. v. Fox*, 16 Q. B. 229.

(h) *Uthwatt v. Elkins*, 13 M. & W. 772; and see *Furnival v. Coombes*, 5 M. & G. 736.

(i) *Smith v. Eldridge*, 15 C. B. 236; *Dawes v. Dowling*, 31 L. T. 65.

(j) *Neale v. Swind*, 2 C. & J. 377.

(k) *Coggan v. Warwicker*, 3 C. & K. 40.

CH. XIV. s. 3. under an agreement for a future lease, which it afterwards appeared the plaintiff was unable or unwilling to grant, the defendant was relieved from liability to an action for use and occupation, although he had received some of the rents from the subtenants (*l*).

Intended
Purchaser.

Where the vendee of an estate sold by auction or otherwise has been suffered to enter upon and hold the premises while the title was under investigation, and the contract has afterwards been determined for want of title, the vendor cannot, on these grounds only, recover for use and occupation, although the jury find that the occupation has been beneficial (*m*): or that he has received rent from the subtenants (*n*). But if the vendee retain possession *after the contract for purchase has gone off*, he will be liable for the subsequent use and occupation (*o*).

Vendor re-
maining in
Possession not
liable.

The fact that vendor remains in possession of part of the property after the execution of the conveyance, does not thereby make him a tenant to the purchaser (even at sufferance), nor in any way liable to him in an action for use and occupation. The purchaser's remedy in such a case is by an action to recover possession of the land and mesne profits (*p*).

SECT. 4.—*For what Kind of Property the Action is maintainable.*

Compensation
recoverable
for Use and
Occupation of
Incorporeal
Property.

This right to recover compensation for use and occupation is not confined to land and houses, or the like, but will extend to any hereditament, corporeal or incorporeal: such, for example, as a fishery (*q*); a right of fishing with rod and line (*r*); a right of shooting (*s*) and of hunting (*t*); a mine with liberty to dig (*u*); a coal pit (*r*); a water-course and weir (*w*); a way (*x*); tithes; a pew; seats in a Jewish synagogue (*y*); a seat in a house to view a procession; the saloon of a theatre with a right to supply refreshments (*z*); and furnished or unfurnished lodgings (*a*).

(*l*) *Rumball v. Wright*, 1 C. & P. 589.

(*m*) *Winterbottom v. Ingham*, 7 Q. B. 611; *Kirtland v. Pounsett*, 2 Taunt. 146; *Hearne v. Tomlin*, Peake, N. P. C. 192, 253; *Corringan v. Woods*, 1 Ir. Com. L. R. 73; 15 W. R. 318.

(*n*) *Rumball v. Wright*, 1 C. & P. 589.

(*o*) *Howard v. Shaw*, 8 M. & W. 118.

(*p*) *Tew v. Jones*, 13 M. & W. 12.

(*q*) See 15 & 16 Vict. c. 76, Schedule (B), Form 10.

(*r*) *Holford v. Fritchard*, 3 Exch. 793.

(*s*) *Thomas v. Fredericks*, 10 Q. B. 775.

(*t*) *Bird v. Higginson*, 2 A. & E. 696; 6 A. & E. 824.

(*u*) *Jones v. Reynolds*, 4 A. & E. 805; 7 C. & P. 335.

(*v*) *Lees v. Wright*, 1 D. & R. 391.

(*w*) *Davis v. Morgan*, 4 B. & C. 8.

(*x*) 2 Chit. Pl. (7th ed.), 39, 40, 41.

(*y*) *Israel v. Simmons*, 2 Stark. 356.

(*z*) *Drury Lane Theatre Co. v. Chapman*, 1 C. & K. 14.

(*a*) 2 Chit. Pl. 41, 42; *Cook v. Moylan*, 1 Exch. 67; 5 D. & L. 101; *Lzon v. Gorton*, 5 Bing. N. C. 501.

SECT. 5.—*Writ and Pleadings.*

CH. XIV. s. 5.

Use and Occupation (Writ and Pleadings).

Form of Indorsement of Writ.

Much of the learning with regard to actions for use and occupation, which under the former system of pleading was of great importance, has become obsolete since the Judicature Acts have come into force. The old form of words is to some extent still preserved in the indorsement of writs; the schedule to the Rules of the Supreme Court (*b*) giving the form, “the plaintiff’s claim is £ for the use and occupation of a house.” There is also a form given (*b*), “the plaintiff’s claim is for £ for arrears of rent”; and the former will be the more correct indorsement where the money claimed is not strictly rent—i. e. is not due under any actual demise: but the writ may be amended by leave at any stage of the proceedings (*c*). As Pleadings. far, however, as the pleadings are concerned the law now requires them to be a statement of facts, and therefore the technical forms are no longer of importance, and it is enough if the statement of claim allege facts which show an entry and occupation and a relation of landlord and tenant between the parties.

The defendant will be in the same position as if there had been an actual demise as regards any right to set up that the plaintiff had no title when he the defendant entered, a defence which, as we have seen, is not open to him (*d*), though he may show that it has since come to an end (*e*).

Thus if the defendant obtained possession of the premises from the plaintiff as tenant thereof to him, he is thereby estopped from disputing the plaintiff’s right to dispose of such possession (*f*). The principle is, that the defendant, having had the use, occupation and enjoyment of the premises by the permission of the plaintiff, cannot deny the plaintiff’s title to dispose of the possession during the period of such occupation, as an answer to the claim for compensation (*g*). If the steward of a person not named says to another, “I let you into possession in the name of the landlord” (not mentioning the name); parol evidence is admissible to show who such landlord is, and the tenant who so obtained possession is estopped from denying such landlord’s title (*h*). But in any such cases the defendant may show that after the demise, and before any part of the rent claimed became due, the plaintiff assigned his reversion (*i*); or that the plaintiff’s title was defeasible, and was legally defeated after the demise and before

Estoppel.

(*b*) R. S. C., App. A., Part II., s. 2.

(*c*) R. S. C., Order XXVII., Rule 11.

(*d*) *Lewis v. Willis*, 1 Wils. 314; *Curtis v. Spittly*, 1 Bing. N. C. 15.

(*e*) *Newport v. Hardy*, 2 D. & L. 921; see, too, *Boodle v. Campbell*, 7 M. & G. 386; *Selby v. Broune*, 7 Q. B. 620; *Hartshorne v. Watson*, 4 Bing. N. C. 178.

(*f*) *Fleming v. Gooding*, 10 Bing. 549; *Cooper v. Blandy*, 1 Bing. N. C. 45; *Cooke v. Loxley*, 5 T. R. 4; *Balls v. Westwood*, 1 Camp. 12.

(*g*) See *Agar v. Young*, Car. & M. 78.

(*h*) *Fleming v. Gooding*, 10 Bing. 549.

(*i*) *Harmer v. Bean*, 3 C. & K. 307.

CH. XIV. s. 5. the rent claimed became due (*k*). If the defendant obtained possession from A. B. as his tenant, and the plaintiff derives his title from A. B., the defendant is estopped from disputing the right of A. B. to dispose of such possession (*l*), and also from disputing A. B.'s right to assign the reversion (*m*); but the assignment itself may be disputed (*n*). If the defendant has expressly attorned to the plaintiff, he will thereby be estopped from disputing the plaintiff's title, unless such attornment be proved to have been obtained by fraud, or through some mistake of facts (*o*). Where a tenant was let into possession by A. and paid him rent, and afterwards A. agreed to grant a lease to B., who then received one quarter's rent from the tenant, but afterwards the agreement between A. and B. was rescinded: it was held that, in an action by B. for use and occupation for the next quarter's rent, the tenant was not estopped from showing these facts, whereby the parties were remitted to their original rights (*p*).

The Statute of Limitations. It is a good defence to plead the Statute of Limitations where the defendant was formerly tenant from year to year, and quitted without due notice, but has not, within six years before the action, occupied the premises, or paid any rent, or done any act from which a tenancy can be inferred (*q*). It is also a good defence as to any rent which became due and payable more than six years before the commencement of the action. The defendant may also show that the plaintiff's title to the reversion has been barred and extinguished under 3 & 4 Will. 4, c. 27 (*s*). But so long as the relation of landlord and tenant subsists, the right of the landlord to rent is not barred by nonpayment, except that under sect. 42 the amount to be recovered is limited to six years (*t*).

SECT. 6.—Evidence.

Relation of Landlord and Tenant. We have seen that to entitle a plaintiff to recover compensation for the use and occupation of his property it must appear that there was a relation of landlord and tenant between the parties; there may, however, be various modes in which this may be proved for the purposes of an action; an admission of the tenancy by the defendant, by submission to a distress, advertisement of himself as tenant or

(*k*) *Mountney v. Collier*, 1 E. & B. 630; 22 L. J., Q. B. 124; *Powell v. Hibbert*, 15 Q. B. 129; 19 L. J., Q. B. 347.

(*l*) *Palmer v. Ekins*, 2 Ld. Raym. 1550; 2 Stra. 817; *Parker v. Manning*, 7 T. R. 537; *Bringlee v. Goodson*, 4 Bing. N. C. 726.

(*m*) *Rennie v. Robinson*, 1 Bing. 147; *Parker v. Manning*, 7 T. R. 537; *Sturgeon v. Wingfield*, 15 M. & W. 221; *Doe d.*

Marriott v. Edwards, 5 B. & Adol. 1065.

(*n*) *Phillips v. Pearce*, 5 B. & C. 433.

(*o*) *Phipps v. Sculthorpe*, 1 B. & A. 50; *Doe d. Marlow v. Wiggins*, 4 Q. B. 367; ante.

(*p*) *Brook v. Briggs*, 2 Bing. N. C. 572.

(*q*) *Leigh v. Thornton*, 1 B. & A. 625.

(*r*) *Furden v. Clogg*, 10 M. & W. 572.

(*t*) *Archbold v. Scully*, 9 H. L. Cas. 360; 7 Jur., N. S. 1169.

otherwise is *prima facie* evidence against him (*u*), but may be rebutted by sufficient evidence to the contrary (*x*). Evidence that the defendant has actually occupied the premises, and has on one or more occasions paid rent to the plaintiff in respect thereof, will be *prima facie* sufficient (*y*). Indeed, payment of rent is a sufficient recognition of the landlord's title to support an action for use and occupation, although it appear upon the evidence on the part of the plaintiff that the defendant originally came in under another person, or that the plaintiff has only an equitable estate (*z*). In one case the defendant and his predecessors in estate had paid to the plaintiffs and their predecessors, overseers of the poor of the township of S., an annual sum of 6*l.* 14*s.* 8*d.*, expressed to be for rent for common lands, and it was admitted that the defendant was in possession of the lands out of which the rent issued, but they were not identified, and there was no evidence given of their extent or value, and the defendant would not produce his deeds pursuant to notice: it was, however, held, that there was evidence on which a jury might find that a relation existed between the parties such as to entitle the plaintiffs to recover for use and occupation (*a*).

CH. XIV. s. 6.
Use and Occupation (Evidence).

Occupation and Payment of Rent.

A judgment in a previous action for use and occupation between the same parties is *prima facie* evidence that the defendant occupied by the sufferance of the plaintiff: but it is not conclusive, and the jury ought to take into their consideration all the circumstances under which that judgment was obtained (*b*). The correctness or validity of such judgment can be questioned only in a court of appeal (*c*): and parol evidence will probably always be admissible to show in respect of what premises, and for what rent, such judgment was recovered (*d*). But a previous judgment against two persons is no evidence in another action against one of them only for subsequent use and occupation (*e*).

Judgment in previous Action for Use and Occupation.

A notice to quit given by the defendant is admissible evidence that the defendant held the premises therein mentioned as tenant thereof to plaintiff (*f*).

Notice to quit given by Defendant.

We have also seen that there must be an *entry* as tenant; for example, if a party to whom a mining lease is granted enter and dig

(*u*) *Panton v. Jones*, 3 Camp. 372; *Cooper v. Blandy*, 1 Bing. N. C. 45; *Sullivan v. Jones*, 3 C. & P. 579; *Hill v. Ramm*, 5 M. & G. 789.

(*x*) *Cox v. Knight*, 18 C. B. 645; 25 L. J., C. P. 314.

(*y*) *Roe. Ev.* 162, 163 (11th ed.).

(*z*) *Dolby v. Iles*, 11 A. & E. 335.

(*a*) *Hardon v. Heskeith*, 4 H. & N. 175; 28 L. J., Ex. 137; compare this case with *Att.-Gen. v. Stephens*, 6 Do Gex, M. & G. 111; 25 L. J., Ch. 888.

(*b*) Per Coleridge, J., *Jones v. Reynolds*, 7 C. & P. 335.

(*c*) 9 C. B. 333; *Dick v. Tolhausen*, 4 H. & N. 695.

(*d*) See, as to the right to reopen a verdict, *Hutchin v. Campbell*, 2 W. Blac. 827; 3 Wils. 304; *Seldon v. Tutop*, 6 T. R. 607; *Preston v. Pecke*, E., B. & E. 336; 28 L. J., Q. B. 424, 427.

(*e*) *Christy v. Tancered*, 9 M. & W. 433; 12 M. & W. 316.

(*f*) *Marston v. Dean*, 7 C. & P. 13.

CH. XIV. s. 8. *Use and Occupation (Evidence).* holes merely to ascertain what sort of a bargain he has made, or is about to make, and has them filled up again immediately, that does not amount to an entry to take possession as tenant (*h*). But where a party who had agreed to rent a house sent in a woman to clean it, and workmen to paper one of the rooms, that was held sufficient evidence to go to the jury of a taking possession as tenant (*i*). So where, after an agreement for a lease, the intended lessee entered and put up a board stating "this house to let, inquire, &c.:" this was held to be sufficient evidence to go to the jury of a taking possession as tenant (*k*).

Evidence of
Entry of
Defendant as
Tenant.

If the landlord prove that a tenancy commenced and entry was had, the burden is then on the defendant to show that it has been determined before the time for which compensation is claimed (*l*).

Surrender.

The defendant may prove a surrender of his term to the plaintiff before any of the rent claimed became due; such surrender may be by deed (*m*), or by the acceptance of a new lease (*n*), or by other act and operation of law (*o*). If a landlord during a current quarter accept from his tenant the key of the house demised, under a parol agreement that upon the tenant then giving up possession the rent shall cease, and the landlord occupies the premises from that time, he cannot recover for any use and occupation subsequent to his accepting the key (*p*).

Notice to quit,
&c.

The defendant may prove that he gave due notice to quit and quitted accordingly before the commencement of the period in respect whereof the rent is claimed (*q*). Whether the notice to quit was sufficient and served in due time is sometimes the real question to be decided in this form of action (*q*). Such notice is sufficient if given to the plaintiff's authorized agent, or sent to him by post in due time (*r*). Where a tenant from year to year, at a rent payable half-yearly, quitted at the end of a current year without giving notice, and the landlord before the end of the next half-year relet the premises to another tenant: held, that such reletting amounted to an eviction of the first tenant, and that the landlord could not maintain use and occupation against him for any rent subsequent to the period when he quitted (*s*). But the entry by the landlord must be for the purpose of a profitable occupation, and therefore if he enters and puts a bill in the window for the purpose of reletting

(*h*) *Jones v. Reynolds*, 7 C. & P. 335.
(*i*) *Smith v. Tuoast*, 2 M. & G. 841.
(*k*) *Sullivan v. Jones*, 3 C. & P. 579.
(*l*) *Ward v. Mason*, 9 Price, 291.
(*m*) Ante, 274.
(*n*) Ante, 276.
(*o*) *Whitehead v. Clifford*, 5 Taunt. 518;
Grimman v. Legge, 8 B. & C. 324; *Furni-*

vall v. Grove, 8 C. B., N. S. 496; 30 L. J., C. P. 3.
(*p*) *Bird v. Defonville*, 2 C. & K. 415.
(*q*) *Bessell v. Landsberg*, 7 Q. B. 638;
Papillon v. Brunton, 5 H. & N. 518.
(*r*) *Papillon v. Brunton*, supra.
(*s*) *Hall v. Burgess*, 5 B. & C. 332.

the promises, but not to retake possession, that will not be sufficient to prevent him recovering subsequent rent from a tenant who quitted without notice (*t*). CH. XIV. s. 6.
Use and Occupation (Evid-
ence).

SECT. 7.—*What Amount can be recovered.*

As the presumption, when a landlord proceeds to recover compensation of this kind, is, that no specific rent has been agreed on, he may recover in this form of action a reasonable satisfaction for the use and occupation of the lands, tenements or hereditaments held or occupied by the defendant as his tenant, or by his permission or sufferance (*u*). No inquiry is made as to the profit resulting from the cultivation, or as to the property being cultivated at all (*x*). He who holds another's premises with his permission, but without an express bargain as to the rent, agrees to pay what a jury may find the occupation to be worth. This is a principle resulting from the nature of an action for "use and occupation" (*y*). Such "reasonable satisfaction" accrues, like interest, *de die in diem* according to the time of the actual occupation (*z*). What can be
recovered.

Where it turns out that a specific rent has been agreed on, payable quarterly, half-yearly or yearly, such rent is the proper measure of damages; and the lease (if not under seal) or the written agreement, if duly stamped, may, as we have seen, by 11 Geo. 2, c. 19, s. 14, be used as evidence of the *quantum* of damages to be recovered (*u*), and of the time at which such rent became payable. It makes no difference in this respect that the agreement is void as to the duration of the term therein mentioned, either by the Statute of Frauds or the 8 & 9 Vict. c. 106, s. 3 (*b*); nor that the defendant was and is a lunatic (*c*). But if the defendant has not had the use and occupation of *all* the premises agreed to be demised, or if there has been an eviction from part, by reason of a defect in the plaintiff's title, the jury may ascertain the value of the occupation of the land actually enjoyed, without regarding the amount of rent reserved by the agreement (*d*). So where the plaintiff has not performed a *condition precedent* on his part, ex. gr. to do certain repairs (*e*), to furnish the house or apartments in a specified manner (*f*), or the like, Where a specific Rent
agreed on.

After an
Eviction from
Part.

Where Plain-
tiff has not
performed a
Condition
precedent.

(*t*) *Redpath v. Roberts*, 3 Esp. 225, Kenyon, C. J.; *Bird v. Debonville*, 2 C. & K. 415, Erle, J.

(*u*) 11 Geo. 2, c. 19, s. 14; ante, 510; *Tomlinson v. Day*, 2 Brod. & B. 680; 1 Arch. N. P. 98.

(*x*) 1 Man. & Gr. 312, n. (*a*).

(*y*) *Mayor of Thetford v. Tyler*, 8 Q. B. 100; 15 L. J., Q. B. 33.

(*z*) *Slack v. Sharpe*, 8 A. & E. 373; *Kirkman v. Jervis*, 7 Dowl. 678; *Pucker v. Gibbins*, 1 Q. B. 421.

(*a*) Ante, 510.

(*b*) *De Medina v. Polson*, Holt N. P. C. 47; *Collett v. Curling*, 10 Q. B. 785; 5 D. & L. 605; *Viscount Downe v. Thompson*, 9 Q. B. 1014.

(*c*) *Dans v. Viscountess Kirkwall*, 8 C. & P. 675.

(*d*) *Tomlinson v. Day*, 2 Brod. & B. 680.

(*e*) *Smith v. Eldridge*, 15 C. B. 236;

Smith v. Twoart, 2 M. & G. 841.

(*f*) *Meehelen v. Wallace*, 6 N. & M. 316; 7 A. & E. 54, n.

CH. XIV. s. 7. the jury may find how much the actual occupation by the defendant, in the then state and condition of the premises, was reasonably worth. The landlord in such case could not recover or distrain for the agreed rent (g).

If there be an agreement to pay rent on a definite day, and the relation of landlord and tenant ceases before the day fixed, to entitle the plaintiff to recover a proportionate part for the broken period it must be found that a new tenancy has been created (h).

Where the
Tenant agrees
to pay Rent
pro Ratâ.

If, however, it be mutually agreed to put an end to a tenancy during a current quarter, the tenant to pay pro ratâ to that time, and the landlord accordingly retakes possession, the amount so agreed to be paid may be recovered in an action for use and occupation (i). So where the tenant holds over for a week after such an agreement has been come to, and then quits possession, and the landlord then accepts possession, the rent to the end of that week may be recovered, together with any previous arrears of rent pro ratâ (k): but the landlord cannot recover as for any subsequent use and occupation (l).

Where the
Tenant has
ceased to
occupy.

If the term or tenancy as agreed on has commenced (the tenant having entered), the lessee or tenant will be liable to all the rent as agreed, notwithstanding he has ceased to occupy (m): unless indeed something has since happened to put an end to the term or tenancy, ex. gr. a surrender by deed or by act and operation of law (n).

After a Fire.
Izon v. Gorton.

It is clear upon the authorities, that even if the premises be destroyed by fire, the whole rent will, if a rent has been agreed on, be payable; unless indeed it has also been agreed that if a fire destroy the premises the rent shall cease (o), in which case a proportionate part may be recovered for the time the premises are actually in use (p). If, however, there is no contract for rent, and the landlord is left to recover compensation for use and occupation, he is (we have seen (p)) only entitled to such sum as a jury shall find to be a reasonable compensation, and the loss of the buildings by fire might, it is presumed, be taken into consideration by the jury in fixing the sum to be paid; and the same principles will apply if a part only be destroyed by fire (q).

When Pre-
mises are held
over.

Where a tenancy is continued beyond the time for which the premises were originally taken, and nothing is arranged respecting the amount to be paid on the new holding, that new holding is not of necessity to be on the same terms as the former, but the jury may

(g) *Mechelen v. Wallace*, *supra*.
(h) *Grimman v. Legge*, 8 B. & C. 321.
(i) *Thomas v. Williams*, 1 A. & E. 478.
(k) *Kirkman v. Jervis*, 7 Dowl. 678.
(l) *Whithead v. Clifford*, 5 Taunt. 518.
(m) *Ante*, 515.
(n) *Whithead v. Clifford*, *supra*; *Grimman v. Legge*, 8 B. & C. 324; *Hall v.*

Burgess, 5 B. & C. 332; *Ward v. Mason*, 9 Price, 291.
(o) *Baker v. Holtzapffell*, 4 Taunt. 45;
Izon v. Gorton, 5 Bing. N. C. 501.
(p) *Ante*, 525.
(q) *Bennett v. Ireland*, E., B. & E. 326;
28 L. J., Q. B. 48.

give the landlord a larger sum for the continued occupation, if there be circumstances to show that such increased rent was expected by him in the event of the tenant holding over, and that such expectation was known to and not repudiated by the tenant (*r*). For instance, where a yearly tenant at 47*l.* per annum continued in possession after the determination of his tenancy and during negotiations for a new lease at 80*l.* per annum, which ultimately went off, it was held, that it was a question for the jury what rent was fairly payable for the continued holding (*s*). In such a case the landlord should not *distrain*, but may maintain an action for use and occupation (*t*).

CH. XIV. s. 7.
Use and Occupation (what Amount can be recovered).

The defendant will not be entitled to any reduction of rent in respect of acts done by a third person which reduced the value of his occupation, but which were done without the authority of the plaintiff (*u*): as where the demised premises are “injuriously affected” (but no part thereof *taken*) by a railway or other company pursuant to their special act or any act incorporated therein (*v*).

No Reduction of Rent by reason of Acts of Third Persons.

Prior to the Judicature Act, where the defendant suffered judgment by default in an action for use and occupation, a writ of inquiry appears to have been necessary (*x*). And as, if the action is strictly one for use and occupation, it is properly for such a sum as shall be found to be a reasonable compensation, a writ of inquiry or other mode of trial would seem to be still necessary (*y*).

Effect of Judgment by Default.

(*r*) *Elgar v. Watson*, Car. & M. 494.

(*s*) *Mayor, &c. of Thetford v. Tyler*, 8 Q. B. 95.

(*t*) *Alford v. Vicary*, Car. & M. 280; *Jenner v. Clegg*, 1 Moo. & R. 213.

(*u*) *Drury Lane Theatre Co. v. Chapman*, 1 C. & K. 14.

(*v*) As to the compensation recoverable by the tenant from the company in such case, see Lands Clauses Consolidation Act, 1845 (8 Vict. c. 18), ss. 119—121.

(*x*) *Arden v. Connell*, 5 B. & A. 885; *Coote L. & T.* 504.

(*y*) R. S. C., Ord. XIII., Rule 6; Ord. XXIX., Rule 4. By the former of these rules, “where the defendant fails to appear to the writ of summons, and the

plaintiff's claim is not for a debt or liquidated damages only, but for detention of goods, and pecuniary damages, or either of them, no statement of claim need be delivered, but interlocutory judgment may be entered, and a writ of inquiry shall issue to assess the value of the goods and the damages, or the damages only, as the case may be, in respect of the causes of action disclosed by the indorsement on the writ of summons.” The rule proceeds to provide that the damages may by order be ascertained “in any way in which any question arising in an action may be tried.” Order XXIX., Rule 4, provides a similar process in case of default of pleading.

CHAPTER XV.

RATES, TAXES AND ASSESSMENTS.

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SECT. 1.—*Contracts as to Rates, Taxes, &c.*

Ordinary Rule.

THE ordinary rule is, that rates and taxes fall upon the tenant, in the absence of express agreement.

Express Agreement.

In addition to this, the ordinary express agreement is that the tenant pay all rates, taxes and assessments. Sometimes, however, they are thrown partly upon the landlord and partly upon the tenant, the agreement being construed according to the real intention of the parties (*a*). Such stipulations are seldom interfered with by the legislature, which usually provides that "nothing in this act con-

Not usually interfered with by Statute.

tained shall be construed to alter, change, determine, or make void any contracts, covenants, or agreements whatsoever between landlord and tenant, or any other persons, touching the payment of taxes and assessments," or to that effect (*b*). But the property tax always formed an exception to the general rule (*c*); and more than one recent statute has either imposed a burden wholly on the landlord, or shared it between the landlord and the tenant (*d*). Generally where a tenant covenants to pay a rent without deducting taxes, a subsequent statute authorizing tenants to deduct will not repeal the covenant. It does

Exceptions.

(*a*) See *Graham v. Wade*, 16 East, 29; *Watson v. Atkins*, 3 B. & A. 647.

(*b*) 38 Geo. 3, c. 5, s. 35 (Land Tax); 18 & 19 Vict. c. 120, s. 219 (Metropolis Management Act); 25 & 26 Vict. c. 102, ss. 96, 97 (Amendment of the Metropolis Management Acts); 38 & 39 Vict. c. 55, s. 226 (The Public Health Act, 1875).

(*c*) 5 & 6 Vict. c. 35, ss. 60, 103; post, Sect. 2 of this chapter.

(*d*) See 32 & 33 Vict. c. 41, as to rating to poor rates any rateable hereditament let for three months or less (post, Appendix (A), Sect. 11, where the act is set out verbatim); and the Rating Act, 1874, post, 547. The Contagious Diseases (Animals) Act, 1869 (32 & 33 Vict. c. 70), s. 89, was to a like effect; but that act has been repealed, and the act of 1878 which replaces it contains no such provision.

not *compel* the tenant to make such deduction, and therefore leaves the covenant in full force (e). So a tenant may covenant to pay all rates, &c., including those which, under a previous local act, he would have been entitled to deduct from his rent (f). But the Property Tax Act makes all such contracts, covenants and agreements “utterly void” (g), so far only as they relate to the property or income tax (h).

CH. XV. s. 1.
*Contracts as to
Rates, Taxes,
&c.*

The land tax usually falls upon the landlord in the absence of an express covenant or stipulation to the contrary (i). So do sewers rates, except perhaps those made for ordinary annual expenses (k). But the tenant may expressly take upon himself the payment of land tax and sewers rates (l); and a general covenant or promise to pay all rates, taxes, &c., will include the land tax and sewers rates (m).

Land Tax and
Sewers Rates.

Under an agreement for a lease at a yearly rent of 40% payable quarterly, “free of all outgoing,” the tenant ought to pay the land tax and commutation rent-charge; and the landlord is entitled to have a covenant to that effect inserted in the lease (n). The tithe rent-charge must be paid under a covenant to pay “any taxes, rates, assessments or charges whatsoever” (o), but not, if the words be only “all taxes and assessments” (p).

Tithe Rent-
charge.

Where a contract for an assignment of the lease of a public house described the public house as held at a certain “*net*” annual rent under usual and common covenants, it was held, that these words included a covenant by the tenant to pay land tax and sewers rates (q). A covenant in a sublease to perform all the covenants in the original lease (except to pay rent and insure) will in effect comprise a covenant, contained in the lease, to pay all rates and taxes whatsoever; and may render the sublessee liable to rates for extraordinary drainage and other works of a permanent nature (r). A covenant by a lessee to pay taxes generally, includes parliamentary taxes, and consequently the land tax; for when “taxes” are generally spoken of, if the subject-matter will bear it, parliamentary taxes given to the crown are

Generally.

Construction
of Covenants
to pay Rates,
&c.

(e) *Brewster v. Kitchen*, 1 Ld. Raym. 320, 321; *Cartlew*, 438, 439; 12 Mod. 169; *Holt R.* 175, 669.

(f) *Payne v. Burridge*, 12 M. & W. 727; *Thompson v. Lapworth*, L. R., 3 C. P. 149; 37 L. J., C. P. 74.

(g) 5 & 6 Vict. c. 35, s. 103.

(h) *Fuller v. Abbott*, 4 Taunt. 105; *Tinckler v. Prentice*, 4 Taunt. 549; *Howe v. Synge*, 15 East, 440; *Festing v. Taylor*, 3 B. & S. 217, 231. See 536, post.

(i) Post, Sect. 3.

(k) Post, Sect. 4; *Callis on Sewers*, 140.

(l) *Southall v. Leadbetter*, 3 T. R. 458; *Bennett v. Womack*, 7 B. & C. 627; 3 C. & P. 96; *Waller v. Andrews*, 3 M. & W. 315; *Payne v. Burridge*, 12 M. & W. 730.

(m) *Amfield v. White*, Ry. & Moo. 246; *Manning v. Lunn*, 2 C. & K. 13.

(n) *Parish v. Sleeman*, 1 De G., F. & J. 326; 29 L. J., Ch. 86. See Form of Covenant, post, Appendix B., Sect. 15; and see further post, Sect. 15, “Tithe Rent-charge.”

(o) *Lockwood v. Wilson*, 43 L. J., C. P. 179; 30 L. T. 761.

(p) *Jeffery v. Neale*, L. R., 6 C. P. 240; 40 L. J., C. P. 191.

(q) *Bennett v. Womack*, 7 B. & C. 627; 3 C. & P. 96.

(r) *Sweet*, app., *Seager*, resp., 2 C. B., N. S. 119; *Thompson v. Lapworth*, L. R., 3 C. P. 149; 37 L. J., C. P. 74.

CH. XV. s. 1. included. If, therefore, a lease be made for years, rendering rent "free and clear from all manner of taxes, charges and impositions whatsoever," the lessee is bound to pay the whole rent without any manner of deduction for any old or new tax, charge or imposition whatsoever: thus on a grant of a fee-farm rent, "without any deduction, defalcation or abatement for or in any respect whatsoever," the grantee was held to be entitled to receive the full rent without deducting the land tax (*t*). Where a tenant verbally agreed "to pay all taxes," it was held, that under this agreement he was bound to pay the land tax, although it was not specifically mentioned (*u*).

Parliamentary and Parochial Taxes.

An agreement that "all taxes, parochial and parliamentary," shall be paid by the tenant, will not comprise a sewers rate, for that is neither parochial nor parliamentary (*x*): so an improvement rate made by commissioners under a local act is not parochial or parliamentary (*y*): but the land tax is a parliamentary tax, being imposed directly by parliament (*z*). A covenant by the lessee to pay all parliamentary taxes, assessments, &c. will extend to the land tax which has been redeemed or purchased by a former lessee, and is payable to him under the Land Tax Act (*a*). A county rate is not a parliamentary tax, but it is a parochial rate, because levied and paid with and out of the poor's rate (*b*). By certain acts of parliament provision was made for making rates on certain lands which were before liable *ratione tenuræ* to repair a bridge, for raising a fund for such repairs; a lessee of part of those lands covenanted to pay his rent free and clear of and from any land tax and all other taxes and deductions whatsoever, either parliamentary or parochial, imposed upon the premises or upon the lessor; it was held, that the rate for the repair of the bridge was not a parliamentary tax within this covenant (*c*). Where a local act imposed upon owners the duty of paving, &c., and, in case of their default, authorized the commissioners to do the work themselves, and to charge the owners with the expenses proportionally, and to levy the amount by distress on the premises: held, that the sum paid by an owner was for his *breach of duty*, and not for a rate or tax which the tenant was liable to repay (*d*).

(*t*) *Bradbury v. Wright*, 2 Doug. 624; *Count of Arran v. Crisp*, 12 Mod. 64; *Hopwood v. Burefoot*, 11 Mod. 237; Bac. Abr. tit. *Covenant* (F.); *Giles v. Hooper*, Carth. 135; *Davenant v. Bp. of Salisbury*, 1 Vent. 223.

(*u*) *Amfield v. White*, Ry. & Moo. 246; *Manning v. Lunn*, 2 C. & K. 13; *Brewster v. Kitchen*, 1 Ld. Raym. 317; 1 Salk. 198; 12 Mod. 166; Carth. 438; *Giles v. Hooper*, Carth. 135; *Champernon v. Champernon*, cited in *Bradbury v. Wright*, 2 Doug. 624; *Blandford v. Marlborough*, 2 Atk. 642.

(*x*) *Palmer v. Earith*, 14 M. & W. 428.

(*y*) *Guardians of Bedford Union v. Bedford Improvement Comms.*, 7 Exch. 777; but general words may include it so as to render the tenant liable; *Payne v. Burridge*, 12 M. & W. 727; *Sweet*, app., *Seager*, resp., 2 O. B., N. S. 119.

(*z*) *Manning v. Lunn*, 2 O. & K. 13.

(*a*) *Governors of Christ's Hospital v. Harrild*, 2 M. & G. 707.

(*b*) *Reg. v. Inhabit. of Aylesbury*, 9 Q. B. 261.

(*c*) *Baker v. Greenhill*, 3 Q. B. 148.

(*d*) *Tidswell v. Whitworth*, L. R., 2 C. P. 326; 36 L. J., O. P. 103. Compare this case with *Thompson v. Lapworth*, L. R.,

A covenant by the tenant to pay the land tax, and all other taxes, rates, assessments and impositions whatever, will not oblige him to pay contribution towards the rebuilding of a party-wall (*e*). But where a tenant covenanted to pay "all taxes, rates, duties, assessments and impositions," "it being the true intent and meaning of these presents, that the lessor should have the said yearly rent of 60% hereby reserved, in net money, without any deduction, defalcation or allowance out of the same, on any account whatsoever," and there was also a special covenant as to repairing party-walls, it was held, he could not compel his lessor to contribute to the expense of rebuilding a party-wall (*f*).

CH. XV. s. 1.
Contracts as to
Rates, Taxes,
&c.

Party-walls.

A covenant to discharge from taxes extends to subsequent taxes of the same nature as those in being at the time the covenant was made, but not to those of a different nature (*g*). Where a lessee covenanted that he would pay all taxes, charges, rates, tithes or rent-charge in lieu of tithe, dues and duties whatsoever as then were or should at any time thereafter during that demise be taxed, charged, assessed or imposed upon the said demised premises; it was held, that the covenant was not confined to rates payable by the landlord, but meant all rates then imposed on the lessee in respect of his occupation, and all future rates which might be imposed on the land itself (*h*). Where a person took a part of certain premises, the whole of which were rated at a certain annual value, and the lessor covenanted to pay all taxes then chargeable thereon, and the lessee covenanted to pay all fresh taxes which might thereafter be charged on the premises, or any part thereof: it was held, that the true construction of these covenants was, that the lessor should pay such taxes as were charged on the premises at the time of making the lease, at the then annual value, and that the lessee should pay all fresh taxes, and all such additions to those formerly chargeable as were occasioned by the improved value of the premises (*i*).

New Taxes.

A tenant of marsh lands, who agreed to pay all outgoings whatever, rates, taxes, scots, whether parochial or parliamentary, that then were or should thereafter be chargeable upon the lands, the present land tax excepted, is liable to pay an extraordinary assessment made by the commissioners of sewers for a work of permanent benefit to the land (*k*). A covenant by the tenant to pay all taxes, rates, duties, levies, assessments and payments will extend to the cost for paving

Extra-ordinary As-
sessments.

3 C. P. 149; 37 L. J., C. P. 74; and see *Bird v. Elwes*, L. R., 3 Ex. 225; 37 L. J., Ex. 91.

(*e*) *Southall v. Leadbetter*, 3 T. R. 458; *Beardmore v. Fox*, 8 T. R. 214.

(*f*) *Barrett v. Duke of Bedford*, 8 T. R. 603.

(*g*) *Brewster v. Kitchell*, 1 Salk. 198;

1 Ld. Raym. 317; *Carthew*, 438; 12 Mod. 166; *Holt R.* 175, 669.

(*h*) *Hurst v. Hurst*, 4 Exch. 571.

(*i*) *Watson v. Atkins*, 3 B. & A. 647; *Graham v. Wade*, 16 East, 29.

(*k*) *Waller v. Andrews*, 3 M. & W. 315; *Palmerv. Earith*, 14 M. & W. 431; *Sweet, app., Seager, resp.*, 2 C. B., N. S. 119.

CH. XV. s. 1. footways, which, by a local act passed before the lease was made, *Contracts as to Rates, Taxes, &c.* were made payable by the tenants of the adjoining houses, and which they were allowed to deduct from their rents, in the absence of any express stipulation to the contrary (*l*). A covenant by a lessor to pay all taxes on the demised premises has been held not to extend to the removal of a nuisance caused by an accumulation of mud in ornamental water, which the tenant ought to have cleared out, and which was removed under the Nuisances Removal Act, 1855 (*m*), but a covenant to “bear, pay and discharge” the sewers rate “and all other taxes, rates and assessments and outgoings whatsoever,” was held, in *Crosse v. Raw*. *Crosse v. Raw* (*n*) to throw upon the tenant the obligation to pay for the making of a drain which, under the 10th section of the Sanitary Act, 1866 (*o*), the landlord as “owner” might have been required by the sewer authority to make, but which the tenant had made under an arrangement with the landlord by which the expense was to be borne by the party liable. Under the Public Health Act, 1875, sect. 23, the local authority has an option to give notice to the owner or occupier to make an improvement of this character, and to recover the expenses from the owner, or to declare them to be “private improvement expenses.” A bishop not being able to bind his successors unless certain conditions and formalities are observed by him, a covenant by him to pay all charges, ordinary and extraordinary, does not include land tax (*p*).

In what Proportion Rates and Taxes are to be paid.

When a lessee agrees to pay all rates, taxes, &c. he must pay the full amount thereof, notwithstanding any subsequent increase occasioned by additions and new buildings, of which he has the use and benefit during the term (*q*). But when a lessor covenants to pay any rate or tax, or it is specifically excepted from the lessee’s covenant, and the annual value of the premises is afterwards increased by alterations and new buildings, the landlord is liable to pay, not the whole rate or tax as paid from time to time by the tenant, but only so much thereof as his rent or the annual value of the premises when demised bears to the improved annual value (*r*). Thus a landlord who covenants to pay the land tax, and save the tenant harmless, will discharge his covenant, if he pay the tax according to the rent he receives, although the premises may be taxed at a higher rate (*s*).

(*l*) *Payne v. Burridge*, 12 M. & W. 727; *Sweet*, app., *Seager*, resp., 2 C. B., N. S. 119; *Thompson v. Lapworth*, L. R., 3 C. P. 149; 37 L. J., C. P. 74.

(*m*) *Bird v. Elwes*, L. R., 3 Ex. 225; 37 L. J., Ex. 91.

(*n*) L. R., 9 Ex. 209; 43 L. J., Ex. 144.

(*o*) See now Public Health Act, 1875, ss. 23, 214, 226, 251.

(*p*) *Bp. of Oxford v. Wise*, cited in *Blanford v. Marlborough*, 2 Atk. 544;

Davenport v. Bp. of Salisbury, 1 Ventr. 223; 2 Lev. 68.

(*q*) *Hurst v. Hurst*, 4 Exch. 571.

(*r*) *Smith v. Humble*, 15 O. B. 321; *Watson v. Home*, 7 B. & O. 285; *Hyde v. Hill*, 3 T. R. 377; *Yeo v. Leman*, 2 Stra. 1190; 1 Wils. 21.

(*s*) *Whitfield v. Brandwood*, 2 Stark. 440; *Yeo v. Leman*, 2 Str. 1191; 1 Wils. 21; *Barnfather v. Lee*, cited 3 T. R. 379; *Bramston v. Robins*, 4 Bing. 11.

If the tenant be under-rated, he can only deduct pro ratâ (*t*). Where the tenant of a piece of ground, at a fixed annual rent, covenanted not to build without the licence of the lessor, and the lessor covenanted to pay all taxes charged or to be charged during the term, and at the time of executing the lease the lessor gave the lessee a licence to build, which he did, and thereby much increased the annual value of the premises; it was held, that the lessor was liable to pay taxes in proportion to the rent received, and not according to the improved annual value (*u*). Where A. granted a building lease to B. at the yearly rent of 7*l.*, who covenanted to pay all taxes except the land tax, and afterwards improved the estate, and sublet it at 54*l.* per annum; it was held, that A. was liable only to pay the land tax in proportion to the old rent (*x*). Under a covenant by a tenant for the payment of 80*l.* yearly rent, all taxes thereon being to him allowed; and also that he would pay all *further* or additional rates on the premises, or on any additional buildings or improvements made by him; and a covenant by the landlord to pay all rates on the premises or on the tenant, in respect of the said yearly rent of 80*l.*, except such further or additional taxes as may be assessed on the demised premises; the tenant was held bound to defray all increase of the old as well as the new rates, beyond the proportion at which the premises were rated at the time of the deed, which was 20*l.* in respect of the 80*l.* rent (*y*). Where the owner of a house, in consideration of a premium, demised it at one-third of its annual value, and afterwards redeemed the land tax, it was held, that he was entitled to receive from the tenant an annual payment equal to two-thirds of the land tax so redeemed (*z*).

CH. XV. s. 1.
*Contracts as to
Rates, Taxes,
&c.*

When a tenant neglects to pay any rates, taxes, &c., pursuant to his covenant or promise in that behalf, the lessor may sue him for the breach of such covenant or promise (*a*), or he may maintain ejectment if the lease contain a proviso for re-entry applicable to such covenant or promise (*b*), but not otherwise.

Landlord's
Remedy.

Where a landlord is liable to any rate or tax, which the tenant has paid, under actual or implied compulsion, the latter may deduct the amount from his rent, unless there is an express covenant or stipulation to the contrary (*c*). He is not entitled to make such deduction until he has actually paid the rate or tax (*d*). The deduction should

Tenant's Re-
medy by De-
duction from
Rent.

(*t*) *Sherington v. Andrews*, Comb. 483; but see *Werden v. Pickering* there cited; *Watson v. Home*, 7 B. & C. 285, 2nd point.

(*u*) *Watson v. Home*, 7 B. & C. 285; *Hyde v. Hill*, 3 T. R. 377; *Rex v. Scott*, 3 T. R. 602.

(*x*) *Barnfather v. Lee*, cited 3 T. R. 379.

(*y*) *Graham v. Wade*, 16 East, 29; *Watson v. Atkins*, 3 B. & A. 647.

(*z*) *Ward v. Const.*, 10 B. & C. 635.

(*a*) *Hurst v. Hurst*, 4 Exch. 571; *Thompson v. Lapworth*, L. R., 3 C. P. 149; 37 L. J., C. P. 74.

(*b*) *Parris v. Burrell*, 10 C. B. 821.

(*c*) *Payne v. Burridge*, 12 M. & W. 727; *Sweet*, app., *Seager*, resp., 2 C. B., N. S. 119; *Hurst v. Hurst*, 4 Exch. 571.

(*d*) *Ryan v. Thompson*, L. R., 3 C. P. 144; 37 L. J., C. P. 134.

CH. XV. s. 1.
*Contracts as to
 Rates, Taxes,
 &c.*

be made from the rent of the current year; and the tenant cannot claim it from his landlord at any subsequent period (*e*). On this ground, a plea in bar to a cognizance for a distress for rent, which stated, that "divers sums, amounting to a certain sum, had been from time to time duly assessed and rated on the premises for land tax, and from time to time paid by the plaintiff, wherefore he deducted the said sum, being the amount of the tax which the defendant, as landlord, was liable to bear in respect of the rent," was held bad, for not stating the specific periods for which the respective sums were assessed or paid; and in not showing that the payment claimed to be deducted was made after the rent distrained for had accrued, or was then accruing (*f*). Where the landlord covenants to pay the land tax, the lessee is not entitled to deduct for more than would be assessed on the amount of his rent, although he may have actually paid more (*g*). Where by lease rent is to be paid without deduction, except for land tax and sewers rate, and the annual value of the premises is afterwards increased by alterations and new buildings, the deduction is to be made not of the whole tax as paid, but only in proportion to the rent reserved as compared with the improved annual value of the premises (*h*). In one case, a succeeding tenant, who came in at Michaelmas (at which time a quarter's rent was due), and received from the former tenant a receipt for a year's property tax also due at Michaelmas, was held to be entitled to deduct the amount upon the landlord's distraining for half-a-year's rent at Christmas (*i*). A broker, who, when receiving rent under a distress, deducts a sum purporting to be for land tax, is not to be considered as *allowing* the land tax, so as to affect the landlord's right, but as merely, from not knowing how to act, consenting to receive the money without the sum deducted (*k*). Sums allowed by way of deduction from rent in respect of rates and taxes paid (although so allowed erroneously) operate as payment, and will support a defence of payment of so much of the rent (*l*).

Remedy by
 Action.

Where a tenant has paid a tax, which his landlord is bound to pay, he may recover the amount paid by action (*m*). A tenant who has been compelled by the "building owner" to pay the proportion of the expenses of a party-wall or structure which was payable under the Metropolitan Building Act, 1855 (18 & 19 Vict. c. 122), by his landlord, the "adjoining owner" may maintain an action against the latter to recover the sum so paid, and is not bound (though entitled) to

(*e*) *Andrew v. Hancock*, 1 B. & B. 37;
Cumming v. Bedfordborough, 15 M. & W. 438.
 (*f*) *Stubbs v. Parsons*, 3 B. & A. 518.
 (*g*) *Whitfield v. Brandwood*, 2 Stark. 440.
 (*h*) *Smith v. Hamble*, 15 C. B. 321.
 (*i*) *Clennel v. Read*, 7 Taunt. 50.

(*k*) *Saunderson v. Hanson*, 3 C. & P. 314.
 (*l*) *Waller v. Andrews*, 3 M. & W. 312;
Dramston v. Robins, 4 Bing. 11.
 (*m*) *Graham v. Tate*, 1 M. & S. 609;
Watson v. Home, 7 B. & C. 285.

deduct it from the rent due or accruing due (*n*). Where the tenant has paid his full rent, without deduction, *under protest*, because of a threat of distress, he may recover by action the amount of rates and taxes which he has paid for the landlord, and which the latter has improperly refused to allow (*o*); but where a tenant has omitted to deduct a landlord's tax (*p*), or voluntarily paid his full rent without deducting a landlord's tax for a considerable time, he cannot recover it back. Thus, where the tenant of premises under a lease, which contained no reservation as to the payment of land tax, claimed a deduction for such tax, which was refused by the landlord, who afterwards distrained, and was paid the whole rent, and the tenant afterwards paid his full rent for five successive years, without claiming to deduct such tax; it was held, that such acquiescence was equivalent to a dereliction of his claim in the first instance; and that he could not recover back any of the sums so paid by him for land tax, in an action of assumpsit for money paid, on the ground of their being involuntary payments (*q*); and where an occupier of lands had, during a course of twelve years, paid to the collector of taxes the landlord's property tax, and the full rent as it became due to the landlord, without claiming any deduction on account of the tax so paid; it was held, that the occupier could not recover back from the landlord any part of the property tax so paid (*r*). But where a local act provided that a drainage tax of one shilling per acre should be paid by the tenants of the land charged with the same, and that the tenants might deduct the same out of the rents payable to their landlords; it was held, that a tenant who on the determination of his tenancy paid the full rent then due, without deducting the tax falling due on the determination of the tenancy, but not then called for, might recover from the landlord the amount of tax which he (the tenant) was afterwards compelled to pay, and would never have any opportunity to deduct from rent (*s*). Where the plaintiff demised a house to the defendant, who by the agreement was to pay a rent clear of all deductions for taxes and parochial rates; and after occupying the premises for some time, the defendant quitted them, leaving claims for land tax and poor's rates, which latter the landlord was obliged by a local act of parliament to pay, and he did pay them; it was held, that he could not recover the amount from the defendant in an action for money paid, but should have declared specially on the agreement, because, as there was no

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*Contracts as to
Rates, Taxes,
&c.*

(*n*) *Earle v. Maugham*, 14 C. B., N. S. 626.

(*o*) *Baker v. Greenhill*, 3 Q. B. 148.

(*p*) *Cumming v. Bedfordrough*, 15 M. & W. 438 (Property Tax).

(*q*) *Spragg v. Hammond*, 2 B. & B. 69; 4 Moo. 431; *Andrew v. Hancock*, 1 B. &

B. 37; 3 Moo. 278; *Fuller v. Abbott*, 4 Taunt. 105; *Waller v. Andrews*, 3 M. & W. 312; *Stubbs v. Parsons*, 3 B. & A. 616; *Brisbane v. Dacres*, 5 Taunt. 143.

(*r*) *Denby v. Moore*, 1 B. & A. 123.

(*s*) *Dawson v. Linton*, 5 B. & A. 521.

CH. XV. s. 1. original liability on the defendant to pay, it could not be said to be money paid to his use (*t*).
Contracts as to Rates, Taxes, &c.

Remedy by Defence to Action for Rent.

In an action for rent, the tenant may plead as to part, that he has paid a landlord's tax to that amount, in respect of the rent due to the plaintiff claimed by the declaration, after he has in fact paid the tax (*u*). In such action the validity of the rate or tax, or the plaintiff's liability to pay all or any part of it, may be disputed (*x*); or the plaintiff may reply that by the lease or agreement the defendant expressly agreed to pay all rates and taxes (*y*). In support of a plea of payment of a landlord's tax, the tenant should call the collector, and produce the assessment (*z*); but the latter has been held unnecessary (*a*).

In case of Bankruptcy.
 32 & 33 Vict.
 c. 71, s. 32.

By "The Bankruptcy Act, 1869," sect. 32, "the debts hereinafter mentioned shall be paid in priority to all other debts. Between themselves such debts shall rank equally, and shall be paid in full, unless the property of the bankrupt is insufficient to meet them, in which case they shall abate in equal proportions between themselves; that is to say,

(1.) All parochial or other local rates due from him at the date of the order of adjudication, and having become due and payable within twelve months next before such time; all assessed taxes, land tax, and property or income tax assessed on him up to the fifth day of April next before the date of the order of adjudication, and not exceeding in the whole one year's assessment;

(2.) All wages or salary of any clerk or servant in the employment of the bankrupt at the date of the order of adjudication, not exceeding four months' wages or salary, and not exceeding fifty pounds; all wages of any labourer or workman in the employment of the bankrupt at the date of the order of adjudication, and not exceeding two months' wages;

Save as aforesaid, all debts provable under the bankruptcy shall be paid *pari passu*" (*b*).

SECT. 2.—*Property Tax.*

Property and Income Tax Acts.

The acts relating to property tax and income tax are very numerous (*c*), as the amount of these taxes varies from time to time according to the exigencies of the government. The principal act, passed

(*t*) *Spencer v. Parry*, 3 A. & E. 331.

(*u*) *Tinckler v. Prentice*, 4 Taunt. 549;
Baker v. Davis, 3 Camp. 474; *Pocock v. Eustace*, 2 Camp. 181.

(*x*) *Lobban v. Cook*, 3 H. & N. 238.

(*y*) *Payne v. Burridge*, 12 M. & W. 727.

(*z*) *Gabell v. Shevell*, 5 Taunt. 81.

(*a*) *Phillips v. Beer*, 4 Camp. 266.

(*b*) As to distresses and proofs for rent, see ante, 252.

(*c*) See Chit. Stat., 4th ed., vol. v., tit. "Property Tax."

in 1842, is 5 & 6 Vict. c. 35, and the amount of the tax is now (October, 1880) sixpence (*d*). CH. XV. s. 2.
Property Tax.

The property tax, like most others, is a tenant's tax as between him and the public (*e*). But by 5 & 6 Vict. c. 35, s. 60, it is enacted that "the occupier of any lands, tenements, hereditaments or heritages, being tenant of the same, and paying the said duties, shall deduct so much thereof in respect of the rent payable to the landlord for the time being (all sums allowed by the commissioners being first deducted) as a rate of [pence] for every twenty shillings thereof would by a just proportion amount unto, which deduction shall be made out of the first payment thereafter to be made on account of rent; and the receivers of her Majesty, and all landlords, both mediate and immediate, their respective heirs, executors, administrators and assigns, according to their respective interests, and their respective receivers or agents, shall allow such deduction upon receipt of the residue of the rent, under the penalty herein contained; and the tenant paying the said assessment shall be acquitted and discharged of so much money as if the same had actually been paid unto the person to or for whom his rent shall have been due and payable; and the occupier of lands charged on the amount of any composition rent, or payment for tithes arising therefrom, and paying the said duties, shall be entitled to make the like deduction from such composition rent or payment on paying the same" (*f*). So mesne landlords, by whom any such deduction shall have been allowed as aforesaid, may deduct and retain a just proportion thereof from the rent, &c. payable by them to their superior landlord (*g*).

Tenant entitled to deduct Property Tax paid from his next Rent.

All Landlords are to allow such Deduction.

By 5 & 6 Vict. c. 35, s. 73, it is provided that no contract, covenant or agreement between landlord and tenant, or any other persons touching the payment of taxes and assessments to be charged on their respective premises shall be deemed or construed to extend to the duties charged thereon under this act, nor to be binding contrary to the intent and meaning of this act; but that all such duties shall be charged upon and paid by the respective occupiers, subject to such deductions and repayments as are by this act authorized and allowed; and all such deductions and repayments shall be made and allowed accordingly, notwithstanding such contracts, covenants or agreements.

By 5 & 6 Vict. c. 35, s. 103, if any person shall refuse to allow (inter alia) "any deduction authorized to be made by this act out of any rent or other annual payment mentioned in the 9th and 10th Rules of No. IV., Schedule (A.), every such person shall forfeit the Penalty 50l.
for refusing
Deduction.

(*d*) 43 & 44 Vict. c. 20, ss. 50—52.

(*e*) *Cumming v. Bedfordshire*, 15 M. & W. 438.

(*f*) 5 & 6 Vict. c. 35, s. 60, Sched. (A.), No. IV., Rule "Ninth," incorporated in subsequent acts.

(*g*) *Id.* Rule "Tenth."

CH. XV. s. 2. sum of fifty pounds; and all contracts, covenants and agreements
Property Tax. made or entered into, or to be made or entered into (h), for payment of any interest, rent or other annual payment aforesaid, in full, without allowing such deduction as aforesaid, shall be utterly void," i. e. the particular stipulation shall be void (i).

Larger Rent, subject to Reduction, good. A larger rent, however, may be reserved, subject to a reduction on the repeal or diminution of the property tax (j).

Repayment by Landlord. It has been held by the Court of Appeal that an agreement, that if the tenant will continue to pay his rent in full without any deduction, in respect of landlord's property paid by him, the landlord will repay to the tenant all sums which he has paid, or shall pay for the landlord's property tax, is not invalid as being contrary to this section (k).

When the Deduction may be made. A tenant is not entitled to make any deduction in respect of property tax until he has *actually paid* the amount (l). Such payment operates as a payment pro tanto of the rent then due, or then accruing (m). It was held in *Cumming v. Bedborough* that where the tenant omitted to deduct the tax on his *next payment of rent*, he could not afterwards recover the amount as "money paid" to the use of the landlord (n). By statute 27 Vict. c. 18, s. 15, however, the tenant has the right to deduct the tax from subsequent rent "during the period through which the same was accruing due (o)."

Penalty on Landlord not allowing Deduction. If the landlord or his agent wrongfully refuse to allow the deduction, he will be liable to a penalty of 50% on each occasion (p). Such penalty may be recovered, either by her Majesty's attorney-general on behalf of the crown, or in a *qui tam* action or information commenced in the Exchequer Division (q) of the High Court within twelve calendar months from the time of the penalty being incurred (r). But the attorney-general may stay any such *qui tam* action or information by entering a *nolle prosequi*, or otherwise, in case it shall appear to his satisfaction that any penalty or forfeiture was incurred without intention of fraud (s).

(h) As to the necessity for these words, see *Re Knight*, 1 Exch. 802.

(i) *Gaskell v. King*, 11 East, 166; *Fulder v. Abbott*, 4 Taunt. 105; *Tinckler v. Prentice*, 4 Taunt. 549; *Howe v. Synge*, 15 East, 440.

(j) *Colbron v. Travers*, 12 C. B., N. S. 181; 31 L. J., C. P. 257; *Beadel v. Pitt*, 13 W. R. 287; 11 Jur., N. S. 152. As to annuity, see *Abadam v. Abadam*, 33 Beav. 475; 33 L. J., Ch. 593; and as to rent-charge (which may be devised free of property-tax), see *Frating v. Taylor*, 32 L. J., Q. B. 41, Ex. Ch.

(k) *Lamb v. Brewster*, 4 Q. B. D. 607; 48 L. J., Q. B. 421; 40 L. T. 537; 27 W. R. 478,—affirming decision below.

(l) *Ante*, 537.

(m) *Baker v. Davis*, 3 Camp. 474; *Franklin v. Carter*, 1 C. B. 760; 3 D. & L. 213, cited 15 M. & W. 551.

(n) *Cumming v. Bedborough*, 15 M. & W. 438; *Denby v. Moore*, 1 B. & A. 123; *Spencer v. Parry*, 3 A. & E. 331.

(o) 27 Vict. c. 18, s. 15.

(p) 5 & 6 Vict. c. 35, s. 103, *ante*, 537; *Reg. v. Sheil*, 1 F. & F. 204; *Att.-Gen. v. Sheild*, 3 H. & N. 834; 28 L. J., Ex. 49.

(q) *Judicature Act*, 1873, s. 34.

(r) 5 & 6 Vict. c. 35, s. 185, referring to 43 Geo. 3, c. 99, ss. 62, 63; *Reg. v. Sheil*, 1 F. & F. 204.

(s) *Id.* s. 62. The 186th section gives costs; and this seems not to be impliedly

Income tax is payable upon royalties in the case of a demise, but not of a sale. In *Edwards v. Eastwood* a piece of land was demised, with power to the lessee to get from the land clay, brick earth and other materials for making bricks, and to make the same into bricks upon the premises for a term of fourteen years, paying to the lessor the yearly sum of 17*l.* 10*s.* for surface rent, by quarterly payments; also paying to the lessor for royalty or brick rent the yearly sum of 100*l.*, by four equal quarterly payments on the same days; and also paying in respect of every thousand bricks over and above the first million which should be made on the premises in any one year, an additional royalty or brick rent of 2*s.*, to be paid on the last day of every year. It was held, that both the royalties or brick rents were chargeable with income tax, and that it was payable in the first instance by the lessee, who was entitled to deduct it from the amount due to the lessor (*t*). In such a case the royalties would go to the heir rather than to the executor of the lessor (*u*), although where a mine is sold and the purchase-money is made payable by fifty annual instalments, such instalments constitute capital (not income), and no income tax ought to be paid or deducted in respect thereof (*v*).

CH. XV. s. 2.
Property Tax.

Income Tax
payable on
Royalties re-
served in
Demise.

In estimating the value of a succession to land under the 16 & 17 Vict. c. 51, the successor is not entitled to a deduction for income tax, or the agent's charges for collecting rents (*y*).

No Deduction
from Success-
ion Duty in
respect of In-
come Tax.

SECT. 3.—Land Tax.

The principal Land Tax Acts are 38 Geo. 3, c. 5, made perpetual by 38 Geo. 3, c. 60; amended by 42 Geo. 3, c. 116; 53 Geo. 3, c. 142; 17 & 18 Vict. c. 85; 19 & 20 Vict. c. 80, s. 4. Additional commissioners were appointed by 32 & 33 Vict. c. 64, and several previous acts therein mentioned.

Land Tax
Acts.

The Land Tax Redemption Acts are very numerous. The principal ones are 42 Geo. 3, c. 116; 16 & 17 Vict. cc. 74, 90, 117; 19 & 20 Vict. c. 80, ss. 3, 4 (*z*).

Land Tax
Redemption
Acts.

The application of moneys arising from the excess or surplus of land tax assessed in any particular parish or place beyond the quota

Application of
Excess of
Land Tax.

repealed by Rules of the Supreme Court, Order LV., which places costs in the discretion of the court.

(*t*) *Edmonds v. Eastwood*, 2 H. & N. 811; 27 L. J., Ex. 209.

(*u*) *Barra v. Lea*, 33 L. J., Ch. 437; 10 Jur., N. S. 996.

(*v*) *Taylor v. Evans*, 1 H. & N. 101; 25 L. J., Ex. 269; *Lady Emily Foley v. Fletcher*, 3 H. & N. 769; 28 L. J., Ex. 100.

(*y*) *In re Elwes*, 3 H. & N. 719; 28 L. J., Ex. 46.

(*z*) See also 46 Geo. 3, c. 133; 49 Geo. 3, c. 67; 50 Geo. 3, c. 58; 52 Geo. 3, c. 80; 53 Geo. 3, cc. 123, 112; 54 Geo. 3, c. 173; 57 Geo. 3, c. 100; 1 Will. 4, c. 11, s. 5; 4 & 5 Will. 4, c. 60, s. 4; 1 & 2 Vict. cc. 57, 58; 5 & 6 Vict. c. 37. As to the terms, &c. upon which land tax may now be redeemed, see post, 542; and see the whole series of acts in Chitty's Statutes, 4th ed., vol. 3, tit. "Land Tax."

CH. XV. s. 3. or proportion payable by such parish or place, is provided for by *Land Tax.* 6 Geo. 4, c. 32, as amended by 24 & 25 Vict. c. 91, ss. 39—44. It is to be applied in or towards redemption of the land tax chargeable upon such parish or place.

Land Tax—how charged. By 38 Geo. 3, c. 5, s. 4, the land tax (then about 4s. in the pound) was directed to be rated and charged in manner therein mentioned) upon all hereditaments in *England, Wales, and Berwick-upon-Tweed*, and upon all persons “having or holding” any such hereditaments “in respect thereof.”

May be levied by Distress and Sale, or by Commitment. By sect. 17, it is to be levied and raised, when necessary, by distress and sale, with power to break open outer doors, &c., in the presence of a constable; and with power to the commissioners of land tax to commit defaulters to prison, there to remain until the arrears of land tax, with costs, are paid. But a distress may not be made immediately after the tax is demanded; there must be a refusal, or a neglect and default to pay the tax, and a reasonable time after demand made should be allowed, otherwise the distress will be illegal (*a*). An outer door, &c. cannot be broken open to levy land tax, except in the presence of a constable (*b*).

Power to Tenant to deduct a proportionate Part from the Rent. By the same sect. 17, “the several and respective tenant or tenants of all houses, &c., which shall be rated by virtue of this act, are hereby required and authorized to pay such sum or sums of money as shall be rated upon such houses, &c., and to deduct out of the rent so much of the said rate as, in respect of the said rents of any such houses, &c., the landlord should and ought to pay and bear; and the said landlords, both mediate and immediate, according to their respective interests, are hereby required to allow such deductions and payments upon the receipt of the residue of the rents.”

Acquittance from Rent, pro tanto. By sect. 18, “every tenant paying the said assessment or assessments last mentioned shall be acquitted and discharged of so much money as the said assessment or assessments shall amount unto, as if the same had actually been paid unto such person or persons to whom his rent shall have been due and payable;” with power to the commissioners of land tax, or any two of them, to settle, as they shall think fit, any differences between landlord and tenant, or any other, concerning the said rates. When they have decided any such difference the court will not re-examine it (*c*).

Express Contracts as to Rates and Taxes not interfered with. Sect. 35 provides, “that nothing in this act contained shall be construed to alter, change, or determine, or make void any contracts, covenants, or agreements whatsoever between landlord and tenant, or any other persons, touching the payment of taxes and assessments in

(*a*) *Gibbs v. Stoad*, 8 B. & C. 528.

(*b*) *Foss v. Racine*, 8 C. & P. 699; 4 M. & W. 419; 7 Dowl. 53.

(*c*) *Brockman v. Honeywood*, 1 P. Wms. 328.

England, Wales, and Berwick-upon-Tweed; anything herein contained to the contrary notwithstanding.” CH. XV. s. 3.
Land Tax.

The land tax is to be rated and charged upon the person “having or holding” the property “in respect thereof” (*d*). It is a tenant’s tax, as between him and the public (*e*). But, in the absence of any express stipulation to the contrary, the tenant is entitled to deduct out of the current or accruing rent, when paid by him (*f*), not the whole rate as paid, but only so much thereof as the rent paid to his immediate landlord bears to the assessed annual value of the demised premises; and such landlord may deduct out of the next rent paid by him to his superior landlord so much of the rate as such last-mentioned rent bears to the assessed annual value of the property, and so on, toties quoties (*g*). When an outgoing tenant who has paid the land tax hands over the receipt to the succeeding tenant, it seems that the latter may have the allowance of it (*h*).

Tenant liable to the Public for the Land Tax.

With Power to deduct a proportionate Part thereof from his next Payment of Rent.

Any contract by a tenant to pay the land tax, or to pay “all rates and taxes,” will render him liable to pay the whole land tax, without making any deduction from his rent in respect thereof (*i*). Even an oral agreement to pay “all taxes” (not specifically mentioning the land tax) will be sufficient for this purpose (*k*). Under an agreement for a lease at the yearly rent of 40*l.*, payable quarterly, “free of all outgoings,” the tenant ought to pay the land tax and tithe commutation rent-charge, and the landlord is entitled to have a covenant to that effect inserted in the lease (*l*). The land tax is a “parliamentary tax” within the meaning of an agreement to pay rent “and all taxes, parliamentary and parochial” (*m*), but not a parochial tax (*n*).

Express Contracts by Tenants to pay Land Tax, &c.

When the tenant covenants or agrees to pay all rates, taxes and impositions, *except land tax*, or when the landlord covenants or agrees to pay the land tax, or “all rates and taxes” (which would include the land tax), and new buildings are subsequently erected, or other improvements made, during the term, whereby the amount of land tax is increased, the landlord is bound to allow the tenant to deduct from his rent only so much of the land tax as would have been payable for the premises in the state in which they were demised, and not such part of the land tax as is occasioned by the new buildings or

Express Contract by Landlord to pay the Land Tax—New Buildings.

(*d*) 38 Geo. 3, c. 5, s. 4, ante, 540.

(*e*) *R. v. Mitcham*, Cald. 276 (*a*); *Doug.* 226; *Buller, J.*; *Watson v. Home*, 7 B. & C. 285; *Const v. Ward*, 10 B. & C. 649. So is the property tax; *Cumming v. Bedfordrough*, 15 M. & W. 438.

(*f*) *Andrew v. Hancock*, 1 Brod. & B. 37; 3 Moo. 278; *Denby v. Moore*, 1 B. & A. 123; *Stubbs v. Parsons*, 3 B. & A. 616; *Carter v. Carter*, 5 Bing. 406.

(*g*) 38 Geo. 3, c. 5, s. 17, ante, 540.

(*h*) *Clennel v. Read*, 7 Taunt. 50.

(*i*) 38 Geo. 3, c. 5, s. 35, ante, 540; *Gibbs v. Hooper*, Carth. 135; *Brewster v. Kitchell*, 1 Ld. Raym. 317; *Christ's Hospital v. Harriell*, 2 M. & G. 707.

(*k*) *Amfield v. White*, Ry. & Moo. 246; *Hopwood v. Barfoot*, 11 Mod. 237.

(*l*) *Parish v. Sleeman*, 1 De G., F. & J. 326; 29 L. J., Ch. 96.

(*m*) *Manning v. Lunn*, 2 C. & K. 13; *Christ's Hospital v. Harriell*, supra.

(*n*) *Waterloo Bridge Co. v. Cull*, 1 E. & E. 213; 28 L. J., Q. B. 70; 29 Id. 10.

CH. XV. s. 3. other improvements, of which the tenant has the use or benefit (*o*).
Land Tax. The result is, that the lessor is bound to pay such proportion only of the land tax as the reserved rent bears to the total annual value (*p*).

Distress—no Breach of Covenant for quiet Enjoyment. A distress for land tax is no breach of a landlord's covenant for quiet enjoyment, without interruption by him or any other person claiming "by, from or under him" (*q*).

Redemption of Land Tax—by whom, and upon what Terms. The terms on which land tax may now be redeemed or purchased are (*r*) 17l. 10s. per cent. less than under 42 Geo. 3, c. 116, ss. 22, 23. But no person can now, by 16 & 17 Vict. c. 117, s. 1, redeem or purchase any land tax except those "having an estate or interest" in the hereditaments whereon such land tax is charged, and to whom a preference in the redemption of land tax was given for a limited period by 42 Geo. 3, c. 116. A tenant may redeem land tax under this act. Where a tenant is bound to pay the land tax, the amount of it, if redeemed by the person entitled to the rent, is payable and may be recovered as rent (*s*). Where the owner of a house in consideration of a premium demised it at one-third of its annual value, and afterwards redeemed the land tax, it was held that he was entitled to recover from the tenant an annual payment equal to two-thirds of the land tax so redeemed (*t*); and where the owner of land subject to a fee-farm rent redeemed the land tax, that he was entitled to deduct a proportionate part of the land tax from such fee-farm rent (*u*). But a remainderman in possession can compel the representatives of the tenant of a previous particular estate, who has redeemed the land tax, to receive the consideration money for such redemption, with all arrears of interest, so as to free the land from the charge and payment of the interest to which it was subject for the benefit of such tenant, under 42 Geo. 3, c. 116, s. 123 (*x*). The second section of 16 & 17 Vict. c. 117, which enacted, that for the future land tax when redeemed should always merge in the property, was repealed by 19 & 20 Vict. c. 80, s. 3. It was probably found that few redemptions of land tax took place under such circumstances.

Land Tax redeemed may be recovered as Rent.

SECT. 4.—*Sewers Rates.*

Sewers Acts. The principal acts relating to sewers and sewers rates are 23 Hen. 8, c. 5 (made perpetual by 3 & 4 Edw. 6, c. 8); 13 Eliz. c. 9; 7 Ann.

(*o*) *Hyde v. Hill*, 3 T. R. 377; *Graham v. Wade*, 16 East, 29; *Whitfield v. Brandwood*, 2 Stark. R. 441; *Watson v. Home*, 7 B. & C. 286; *Smith v. Humble*, 15 C. B. 321.

(*p*) *Ward v. Const*, 10 B. & C. 649, 654.

(*q*) *Stanley v. Hayes*, 3 Q. B. 106.

(*r*) 16 & 17 Vict. c. 74; and see the other statutes mentioned ante, 639.

(*s*) 42 Geo. 3, c. 116, s. 126.

(*t*) *Ward v. Const*, 10 B. & C. 635.

(*u*) *Moody v. Dean and C. of Wells*, 1 H. & N. 40; 25 L. J., Ex. 273.

(*x*) *Cousins v. Harris*, 12 Q. B. 726.

c. 10; 3 & 4 Will. 4, c. 22; 4 & 5 Vict. c. 45; 12 & 13 Vict. c. 50; CH. XV. s. 4. 24 & 25 Vict. c. 133 (y). *Sewers Rates.*

The Metropolitan Sewers Acts are 11 & 12 Vict. c. 112, amended by 12 & 13 Vict. c. 93; 14 & 15 Vict. c. 75; 15 & 16 Vict. c. 64; 16 & 17 Vict. c. 125; 17 & 18 Vict. c. 111; 18 & 19 Vict. c. 120 (z); 19 & 20 Vict. c. 112; 21 & 22 Vict. c. 104; 23 & 24 Vict. c. 51. *Metropolitan Sewers Acts.*

Sewers within the district of any urban authority are provided for by the Public Health Act, 1875 (a). Real property within the district of a local board of health cannot be assessed to a district rate for the purpose of defraying the expenses of sewers for the benefit of the district, unless there be some person having such an occupation as would make him liable to the poor rate in respect thereof (b). *Sewers within Urban Districts.*

Under the Statutes of Sewers, every person whose property derives benefit from the works of the commissioners is liable to be rated, although the benefit be not immediate (c). The sewers rate is not an annual tax. It is a charge in respect of the improvement of the fee simple of the land (d). In the absence of any special stipulation to the contrary, a sewers rate for extraordinary repairs falls upon the landlord, but a rate for ordinary annual repairs falls on the tenant (e), and, if necessary, the commissioners of sewers will, on appeal to them, decide by whom and in what proportion any particular rate shall be borne (f). The tenant or occupier pays the rate in the first instance (g), and afterwards is entitled to deduct from the next payment of his current rent so much of the rate as the landlord ought to bear; in like manner as with respect to land tax (h). Where A. demised land to B. upon a building lease, at the yearly rent of 60/., "clear of all parliamentary, parochial, and other taxes, rates, assessments and deductions whatsoever (the sewers rate, land tax and landlord's property or income tax only excepted)," with the usual covenant to pay the rent without any deduction or abatement whatsoever (except on account of the sewers rate, land tax and landlord's property or income tax): and B. having, by building on the land, increased its rateable value to 300/., per annum: it was held, that he was only *A Landlord's Tax.* *The Tenant must pay any Increase of the Rate caused by New Buildings, &c.*

(y) See 5 Burn's Justice, 415—419 (30th ed. 1869).

(z) See particularly ss. 68—89, 145—148, 163, 164, 169, 181, 182 of this act; *Reg. v. Great Western R. Co.*, 11 B. & E. 600; *Reg. v. Head*, 3 B. & S. 419; 32 L. J., M. C. 115; *Re Pittivard*, 19 C. B., N. S. 489; 34 L. J., C. P. 301.

(a) 38 & 39 Vict. c. 55, s. 13 *et seq.* See ante, 532, and post, 552.

(b) *Hodgson, app., Carlisle Local Board*, resp., 8 E. & B. 116; *Reg. v. Licensed*

Victuallers' Society, 1 B. & S. 71.

(c) *Soady v. Wilson*, 3 A. & E. 248.

(d) *Smith v. Humble*, 15 C. B. 330.

(e) *Callis on Sewers*, 140.

(f) *Callis on Sewers*, 143; *Coote L. & T.* 278; *Payne v. Burridge*, 12 M. & W. 730.

(g) *Callis*, 140; *Soady v. Wilson*, 3 A. & E. 248.

(h) Ante, 540; *Smith v. Humble*, 15 C. B. 321.

CH. XV. s. 4. entitled to deduct the sewers rate and land tax upon the original rent, and not in respect of the improved value (*i*).
Sewers Rates.

Not a "Parliamentary" Tax. A sewers rate properly so called, not being imposed *directly* by act of parliament, but by the authority and judgment of the commissioners of sewers, is not a "parliamentary" tax (*k*); and therefore a tenant who has agreed to pay "all taxes, parochial and parliamentary," may, after paying a sewers rate, deduct the amount from his next rent (*k*); or such proportion thereof as the landlord ought to bear (*l*). But where a tenant of marsh lands agreed to pay *all outgoings* whatsoever, rates, taxes, *scots*, &c., whether parliamentary or parochial (the land tax only excepted): it was held, that an extraordinary assessment made by commissioners of sewers upon the land, for a work of permanent benefit to the land, was a "scot and outgoing" within the meaning of the agreement (*m*).
 but it is a 'Scot or Outgoing.'

Appeal against Sewers Rate. The validity of a rate made by commissioners of sewers *within the limits of their jurisdiction* can be questioned only by an appeal pursuant to 4 & 5 Vict. c. 45, ss. 3, 8, or under the Public Health Act, 1875, when applicable (*n*); but not in an action (*o*).

Rate void, if made without a Presentment. A Court of Sewers cannot lawfully make a rate without the presentment of a jury (except when such presentment is specially dispensed with by statute (*p*)); if they do, they act without jurisdiction, and will be liable in trespass for the taking of cattle or goods under a distress warrant issued by them for the arrears of such rate (*q*); but an old presentment under a previous commission may be adopted and revived by a new general order made by them (*r*). A presentment under 28 Hen. 3, c. 5, s. 3, need not allege any notice to repair, notwithstanding the 3 & 4 Will. 4, c. 22, s. 5 (*s*). Sometimes it may be removed into the Queen's Bench by certiorari and afterwards quashed (*t*). But in such case the prosecutor must, before the allowance of the writ, enter into a recognizance, as required by the 5 & 6 Will. 4, c. 33 (*u*).

Payment of Sewers Rates—how enforced. The payment of sewers rates is generally enforced (when necessary) in a summary manner, pursuant to 12 & 13 Vict. c. 50, s. 7. But a Court of Sewers may, if they think fit, enforce payment by decree and

(i) *Smith v. Humble*, 15 C. B. 321.

(k) *Palmer v. Earith*, 14 M. & W. 428.

(l) *Smith v. Humble*, *supra*.

(m) *Waller v. Andrews*, 3 M. & W. 312.

(n) *Reg. v. Newman*, 2 E. & E. 420; 29 L. J., M. C. 117; *Luton Local Board*, app., *Davis*, resp., 2 E. & E. 678; 29 L. J., M. C. 173; *Reg. v. Higginson*, 2 B. & S. 471.

(o) *Metropolitan Board of Works v. Vauxhall Bridge Co.*, 7 E. & B. 964; 26 L. J., Q. B. 253; *Churchwards of Birmingham v. Shaw*, 10 Q. B. 868, 879; *Le Feuvre v. Miller*, 8 E. & B. 321; *Reg. v. J.J. of Kingston-upon-Thames*, E., B. & E. 256;

Donnell v. Brighton, 5 T. R. 182; *Fawcett v. Foulis*, 7 B. & C. 394, cited 10 Q. B. 882; *Marshall v. Pitman*, 9 Bing. 595, cited 10 Q. B. 883.

(p) 3 & 4 Will. 4, c. 22, s. 13; *Taylor v. Loft*, 8 Exch. 269; *Reg. v. Warton*, 2 B. & S. 719, 733; 31 L. J., Q. B. 265.

(q) *Wingate v. Wait*, 6 M. & W. 739.

(r) *Taylor v. Loft*, 8 Exch. 269.

(s) *Reg. v. Baker*, L. R., 2 Q. B. 621; 36 L. J., Q. B. 242 (where see form of presentment and proceedings thereon).

(t) *Reg. v. Tower Hamlets Commrs.*, 5 Q. B. 357; *Reg. v. Baker*, *supra*.

(u) *Reg. v. Baker*, *supra*.

by a sale of the lands charged, either in fee simple, fee tail, for life or years (*x*). So they may by decree sell copyholds (*y*). And they may order and decree payment, and assess the amount, of all incidental costs, charges and expenses (*z*). By section 261 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), "proceedings for the recovery of demands *below 50l.*, which local authorities are empowered by law to recover in a summary manner, may, at the option of the local authority, be taken in the County Court as if such demands were debts within the cognizance of such courts."

CH. XV. s. 4.
Sewers Rates.

SECT. 5.—*Poor Rates.*

The statute 43 Eliz. c. 2, which may be considered the origin and foundation of our poor laws, empowers the churchwardens of every parish to raise rates for the support of the poor "by taxation of every inhabitant, parson, vicar and other, and of *every occupier* of lands, houses, tithes impropriate, propriations of tithes, coal-mines or saleable underwoods in the said parish" (*a*).

Origin and
Nature of
Poor Rates.

Amongst the numerous statutes (*b*) relating to poor rates passed subsequently to the above statute, the more important are the Parochial Assessment Act (6 & 7 Will. 4, c. 96), the Union Assessment Committee Act (25 & 26 Vict. c. 103), and the Rating Act, 1874 (37 & 38 Vict. c. 54). The rating of houses *let ready furnished*, either wholly or in lodgings, is provided for by 23 Geo. 3, c. 23, s. 4, which enacts that the landlord is to be deemed the occupier, "and shall be subject to be rated to and pay the poor's rates."

Principal
Statutes.

Furnished
Houses.

The poor rate is not a tax on the land, but a personal charge in respect of the land: in general, therefore, the farmer or occupier, and not the landlord, is liable to this tax; for the rate is a charge upon the occupier in respect of his possession, and not on the lessor in regard to the rent received (*c*). But this is now altered where the demise is for three months, or less (*d*). As the *occupier* of land is rateable, it is immaterial by what tenure he holds, or whether he has any title or not: thus if a disseisor obtain possession of land, he is rateable as the occupier of it (*e*): but it has been considered, that an administrator is not liable to pay poor's rate for the intestate, at least

The Occupier
is rateable
generally.

(*x*) 23 Hen. 8, c. 5, s. 8.

(*y*) 7 Ann. c. 10, ss. 1, 2.

(*z*) 3 & 4 Will. 4, c. 22, s. 55.

(*a*) See 4 Burn's Justice, 844—1090 (30th ed. 1869).

(*b*) See 5 Chit. Stat. tit. *Poor (Rating)* (4th ed.).

(*c*) *Rowley v. Gells*, Cowp. 452; 1 Doug. 304.

(*d*) 32 & 33 Vict. c. 41, s. 1, see post, Appendix A., Sect. 6, where the act is set out verbatim.

(*e*) *Id. But v. Grindall*, 2 H. Blac. 260; 1 T. R. 343; *Rex v. Bell*, 7 T. R. 398; *Rex v. Skingle*, 7 T. R. 549; 1 Bott's P. L. 127.

CH. XV. s. 6. that he is not distrainable without a summons (*f*). It seems, however, that an executor or administrator is liable to poor rates (*g*).

Poor Rates.

Any one of several joint occupiers is liable for the whole amount of their joint assessment to a poor rate; and a warrant of distress against any one alone is good (*h*). A corporation may be inhabitants and occupiers of land, and as such liable to be rated in their corporate capacity (*i*). A lessee for a term of years of a private box in a theatre is rateable under a local act, by which all persons are rateable who "inhabit, hold, occupy, possess or enjoy any land, house, shop, wharf, warehouse, or any other building, tenement, or hereditament, or other persons who by law are chargeable" (*k*). No deductions are now allowed for repairs done or agreed to be done by the tenant, nor for contingent or future renewal of buildings or machinery (*l*). Consequently the rateable value more nearly equals the rack-rent, than it formerly used to do.

Where there is an Occupancy by a Servant only.

The words "inhabitant" and "other," in 43 Eliz. c. 2 (*m*), mean *resident* inhabitants and other inhabitants. If a man do not live within a parish he is to be assessed according to his land; but if he live within the parish, he is to be rated as dwelling there. The residence in a lighthouse by the servant of the owner, at an annual salary, to take care of the light, is the occupation of the master, who alone can be rated in respect of such occupation of the lighthouse (*n*). A servant who engaged and occupied a house and garden, the rent and taxes of which were paid by his master, was held liable to be rated as occupier, and not the master (*o*). The trustees of premises not demised to any one, but who meet occasionally on the premises for the purposes of the trust (the actual occupants being the servants and others who are employed in the objects of the trust), are the persons rateable (*p*). The proprietor of a toll traverse who demises it from year to year *by parol* is properly rateable, as the lessee is a mere bailiff for the collection of it (*q*).

Where there is Partial Occupancy only.

If the owner of a house occupy part of it, he is liable to be rated for the whole, unless there be a distinct occupation of the rest by some other person (*r*). A subtenant of part is not liable to be rated for the whole of the premises; the rate should be either upon the immediate landlord in respect of his entire interest, or upon each subtenant in respect of such portion of the premises as he occupies (*s*).

(*f*) *Stevens v. Evans*, 1 W. Blac. 284; 2 Burr. 1152.

(*g*) *Reg. v. Kirby*, 1 B. & S. 647.

(*h*) *Paynter v. The Queen*, 10 Q. B. 908.

(*i*) *Rex v. Gardiner*, Cowp. 79; *Rex v. Mayor of Sudbury*, 1 B. & C. 389.

(*k*) *Reg. v. St. Martin's*, 3 Q. B. 204.

(*l*) *Reg. v. Wells*, 8 B. & S. 607; L. R., 2 Q. B. 542; 36 L. J., M. C. 109.

(*m*) *Ante*, 545.

(*n*) *Rex v. Tynemouth*, 12 East, 46.

(*o*) *Reg. v. Lynn*, 8 A. & E. 379.

(*p*) *Reg. v. Sterry*, 12 A. & E. 84.

(*q*) *Reg. v. Marquis of Salisbury*, 8 A. & E. 716.

(*r*) *Rex v. St. Mary the Less (Durham)*, 4 T. R. 477.

(*s*) *Lobban v. Cook*, 3 H. & N. 238.

Where a man went from home with his family for nearly a year, but left his assistant to carry on his business in his shop in one room of the house, which for this purpose was parted off by laths from the rest; and he left the key of the house door with a friend, and had the garden cultivated for his own benefit as usual; it was held that he was liable to be rated to the relief of the poor as occupier of the whole house (*t*).

CH. XV. s. 6.
Poor Rates.

By 32 & 33 Vict. c. 41, s. 1 (*u*), the occupier of a rateable hereditament let to him for not more than three months is entitled to deduct the amount paid by him, in respect of any poor rate assessed thereupon, from the rent due or accruing due to the owner.

Rating of Hereditaments demised for Three Months or less.

Under the statute 43 Eliz. c. 2, no other mines than coal mines were rateable, but now, by the Rating Act, 1874 (37 & 38 Vict. c. 54), s. 3, all the poor rate acts extend to mines of every kind. The 8th section of the Act of 1874 provides that "where any poor or other local rate, which at the commencement of this act any lessee, licensee, or grantee of a mine is exempt from being rated to in respect of such mine, becomes payable by him in respect of such mine during the continuance of his lease, grant or licence, or before the arrival of the period at which the amount of the rent, royalty or dues is liable to revision or re-adjustment, he may (*unless he has specifically contracted* (*x*) to pay such rate in the event of the abolition of the said exemption) deduct from any rent, royalty or dues payable by him one half of any such rate paid by him: provided that he shall not deduct any sum exceeding what one-half of the rate in the pound of such poor or other local rate would amount to if calculated upon the rent, royalty, or dues so payable by him."

Rating of Iron Mines, &c. under the Rating Act, 1874.

Tenant may deduct one-half from Rent.

The Rating Act, 1874, s. 3, also extends the operation of the poor rate acts to "land used for a plantation or a wood, or for the growth of saleable underwood, and not subject to any right of common."

Rating of Plantation, &c. under Rating Act, 1874.

By sect. 5, "where the rateable value of any land used for a plantation or a wood, or both for a plantation or wood and for the growth of saleable underwood, is increased by reason of the same being estimated in accordance with this act, the occupier of that land under any lease or agreement made before the commencement of this act, may, during the continuance of the lease or agreement, deduct from

Deduction by Tenant.

(*t*) *Rex v. Aberystwith*, 10 East, 354.

(*u*) See post, Appendix A., Sect. 6.

(*x*) A covenant to pay rent "free of all rates, taxes, and deductions whatsoever, parliamentary, parochial, or of any other nature," is not within this exception. *Devonshire (Duke of) v. Barrow Hematite Steel Co.*, L. R., 2 Q. B. Div. 286 (C. A.); nor is a covenant to "pay or cause to be paid all manner of taxes, rates, assess-

ments, charges, and impositions whatever, parliamentary or parochial, which now are or which shall at any time or times hereafter during the continuance of this demise be taxed, rated, charged, assessed, or imposed upon the said demised mines and premises, the landlord's property tax only excepted;" *Chaloner v. Bolckow*, 39 L. T. 134; 26 W. R. 541—H. L.

CH. XV. s. 5. *Poor Rates.* his rent any poor or other local rate, or any portion thereof, which is paid by him in respect of such increase of rateable value, and every assessment committee, on the application of such occupier, shall certify in the valuation list, or otherwise, the fact and amount of such increase."

The Rating Act, 1874, s. 3, also extends the operation of the poor rate acts to such incorporeal hereditaments as "rights of fowling, of shooting, of taking or killing game or rabbits, and of fishing, when severed from the occupation of the land."

Rating of
Rights of
Sporting, &c.
under Rating
Act, 1874, s. 6.

By sect. 6 "(1), where any right of fowling, or of shooting, or of taking or killing game or rabbits, or of fishing (hereinafter referred to as a right of sporting) is severed from the occupation of the land, and is not let, and the owner of such right receives rent for the land, the said right shall not be separately valued or rated, but the gross and rateable value of the land shall be estimated as if the said right were not severed; and in such case, if the rateable value is increased by reason of its being so estimated, but not otherwise, the occupier of the land may (unless he has specifically contracted (y) to pay such rate in the event of an increase) deduct from his rent such portion of any poor or other local rate as is paid by him in respect of such increase; and every assessment committee, on the application of the occupier, shall certify in the valuation list, or otherwise, the fact and amount of such increase.

"(2.) Where any right of sporting, when severed from the occupation of the land, is let, either the owner or the lessee thereof, according as the persons making the rate determine, may be rated as the occupier thereof.

"(3.) Subject to the foregoing provisions of this section the owner of any right of sporting, when severed from the occupation of the land, may be rated as the occupier thereof.

"(4.) For the purpose of this section the person who, if the right of sporting is not let, is entitled to exercise the right, or who, if the right is let, is entitled to receive the rent for the same, shall be deemed to be the owner of the right."

Local Rate.

Local rate, by s. 15, means any "county rate, borough rate, highway rate, and other local rate leviable upon property rateable to the relief of the poor."

In case of
Bankruptcy
of Tenant.

When a tenant becomes bankrupt, all parochial and other local rates to which he is liable must generally be paid in full (s).

(y) See note (x), *supra*. For cases prior to the act, see Chap. XVIII., *post*. (z) 32 & 33 Vict. c. 71, s. 32.

SECT. 6.—*Assessed Taxes (a).*

CH. XV. s. 6.

*Assessed
Taxes.*

The window duties under 48 Geo. 3, c. 55, were repealed by 14 & 15 Vict. c. 36, which imposed the following house duties, viz.:—

“For every *inhabited* dwelling-house which, with the household and other offices, yards and gardens therewith occupied and charged, is or shall be *worth the rent of 20l. or upwards* by the year :

Window Du-
ties repealed.
House Tax.

Where any such dwelling-house shall be occupied by any person in trade, who shall expose to sale and sell any goods, wares or merchandise, in any shop or warehouse, being part of the same dwelling-house, and in the front and on the ground or basement story thereof :

And also where any such dwelling-house shall be occupied by any person who shall be duly licensed by the laws in force to sell therein by retail beer, ale, wine or other liquors, although the room or rooms thereof in which any such liquors shall be exposed to sale, sold, drunk or consumed, shall not be such shop or warehouse as aforesaid :

And also where any such dwelling-house shall be a farmhouse occupied by a tenant or farm servant, and *bonâ fide* used for the purposes of husbandry only,—

There shall be charged for every twenty shillings of such annual value of any such dwelling-house the sum of *sixpence* :

And where any such dwelling-house shall not be occupied and used for any such purpose and in manner aforesaid, there shall be charged for every twenty shillings of such annual value thereof the sum of *ninepence*.”

By 30 & 31 Vict. c. 90, s. 25, “From and after the 5th day of April, 1867, in order to entitle the occupier of any tenement or building, or part of a tenement or building, to exemption from inhabited house duties on the ground of such premises being occupied as a house for the purposes of trade only, or as a warehouse for the sole purpose of lodging goods, wares or merchandise therein, or as a shop or counting-house, it shall not be necessary to prove, nor shall proof be required, that such occupier resides in a separate and distinct dwelling-house or part of a dwelling-house charged with the said duties.”

As to Ex-
emption of
Trade Pre-
mises from
Inhabited
House Duty.

By 32 & 33 Vict. c. 14, s. 11, “From and after the 5th day of April, 1869, any tenement or part of a tenement occupied as a house for the purpose of trade only, or as a warehouse for the sole purpose of lodging goods, wares or merchandise therein, or as a shop or counting-house, shall be exempt from inhabited house duties,

Exemption
from In-
habited House
Duties of
Trade Pre-
mises under
Care of Ser-
vant only.

CH. XV. s. 6. although a servant or other person may dwell in such tenement, or part of a tenement, for the protection thereof.”

*Assessed
Taxes.*

*Tenant's
Taxes.*

In the absence of any special stipulation to the contrary all assessed taxes fall upon the tenant, who has the use and enjoyment of the articles taxed, and has no right to deduct any part of such taxes from his rent.

*Effect of Ex-
emptions in
Local Acts.*

A local act which exempts certain land from all taxes and assessments whatsoever will not exonerate such land from house duty or other taxes imposed by subsequent public general acts (c).

SECT. 7.—*County Rates.*

*County Rate
Acts.*

The assessment and collection of county rates are regulated by 15 & 16 Vict. c. 81, as altered by 21 & 22 Vict. c. 33 (d). By 15 & 16 Vict. c. 81, s. 6, “for the purposes of preparing ‘the basis for the county rate as in the act mentioned,’ the words ‘full and fair annual value’ shall be taken to mean the net annual value of any property as the same is or may be required by law to be estimated for the purpose of assessing the rates for the relief of the poor.”

*Not Parlia-
mentary
Taxes,*

“A county rate is not a parliamentary tax, although it is in one sense made by parliament; but the rate is not fixed or assessed by act of parliament” (e), but by the justices at quarter sessions, subject to an appeal (f). It is not a tax or tollage within the meaning of the privilege of tenants in ancient demesne as to exemption from taxes and tollages granted by parliament, unless specially named (g). It seems however, to be a parochial tax, being paid out of the poor’s rate (h).

but Parochial,

*and fall on
the Tenant.*

The county rate is collected together with the poor’s rate, and of course falls upon the tenant, who has no right to deduct any part thereof from his rent, in the absence of any special stipulation to the contrary.

*Unoccupied
Houses.*

Unoccupied houses capable of being rated ought to be included in the valuation (i), but an incoming tenant will have to pay only his proportion according to the time of his occupation (k).

SECT. 8.—*Borough Rates.*

*Borough
Rates in
Municipal
Boroughs.*

By 5 & 6 Will. 4, c. 76, s. 92, if the borough fund of a municipal corporation be insufficient for all the purposes specified in this section,

(c) *Perchard v. Heywood*, 8 T. R. 468.
(d) See 2 Chit. Stat. (4th ed.) tit. *County Rate*.

(e) 14 M. & W. 428, Alderson, B.
(f) 15 & 16 Vict. c. 81, ss. 21, 22; 21 & 22 Vict. c. 33.

(g) *Reg. v. Aylesford*, 2 E. & E. 538; 29 L. J., M. C. 83.

(h) *Reg. v. Aylesbury-with-Walton*, 9 Q. B. 261.

(i) *Reg. v. Hammer-smith*, 31 L. J., Q. B. 3; 7 W. R. 524.

(k) 33 Vict. c. 41, s. 16.

the council shall order a borough rate *in the nature of a county rate*, to make up the deficiency. An appeal against such rate may be made to the recorder of the borough (*l*). CH. XV. s. 8.
Borough Rates.

By 17 & 18 Vict. c. 71, a borough rate in the nature of a county rate may be made in boroughs not within the above act. In other
Boroughs.

SECT. 9.—*Highway Rates.*

By the General Highway Act, 5 & 6 Will. 4, c. 50 (*m*), highway rates are to be made by the surveyor of highways, and allowed by two justices, and published and collected in the same way as poor rates (*n*). They are to be made in a prescribed form and manner upon *the occupiers* (*o*). Errors in highway rates may be corrected by the surveyor with the consent and approbation of the justices at a special session for the highways (*p*). Persons rated who through poverty are unable to pay may be excused by the justices at such session (*q*). When property, or the owner or occupier in respect thereof, has, previous to the passing of this act, been *legally exempt from the performance of statute duty*, or from the payment of any composition in lieu thereof, or of highway rate, the said property, and the owners and occupiers thereof, shall be exempt from the payment of the rate hereby imposed (*r*). For levying and recovering the said rate by this act authorized to be made, the surveyor has the same powers, remedies, and privileges, as the overseers of the poor of the parish have by law for the recovery of any rate made for the relief of the poor (*s*). In parishes in which the overseers of the poor have power by local acts of parliament to compound with or require composition for poor rates from the landlords of certain houses, tenements, or hereditaments, and, in case of their refusal to compound, to rate such landlords as the occupiers, the surveyor shall have the same powers, remedies, and privileges to compound and enforce composition, and, in case of refusal by the landlords, to assess them in the same proportions to the rates authorized to be made by this act, as the overseers of the poor have by such acts for assessing and recovering any rate made for the relief of the poor, or the compositions entered into for the same (*t*). An appeal against any highway rate may be made to the quarter sessions (*u*). But the usual

Highway Rates—how made and enforced generally.
On Occupiers.
Correction of Errors.
Excuses from Poverty.
Exemptions.

Recovery of Rates.

Compositions in certain Cases.

Appeal to Sessions.

(*l*) Rawlinson on Municipal Corporations, 179 (5th ed. 1868).

(*m*) See also 25 & 26 Vict. c. 61; 26 & 27 Vict. cc. 61, 94; 27 & 28 Vict. c. 101; 2 Burn's Justice, 974 (30th ed. 1869); id. 270—1149.

(*n*) 5 & 6 Will. 4, c. 50, s. 27—34. If not so published, it does not follow that the rate is utterly void; *Le Feuvre v. Miller*,

8 E. & B. 321.

(*o*) Sect. 29, and Sched. Form No. 4.

(*p*) Sect. 31.

(*q*) Sect. 32.

(*r*) Sect. 33.

(*s*) Sect. 34.

(*t*) Sect. 30.

(*u*) Sect. 103—108.

CH. XV. s. 9. notice of such appeal, together with a statement in writing of the grounds thereof, must be given to the surveyor within fourteen days after such rate shall have been made; and within four days after such notice a recognizance must be entered into, before some justice, with two sufficient sureties, conditioned to try such appeal at, and abide the order of, and pay such costs as shall be awarded (*x*). The sessions may grant a special case (*y*). No highway rate shall be quashed for want of form, or removed by certiorari (*z*). Nothing in this act contained shall apply to any turnpike roads, except where expressly mentioned, or to any roads, &c. under any local act (*a*).

Highway Rates.

Notice and Grounds of Appeal—Recognizance.

Rates not to be quashed for Want of Form, &c.

Highways within the district of any urban sanitary authority are usually provided for under the Public Health Act, 1875 (38 & 39 Vict. c. 55, s. 216), by general district rates levied under that act.

SECT. 10.—*General District Rates under Public Health Act.*

Assessment of General District Rate.

Public Health Act, 1875, s. 211.

By sect. 211 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), “general district rates” are levied on the “occupier of all kinds of property for the time being by law assessable to any rate for the relief of the poor,” and are assessed “on the full net annual value of such property ascertained by the valuation list for the time being in force, or if there is none, by the rate for the relief of the poor made next before the making of the assessment,” under the act.

Rating of Owner instead of Occupier

But the same section provides for the rating of the owner in certain cases as follows:—

“The owner, instead of the occupier, may, at the option of the urban authority, be rated in cases

Where the rateable value of any premises liable to assessment under this act does not exceed the sum of 10*l*.; or

Where any premises so liable are let to weekly or monthly tenants;
or

Where any premises so liable are let in separate apartments, or where the rents become payable or are collected at any shorter period than quarterly:

at Reduced Rate.

Provided that in cases where the owner is rated instead of the occupier, he shall be assessed on such reduced estimate as the urban authority deem reasonable of the net annual value, not being less than two-thirds nor more than four-fifths of the net annual value; and where such reduced estimate is in respect of tenements whether

(*x*) 5 & 6 Will. 4, c. 50, s. 105; see also Highway Act, 1864 (27 & 28 Vict. c. 101), s. 37.

(*y*) Sect. 108.

(*z*) Sect. 107.

(*a*) Sect. 113; *Reg. v. Trafford*, 5 E. & B. 967; *Reg. v. Arnold*, 8 E. & B. 550; 27 L. J., M. C. 92; *Ex parte Bennett*, 6 Jur., N. S. 1196; 9 W. R. 54.

occupied or unoccupied, then such assessment may be made on one half of the amount at which such tenements would be liable to be rated if the same were occupied and the rate were levied on the occupiers.”

CH. XV. s. 10.
*Rates under
Public Health
Act.*

The same section (211 of the Public Health Act, 1875) provides that (inter alios) “the occupier of any land used as arable, meadow or pasture ground only, or as woodland, market gardens, or nursery grounds, and the occupier of any land covered with water, shall be assessed in respect of the same in the proportion of one-fourth part only of such net annual value thereof.”

Quarter
Rating.

As to unoccupied premises, the same section provides:—“If at the time of making any general district rate any premises in respect of which the rate may be made are unoccupied, such premises shall be included in the rate, but the rate shall not be charged on any person in respect of the same while they continue to be occupied; and if any such premises are afterwards occupied during any part of the period for which the rate was made and before the same has been fully paid, the name of the incoming tenant shall be inserted in the rate, and thereupon so much of the rate as at the commencement of his tenancy may be in proportion to the remainder of the said period shall be collected, recovered and paid in the same manner in all respects as if the premises had been occupied at the time when the rate was made.”

Unoccupied
Premises.

As to incoming tenants, the same section provides:—“If any owner or occupier assessed or liable to any such rate ceases to be owner or occupier of the premises in respect whereof he is so assessed or liable, before the end of the period for which the rate was made, and before the same is fully paid off, he shall be liable to pay only such part of the rate as may be in proportion to the time during which he continues to be such owner or occupier; and in every such case if any person afterwards become owner or occupier of the premises during part of the said period, he shall pay such part of the rate as may be in proportion to the time during which he continues to be such owner or occupier, and the same shall be recovered in the same manner as if he had been originally assessed or liable.”

Outgoing and
Incoming
Tenants.

The same section keeps alive exemptions under local acts, and provides for divisions of districts and assessments accordingly (*b*).

Sect. 97 of the Public Health Act, 1848, which act is entirely repealed by the Act of 1875, provided “that nothing in this act shall alter, interfere with or affect any lease, contract or agreement which

Contracts be-
tween Land-
lord and Te-
nant not in-
terfered with.

(*b*) See Lumley's Public Health Act, 1875; and see sect. 320 of the act as to division of expenses between landlord and

tenant, under the provisions of any local act before the passing of the Public Health Act, 1872.

Ch. XV. s. 10. shall have been made or entered into between landlord and tenant before this act is applied to the district in which the premises are situate in respect of which the lease, contract or agreement was made." On the same principle sect. 226 of the Act of 1875 provides that "nothing in this part [i. e. Part VI., which applies to "rating and borrowing powers"] of this act shall alter or affect any lease, contract or agreement made or entered into between the landlord and tenant of any premises."

Expenses of
abating Nui-
sance.

*Budd v. Mar-
shall.*

Where the landlord executed certain works upon the demised premises in consequence of a notice from the sanitary authority under section 94 of the Public Health Act, 1875, to abate a nuisance thereon, and in order to prevent proceedings against himself, it was held that "he could not recover the expenses of such works from the tenant upon the tenant's covenant to pay all taxes, rates, charges, assessments and impositions whatsoever" (except land tax and landlord's property tax) charged, &c. "by authority of parliament or otherwise howsoever" (c). In the subsequent and similar, though in law distinguishable, case of *Budd v. Marshall* (d), however, in which the word "duties" occurred in the covenant to pay taxes, the Court of Appeal held that the landlord could recover.

Private Im-
provement
Rates.

The urban authority have also power, under the Public Health Act, 1875, to make and levy "private improvement rates" upon the occupier (e), who may deduct three-fourths, or such proportion of three-fourths of the rate paid by him as his rent bears to the rack-rent (f), unless there be some special stipulation in his lease to the contrary (g). By sect. 215, "at any time before the expiration of the period for which any private improvement rate is made, the owner or occupier of the premises assessed thereto may redeem the same, by paying to the urban authority the expenses in respect of which the rate was made, or such part thereof as may not have been defrayed by sums already levied in respect of the same."

Water Rates.

Any urban authority may also, under the same act, provide their district with water, and where they supply to any premises "may charge in respect of such supply a water rate to be assessed on the net annual value of the premises" (h).

Generally fall
on Occupier.

With respect to each of the above-mentioned rates it is to be observed that they are to be made and levied upon the occupier, who generally has no right to deduct any part thereof from his rent (except about three-fourths of "improvement rates"). But contracts

(c) *Rawlins v. Briggs*, L. R., 3 C. P. D. 368; 47 L. J., C. P. 487; 27 W. R. 138.

(d) 42 L. T. 793, *Brett, L. J.*, diss., affirming judgment of *Grove, J.*, who had tried the case without a jury (Id. 149).

(e) 38 & 39 Vict. c. 55, s. 213.

(f) Sect. 214.

(g) Sect. 226, *supra*; and see *Smith v. Humble*, 15 C. B. 321.

(h) Sects. 51, 56 *et seq.* And see 556, *post*.

between landlord and tenant as to the payment of rates and taxes are not interfered with (*k*).

The validity of a rate which might be appealed against cannot be questioned in an action, or otherwise than on appeal, unless such rate was wholly *illegal*, and made without jurisdiction (*l*). Any appeal must be entered within a very limited time, and notice of appeal, together with the grounds of appeal, given, and a recognizance with sureties entered into, within the time and in manner in that behalf prescribed (*m*).

The liability to repair a highway *ratione clausuræ* is in the occupier of the land inclosed; not in the owner as owner (*n*). And it seems that such liability does not accrue where either the highway is not immemorial, or where the adjoining land inclosed has not before the inclosure been used for passage (*n*).

CH. XV. s. 10.
Rates under
Public Health
Act.

Appeal.

Repairs of
Highways
Ratione
Clausuræ.

SECT. 11.—Watching and Lighting Rates.

The act 3 & 4 Will. 4, c. 90, was passed to enable parishes and parts of parishes, *without obtaining any local acts*, but with the consent of the ratepayers (*o*), to watch and light, or watch or light, their own parish or district under the direction of inspectors appointed by the ratepayers, and by means of rates to be raised and levied in like manner as poor rates, not exceeding a certain sum to be fixed in the first year, and not to be exceeded in any subsequent year (*p*). The provisions of this act may be adopted in any parish, or part of a parish, in England or Wales, as to watching and lighting, or watching or lighting (both or either), as may be deemed expedient (*q*). But they are not to interfere with "An Act for Improving the Police in and near the Metropolis" (10 Geo. 4, c. 44); nor to extend to any parish or place already regulated by or under the provisions of any act of parliament for all or any of the purposes hereinbefore provided for; or to interfere with the powers which any corporate body may have with respect to watching and lighting (*r*); nor to extend to any part of a parish so regulated (*s*). But the powers of this act may be adopted in any parish so far as the same relate to lighting, although such parish shall be watched (*t*).

(*k*) Sect. 226; *supra*.

(*l*) *Luton Local Board*, app., *Davis*, resp., 2 E. & E. 678; 29 L. J., M. C. 173.

(*m*) Sect. 268 *et seq.*

(*n*) *Reg. v. Ramadan*, Bart., E., B. & E. 949.

(*o*) *Eynaham case*, 12 Q. B. 398, n.; *Reg.*

v. Dunn, 7 E. & B. 220; 26 L. J., M. C. 74.

(*p*) *Beechey v. Quintery*, 10 M. & W. 65.

(*q*) Sects. 71, 73.

(*r*) Sect. 72.

(*s*) Sect. 73.

(*t*) See 3 Burn's Justice, 364—389 (30th ed. 1869).

CH. XV. s. 11. In any district where the Public Health Act, 1875, is in force, in which the 3 & 4 Will. 4, c. 90, has been adopted, such last-mentioned act is superseded (*u*).

*Watching and
Lighting
Rates.*

Rates on
Occupiers.

Rates made under 3 & 4 Will. 4, c. 90, or under local acts as to paving, watching, lighting, &c., generally fall upon the occupier, who has no right to deduct them from his rent. But sometimes the burthen is thrown upon the landlord. Thus by 57 Geo. 3, c. xxix, for regulating the pavement of London, Westminster and Southwark, and the parishes of St. Marylebone and St. Pancras, the paving rates are directed to be paid by the landlord in certain cases.

SECT. 12.—*Water Rates.*

Payable by
Tenant.

10 & 11 Vict.
c. 17, s. 72.
By Landlords
of Small
Tenements.

Water rates are always payable by the tenant or occupier in the absence of an express stipulation to the contrary, for he has the use and enjoyment of the water supplied. But by the Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17), s. 72, the owners of dwelling-houses, the annual value of which does not exceed 10*l*., are made liable to the payment of water rates instead of the occupiers; "and the person receiving the rents of any such house or tenement as aforesaid from the occupier thereof on his own account, or as agent or receiver for any person interested therein, shall be deemed the owner of such house or tenement." Sect. 73 gives power to owners of tenements, where the occupation is under a lease or agreement made *prior to the passing of the special act* (*x*), to recover such payments from the occupiers in the same manner as arrears of rent may be recovered.

Water Rate
under Public
Health Act.

By sects. 51—66 of the Public Health Act, 1875 (38 & 39 Vict. c. 55), local authorities within the meaning of that act may supply their districts with water; and for this purpose there are incorporated with the Public Health Act, 1875, the Waterworks Clauses Act, 1863, and the provisions (*inter alia*) of the Waterworks Clauses Act, 1847, which relate to the "payment and recovery of the water rates." And it is provided by sect. 57 of the Public Health Act, 1875, that "any rent for pipe and works paid by an occupier" under sect. 44 (*y*) of the Waterworks Clauses Act, 1847, "may be deducted by him from any rent from time to time due from him to such owner."

(*u*) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 163.

(*x*) The local act which incorporates the general act above mentioned.

(*y*) This section applies to houses of not exceeding ten pounds annual value. To

such houses, by virtue of the same section as amended by sect. 57 of the Public Health Act, 1875, communication pipes must be laid down at the request of owners or occupiers.

SECT. 13.—*Gas Rates.*

CH. XV. s. 13.
Gas Rates.

Gas rates are always payable by the tenant, in the absence of any express stipulation to the contrary. The supply of gas to the metropolis is regulated by 23 & 24 Vict. c. 125, which, however (by sect. 5), excepts *nine* gas companies in the suburbs. The act itself must be referred to for details (z). But, by sect. 39, “in case any consumer leave the premises where gas was supplied to him, without paying to the gas company the rate or meter rent due from him, the gas company shall not require from the next tenant of the premises payment of the arrears so left unpaid, unless the incoming tenant agreed with the defaulting consumer to pay the arrears; but the gas company shall, notwithstanding any such arrears, in the absence of collusion between the outgoing and incoming tenant, supply gas to the incoming tenant as required by this act, on being required by him so to do.”

In the Metro-
polis.

Supply of
Gas to In-
coming To-
nant.

The supply of gas elsewhere than in the metropolis is regulated by the Gasworks Clauses Acts, 1847 and 1871, and by the special acts of each company. By sect. 39 of the Gasworks Clauses Act, 1871 (34 & 35 Vict. c. 41), “in case any consumer of gas” leaves the premises where the gas has been supplied to him “without paying the gas rent or meter rent due from him,” the company “shall not be entitled to require from the next tenant the payment of the arrears left by the former tenant, unless such incoming tenant has undertaken with the former tenant to pay or exonerate him from the payment of such arrears.”

Elsewhere
than in the
Metropolis.

SECT. 14.—*The Rating Act, 1874.*

The more important special sections of the Rating Act, 1874, have already been set forth (a). It may be added here, that the act, by sect. 11, came into operation (except for certain valuing purposes, for which it came into operation on the 7th August, 1874) on the 6th April, 1875.

Commence-
ment of Act.

By sect. 9, “where any occupier, lessee, licensee, grantee, or other

Deduction of
Rates.

(z) See also *Great Central Gas Consumers Co. v. Clark*, 11 C. B., N. S. 814; 11 W. R. 123; *Imperial Gaslight and Coke Co. v. West London Junction Gas Co.*, 14 W. R. 1019; 15 L. T. 66. Taking up a pavement, and digging trenches in the roadway and footway of a public thoroughfare, in order to lay down service pipes for the supply of gas from mains to private houses, are not acts that can be justified at common law, as done in the exercise of the right of every occupier of a house to make such a temporary obstruction of the highway as may be necessarily incidental

to the enjoyment of the property; and a householder who authorizes such acts, and they who do them, having no parliamentary powers for the purpose, are liable to be indicted for a nuisance. (*Reg. v. Longlar Gas Co.*, 29 L. J., M. C. 118; 6 Jur., N. S. 601.) But the High Court will not restrain such acts by injunction, even as between rival gas companies. (*Att.-Gen. v. Sheffield Gas Co.*, 3 De Gex, M. & G. 304; *Att.-Gen. v. Cambridge Consumers Gas Co.*, L. R., 4 Ch. 71.)

(a) Ante, 547.

CH. XV. s. 14.
*The Rating
 Act, 1874.*

person is authorized by this act to deduct any rate or sum in respect of a rate from any rent, royalty, or dues payable by him, then—
 (1). Any payment so authorized to be deducted shall be a good discharge for such amount of rent, royalty, or dues as is equal to the amount of such payment, and shall be allowed accordingly. (2). Any payment so authorized to be deducted may be recovered as an ordinary debt from the person to whom the rent, royalty or dues may be payable. (3). The person receiving the rent, royalty, or dues shall have the same right of appeal and objection with reference to the rate and to the valuation of the hereditaments in respect of which the rate is payable as he would have if he were the occupier of such hereditaments."

Liability of
 Property to
 Local Rates
 as well as
 Poor Rates.

And by sect. 10, "after the commencement of this act, the hereditaments to which the poor rate acts are extended by this act, and which are thus made rateable to the relief of the poor, shall be rateable to all local rates in like manner as if the poor rate acts had extended to such hereditaments."

SECT. 15.—*Tithe Rent-charge.*

The incidence of the tithe rent-charge is regulated by the Tithe Commutation Act, 1836 (6 & 7 Will. 4, c. 71), and its amending acts (*b*), the effect of this legislation being to impose the charge upon the land alone, and to impose no personal liability to the tithe-owner on either landlord or tenant (*c*), but at the same time to allow the tenant to deduct the rent-charge from his rent (*d*).

Deduction
 from Rent.

By sect. 80 of 6 & 7 Will. 4, c. 71, "every tenant or occupier who shall occupy any lands by any lease or agreement made subsequent to such commutation [of tithes], and who shall pay any such rent-charge, shall be entitled to deduct the same from the rent payable by him to his landlord, and shall be allowed the same in account with the said landlord."

Distress on
 Land after
 Notice to
 Tenant in
 Possession.

By sect. 81 of the same act, "in case the said rent-charge shall at any time be in arrear and unpaid for the space of twenty-one days next after any half-yearly day of payment, it shall be lawful for the person entitled to the same, after having given or left ten days' notice in writing at the usual or last-known residence of the tenant in possession (*e*), to distrain upon the lands liable to the payment thereof,

(*b*) See Chit. Stat. (4th ed.), tit. *Tithes*.
 (*c*) See section 67 of 6 & 7 Will. 4, c. 71;
Griffenhoefe v. Dawbuz, 24 L. J., Q. B. 20;
 5 E. & B. 746.

(*d*) For cases as to construction of covenants, see ante, 529.

(*e*) Or if no person in occupation, then by affixing the notice in some conspicuous place on the land; 5 & 6 Vict. c. 54, s. 17.

or any part thereof, for all arrears of the said rent-charge, and to dispose of the distress when taken, and otherwise to act and demean himself in relation thereto as any landlord may for arrears of rent reserved on a common lease for years; provided that not more than two years' arrears shall at any time be recoverable by distress." CH. XV. s. 15.
Tithe Rent-charge.

And by sect. 85, "whenever any rent-charge payable under the provisions of this act shall be in arrear, notwithstanding any apportionment which may have been made of any such rent-charge, every part of the land situate in the parish in which such rent-charge shall so be in arrear, and which shall be occupied by the same person who shall be the occupier of the lands on which such rent-charge so in arrear shall have been charged, whether such land shall be occupied by the person occupying the same as the owner thereof, or as tenant thereof, holding under the same landlord under whom he occupies the land on which such rent-charge so in arrear shall have been charged, shall be liable to be distrained upon or entered upon as aforesaid for the purpose of satisfying any arrears of such rent-charge, whether chargeable on the lands on which such distress is taken or such entry made, or upon any other part of the lands so occupied or holden: provided always, that no land shall be liable to be distrained or entered upon for the purpose of satisfying any such rent-charges charged upon lands which shall have been washed away by the sea, or otherwise destroyed by any natural casualty." Extent of
Lands liable
to Distress.

By 14 & 15 Vict. c. 25, s. 4, "if any occupying tenant of land shall quit, leaving unpaid any tithe rent-charge for or charged upon such land, which he was by the terms of his tenancy or holding legally or equitably liable to pay, and the tithe-owner shall give or have given notice of proceeding by distress upon the land for recovery thereof, it shall be lawful for the landlord or the succeeding tenant or occupier to pay such tithe rent-charge, and any expenses incident thereto, and to recover the amount or sum of money which he may so pay over against such first-named tenant or occupier, or his legal representatives, in the same manner as if the same were a debt by simple contract due from such first-named tenant or occupier to the landlord or tenant making such payment." Payment by
Landlord or
Incoming Te-
nant, where
Outgoing Te-
nant leaves
Tithe Rent-
charge un-
paid.

CHAPTER XVI.

OBLIGATIONS WITH RESPECT TO THE PRESERVATION OF THE DEMISED PREMISES.

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SECT. 1.—*Express Contract to Repair, &c.*(a) *By Tenant.*

Express Contract to Repair, &c.

LEASES of houses, &c. usually contain a covenant by the lessee to repair and keep in repair the demised premises during the term: also another distinct covenant to repair specific defects within a certain number of months (usually three) after written notice thereof (a): also to paint the outside and inside wood and ironwork in a certain manner, at stated times: and a covenant to leave the premises in proper repair at the end or other sooner determination of the term, besides other covenants as agreed: after which usually follows a proviso for re-entry on breach of any of the covenants (b). In many cases, especially where a premium is given and in building leases, this proviso for re-entry may well be qualified and limited to breaches occasioning a specified amount of damage to the reversion and inheritance (c), or to breaches after a certain notice in writing (d), or to cases where damages in an action for the breach have not been paid (e): but

(a) *Baylis v. Le Gros*, 4 C. B., N. S. 537; *Few v. Perkins*, L. R., 2 Ex. 92; 38 L. J., Ex. 54.

(b) See Forms of Leases, post, Appendix B.

(c) *Doe d. Earl of Darlington v. Bond*, 5 B. & C. 865; *Cole Ejec.* 427.

(d) *Doe d. Rankin v. Brindley*, 4 B. & Ad. 84.

(e) See p. 23, ante.

it is commonly made to apply to any breach of covenant whatever, without due consideration on behalf of the lessee as to the possible consequences (*f*).

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*Express Con-
tract to Repair
(by Tenant).*

A lessee is not liable for breaches of covenant to repair, committed *before the execution of the lease* by the lessor, although subsequent to the day from which the habendum states the commencement of term (*g*). Where by an agreement under seal, for a lease of copyholds to be granted to the defendant as soon as the licence could be obtained from the lord of the manor, the defendant covenanted that he would from time to time *during the term to be granted as aforesaid* keep the premises in repair, &c., and the defendant entered upon the premises and occupied them until the expiration of the term agreed to be granted, it was held, that he was liable to repair according to the covenant, although no lease had ever been made to him pursuant to the agreement, nor any licence obtained from the lord (*h*). So the assignees of a void lease, which had been treated by all parties as valid, were held liable for rent and repairs up to the end of the term, according to the covenants in the lease (*i*). It is, however, to be observed, that in such cases an actual tenancy from year to year “upon the terms” of the intended lease, so far as they are applicable to and not inconsistent with a yearly tenancy, is created by the entry, &c. (*k*). An agreement made on the 31st of August, to take premises from the 29th of September following, the landlord agreeing to take back the fixtures at the end of the term, provided “they are in as good a condition as they *now* are,” and the tenant agreeing to leave the premises “in the the same state as they *now* are,” there being at the time another tenant in possession, and the new tenant not taking possession until the 29th of September, refers to the state of the premises on the 29th of September (*l*).

Breaches be-
fore Execu-
tion of the
Lease.

A covenant “forthwith” to put premises into repair must receive a reasonable construction, and is not limited to any specific time: therefore it is for the jury to say, upon the evidence, whether the defendant has done what he reasonably ought in performance of it (*m*). “There is no doubt that the word *forthwith* means with all reasonable celerity” (*n*). It does not mean “immediately” (*o*).

Covenant to
repair *forth-
with*.

A lessee who has covenanted to repair and keep in repair the demised premises during the term must have them in repair *at all times during the term*; and if they are at any time out of repair, he commits a breach of covenant (*p*), for which the lessor or his assigns may, even

Covenant to
keep in repair
*during the
Term*.

(*f*) See *Hodgkinson v. Crowe*, L. R., 10 Ch. 622; and 114, ante.

(*g*) *Shaw v. Kay*, 1 Exch. 412.

(*h*) *Pistor v. Cater*, 9 M. & W. 315.

(*i*) *Beale v. Sanders*, 3 Bing. N. C. 850.

(*k*) *Anto*, 206.

(*l*) *White v. Nicholson*, 4 M. & G. 95.

(*m*) *Doë d. Pitman v. Sutton*, 9 C. & P. 706.

(*n*) *Burgess v. Booteleur*, 7 M. & G. 494.

(*o*) *Roberts v. Brett*, 11 H. L. Cas. 337; 34 L. J., Ch. 241.

(*p*) *Luxmore v. Robson*, 1 B. & A. 584.

CH. XVI. s. 1. during the term, recover damages commensurate with the injury thereby done to the reversion (*q*), or may maintain an action of ejectment, if there be a proviso for re-entry applicable to such covenant (*r*). On a covenant to keep premises in repair, it is a breach to pull them down either wholly or partially, even so far as to open doors in a wall; and it is a breach for which the lessor may sue and recover substantial damages during the term: nor is it any equitable defence that it was done with the "consent and acquiescence" of the lessor, unless it appears that it was with his previous consent (*s*). Where there is a demise for seven years, and thenceforth from year to year, the covenants to repair, &c. continue in force after the expiration of the seven years (*t*).

General
Covenant to
repair—how
construed.

A general covenant to repair is satisfied by the lessee keeping the premises in *substantial repair*: a literal performance of the covenant is not to be required (*u*).

Old Premises.

Where a lessee covenants to keep *old* premises in repair, he is not liable for such dilapidations as result from the natural operation of time and the elements (*x*); and with a view to determine the relative sufficiency of repair, the jury may consider whether the house was new or old at the time of the demise (*y*); and what was its *then* state of repair and condition *generally* (*z*), not in detail (*a*).

"Keep" in
repair.
Payne v.
Haine.

A covenant to *keep* old premises in repair and to leave them in repair at the end of the term, means that the lessee will, if necessary, *put them into repair*; for otherwise they cannot be kept or left in repair pursuant to the covenant (*b*). Their age, and class, and general condition, must be taken into consideration, but not particular defects or want of repair at the time the term commenced (*b*).

Sublease.

A covenant to repair contained in a sublease, though in the same words as the covenant in the original lease (except as to names), has not the same legal effect and meaning, because of the different ages and conditions of the premises at the respective times of the lease and sublease (*c*). "It is perfectly well settled," observed Parke, B., in *Walker v. Hatton*, "that a general covenant to repair must be construed to have reference to the condition of the premises at the time when the covenant begins to operate" (*d*).

(*q*) *Smith v. Peat*, 9 Exch. 161.
(*r*) *Baylis v. Le Gros*, 4 C. B., N. S. 537;
Bennett v. Herring, 3 C. B., N. S. 370.

(*s*) *Gange v. Lockwood*, 2 F. & F. 115;
Doe d. Vickery v. Jackson, 2 Stark. R. 293.

(*t*) *Brown v. Trumper*, 26 Beav. 11.

(*u*) *Harris v. Jones*, 1 Moo. & R. 173.

(*x*) *Gutteridge v. Munyard*, 1 Moo. & R. 334.

(*y*) *Stanley v. Towgood*, 3 Bing. N. C. 4.

(*z*) *Burdett v. Withers*, 7 A. & E. 136.

(*a*) *Mantz v. Goring*, 4 Bing. N. C. 451;
Young v. Mantz, 6 Scott, 277; *Belcher v.*
M'Intosh, 8 C. & P. 720; 2 Moo. & R.
186; *Woolcock v. Dew*, 1 F. & F. 337.

(*b*) *Payne v. Haine*, 16 M. & W. 541
Easton v. Pratt, 2 H. & C. 676; 33 L. J.
Ex. 233; *Haldane v. Newcomb*, 12 W. R.
136; and see *Schroder v. Ward*, 13 C. B.
N. S. 410.

(*c*) *Walker v. Hatton*, 10 M. & W. 249;
2 Dowl., N. S. 263.

(*d*) *Supra* (*c*).

A covenant to repair the buildings demised and to rebuild them if necessary, compels the tenant always during the term to keep them in good repair, and a deduction in damages for their age has been disallowed (e). Where a tenant agrees "to put the premises in habitable repair," he is to put them in a better state than that in which he found them, and into a state reasonably fit for the occupation of the class of persons likely to inhabit them (f). A tenant under a covenant to repair is liable for repairs only, and not for the extra expense of laying a new floor on an improved plan (g). Breaking a doorway through the wall of a demised house into an adjoining house is a breach of the general covenant to keep in repair, and so is the continuing of it so broken (h); but enlargement of windows, opening external doors, and taking down partitions, are no breach of a covenant to repair and keep in repair a dwelling-house, together with all such buildings, *improvements and additions* as should be executed, set up or made by the lessee; for the lease evidently contemplates such alterations, and allows them to be made (i). A covenant by a lessee, that he will, during the term, repair, uphold, support, maintain and sustain the brick walls to the demised premises belonging, is broken if he pull down a brick wall which divides the court-yard at the front of the house from another yard at the side of the house (k). A covenant to repair the external parts of the demised house comprises the partition wall between it and an adjoining house (l). Where the tenant of a farm covenanted "well and substantially" to repair and "keep in good substantial repair," and so "well and substantially repaired" to yield up at the end of the term, it was held that the tenant was bound to give up the premises in as good a state of repair as when he took possession, and that they must be inferred to have been then in a tenantable state (m). A covenant to leave the premises at the end of the term sufficiently maintained, repaired, paved and fenced, was held to have been broken when the pavement was out of repair and the glass in the windows broken (n).

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tract to Repair
(by Tenant).*

Cases as to
Construction
of Covenants
to repair.

The painting of a house is usually provided for by the express terms of a lease, but it would seem that some degree of painting is implied in the mere term "repair." It has been ruled, for instance, that under a covenant to "substantially repair, uphold, and maintain" a house, he is bound to keep up the inside painting (o); but it has been also ruled, on a covenant, as often as necessary well and

Painting.

(e) *Worcester School Trustees v. Rowlands*, 9 C. & P. 734.

(f) *Belcher v. M'Intosh*, 8 C. & P. 720; 2 Moo. & R. 186, 189.

(g) *Saward v. Leggatt*, 7 C. & P. 613.

(h) *Doe d. Vickery v. Jackson*, 2 Stark. 293; *Gange v. Lockwood*, 2 F. & F. 115; *Borgnis v. Edwards*, Id. 111.

(i) *Doe d. Dalton v. Jones*, 4 B. & Ad. 126; *Cole Ejec.* 425.

(k) *Doe d. Wetherell v. Bird*, 2 N. & M. 285; 6 C. & P. 195.

(l) *Green v. Eales*, 2 Q. B. 225.

(m) *Brown v. Trumper*, 28 Beav. 11.

(n) *Ryot v. Lady St. John*, Cro. Jac. 329.

(o) *Monk v. Noyes*, 1 C. & P. 265.

CH. XVI. s. 1. sufficiently to repair, uphold, sustain, paint, glaze, cleanse and scour, and keep and leave the premises in such repair, reasonable wear and tear excepted, that the tenant, if he has repaired within a reasonable time before leaving, is only bound, in addition to the repair of actual dilapidations, to clean the old paint, &c., and not to repaint (*p*).

Questions of this kind will often be more questions of fact than of law; but if the painting be left to be included in the general term "repair," the only legal obligation would seem to be to paint just as much as is necessary to keep the premises from actual deterioration.

Substantial Damages, though Buildings intended to be pulled down.

Although buildings are intended to be immediately pulled down and rebuilt by an incoming tenant, the landlord may recover more than nominal damages against the outgoing tenant for not performing his covenant to keep and leave them in good repair (*q*).

Buildings erected during the Term.

General covenants to repair and leave in repair, extend to all buildings erected during the term (*r*). But where, in a lease of land with buildings on it, the covenant was to repair *the buildings demised*, and to rebuild *them* if necessary, and to keep the fences in repair; it was held, that the tenant was not bound to keep in repair additional buildings erected on other parts of the land (*s*). In *White v. Wakley*, under a lease of a farm, the tenant was bound to keep in repair the buildings to be erected thereon during the term: the tenant, with the permission of the landlord, who was lord of the manor, built a house on the waste adjoining the farm, and enjoyed it with the farm. It was held that the tenant was also under an obligation to keep the house in repair (*t*). A covenant to yield up in repair all buildings and improvements erected during the term, has been held to be broken by the removal of a veranda, the lower part of which was attached to posts fixed in the ground (*u*); but if the buildings erected during the term be solely for the purpose of trade and manufacture, and rest merely upon blocks or pattens, the covenant to yield up in repair all buildings to be erected during the term does not extend to them (*v*), although it would be otherwise if they had been let into the soil: on this point, however, many distinctions in favour of trade have been taken (*x*). Where a tenant erects fixtures for the purpose of his trade on the demised premises, and afterwards takes a new lease to commence at the expiration of the former one, and the latter lease contains

(*p*) *Scales v. Lawrence*, 2 F. & F. 289.

(*q*) *Rawlings v. Morgan*, 18 C. B., N. S. 776; 34 L. J., C. P. 185.

(*r*) 1 Esp. N. P. 277; *Dowse v. Cale*, 2 Vent. 126; *Dowse v. Earle*, 3 Lev. 264; Bac. Abr. Covenant (F). See as to construction of express covenant to repair buildings "to be erected," *Hudson v. Williams*, 39 L. T. 632.

(*s*) *Worcester School Trustees v. Rowlands*, 9 C. & P. 734; *Cornish v. Cleife*, 3 H. & C. 446; 34 L. J., Ex. 19.

(*t*) *In re Newbery, White v. Wakley*, 26 Beav. 17; 28 L. J., Ch. 77.

(*u*) *Penry v. Brown*, 2 Stark. R. 403.

(*v*) *Naylor v. Collinge*, 1 Taunt. 19.

(*x*) See post, Sect. 8, "Fixtures."

a general covenant to repair, such lessee is bound to repair such fixtures, unless it can be satisfactorily shown that they were not intended to pass under the general words of the second lease (*y*). CH. XVI. s. 1.
Express Contract to Repair (by Tenant).

If a tenant covenant to repair and keep in repair the demised premises during the term (not saying "damage by fire excepted," or to that effect (*z*)), he must rebuild them if burnt down by accident, negligence, or otherwise (*a*). He must also continue to pay his rent in the same manner as if no fire had happened (*b*), and it has been said to make no difference that the landlord has received insurance money (*c*). Even where the tenant's covenant to repair, &c. contains an express exception of damage by fire and tempest, whereby he is exonerated from rebuilding, it seems that this exception casts no obligation upon the landlord to rebuild or repair in the event of loss or damage by fire or tempest (*d*), and that only an express covenant by the landlord to repair will cast such an obligation upon the landlord. A covenant for quiet enjoyment during the term is not sufficient (*e*). Where a farmhouse was burnt by accident, it was held by the House of Lords, reversing a judgment of the Court of Session in Scotland, that the landlord was not bound to rebuild (*f*). If there be a covenant by the tenant to keep the premises in repair, and also a covenant to insure them for a specific amount against fire, on their being burnt down, the tenant's liability on the former covenant is not limited to the amount to be insured under the latter covenant (*g*).

Repair, in case of Fire.
Bullock v. Dommitt.

The 86th section of the Old Building Act (14 Geo. 3, c. 78) provides that no action shall be maintained against any person in whose house, chamber, stable, barn, or other building, or on whose estate, any fire shall *accidentally begin*, nor shall any recompense be made by such person for any damage suffered thereby: provided, "that no contract or agreement made between landlord and tenant shall be hereby defeated or made void" (*h*). Exemption from Liability for Fire by Building Act.

Where a lessee in a lease of three houses covenanted to pull them down, and rebuild three others, and that he would repair the houses so agreed to be built, *and also that he would repair the demised* Covenant to rebuild.

(*y*) *Thresher v. East London Waterworks Co.*, 2 B. & C. 608.

(*z*) As to the construction of such an exception, see *Hemmett v. Ireland*, E., B. & F. 326; 28 L. J., Q. B. 48.

(*a*) *Bullock v. Dommitt*, 2 Chit. R. 608; 6 T. R. 650; 2 Wms. Saund. 422; *Earl of Chesterfield v. Duke of Bolton*, Comyn, 267; *Poole v. Archer*, Skin. 210; *Digby v. Atkinson*, 4 Camp. 275; *Clarke v. Glasgow Assurance Co.*, 1 Macq. H. L. Cas. 668.

(*b*) *Belfour v. Weston*, 1 T. R. 310; *Baker v. Holtzapffel*, 4 Taunt. 45; *Holtzapffel v. Baker*, 18 Ves. 118; *Izon v. Gorton*, 5 Bing.

N. C. 501; *Parker v. Gibbins*, 1 Q. B. 421; *Lofft v. Dennis*, 1 E. & E. 474; *Smith L. & T.* 276 (2nd ed.).

(*c*) *Leeds v. Cheetham*, 1 Sim. 146; *Lofft v. Dennis*, 1 E. & E. 474; 28 L. J., Q. B. 168. But see 380, ante.

(*d*) *Weigall v. Waters*, 6 T. R. 488.

(*e*) *Brown v. Quiller*, 2 Ambler, 619; *Bayne v. Walker*, 3 Dow, 233.

(*f*) *Bayne v. Walker*, supra.

(*g*) *Digby v. Atkinson*, 4 Camp. 275.

(*h*) As to the construction of this section, see post, Chap. XVII., Sect. 1.

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*Express Con-
tract to Repair
(by Tenant).*

premises, and leave the said premises in repair; and he pulled down the three and built four in their stead; it was held, that though he was obliged to build only three houses, yet he was bound to deliver up all in repair; the last covenant being general, and not confined, as the former, to the houses agreed to be built (*i*). Where, however, in a lease of four houses for 99 years, the lessee covenanted within two years to put them in good repair, and keep them in repair during the term, and further, within the first fifty years of the term, to take down the houses "as occasion may require," and in the place thereof to erect four new brick houses: the court intimated that, if within the fifty years the houses should be so repaired as to make them completely and substantially as good as new houses, the "occasion" on which the new houses were to be built did not arise (*k*). A lease was granted of a piece of land with two unfinished houses thereon, and the lessee covenanted to complete them within two months, and to keep them in repair during the term, there being a proviso for re-entry on breach of the covenant. The two houses were never finished, and long after the expiration of the two months they were much dilapidated. It was held, that a person to whom the reversion was assigned long after the expiration of the two months might maintain ejectment for the subsequent non-repair (*l*).

Covenant to
repair after
Notice.

The covenant to repair generally, and the covenant to repair within three months after notice (*m*), are generally held to be distinct and independent covenants (*n*); but if they immediately follow in such a manner, that they must be joined to make the sentence complete, they are construed as one entire covenant, and the latter part respecting notice is held to qualify the former (*o*), as where there is a covenant to repair at all times, when, where and as often as occasion shall require, and, at the farthest, within three months after notice of want

Suspension of
effect of
Notice.

*Hughes v.
Met. R. Co.*

of reparation (*o*). And where a notice to repair has been given, and the lessee meets it by an offer to sell which leads to negotiation, the effect is to suspend the notice until the negotiation is broken off (*p*).

Conditional
or qualified
Covenants to
repair, &c.

Where a lessee covenanted that *from and after the amendment and repair* of the demised messuages, &c. by the lessor he would repair

(*i*) *Dowse v. Earle*, 3 Lev. 264; *Dowse v. Cale*, 2 Ventr. 126.

(*k*) *Evelyn v. Raddish*, 7 Taunt. 411; Holt, 543.

(*l*) *Bennett v. Herring*, 3 C. B., N. S. 370.

(*m*) See forms of such notice, Appendix C., Scots. 13, 14, post.

(*n*) *Baylis v. Le Gros*, 4 C. B., N. S. 537; *Roe d. Goatley v. Paine*, 2 Camp.

520; *Few v. Perkins*, L. R., 2 Ex. 92; 36 L. J., Ex. 54; *Doe d. Morecroft v. Meux*, 4 B. & C. 606.

(*o*) *Horsefall v. Testar*, 7 Taunt. 385.

(*p*) *Hughes v. Metropolitan R. Co.*, 45 L. J., C. P. 578; L. R., 1 C. P. Div. 120 (C. A.); affirmed by House of Lords, L. R., 2 App. Cas. 439; 46 L. J., C. P. 583; 36 L. T. 932; 25 W. R. 680.

and sustain them during the term, and at the end thereof leave them well and sufficiently repaired, and the lessor sued him for non-repair of a dovehouse, parcel of the demised premises, which at the commencement of the term was in good and sufficient repair, it was held, after verdict for the plaintiff, that the defendant's covenant was conditional only, and that no action could be maintained against him for the alleged breach, the plaintiff not having first amended and repaired the premises pursuant to the lease (g). So where a lessee agrees to keep in repair the messuages, buildings and premises demised, *the same being first put into repair by the lessor*, the latter words create a covenant on the part of the lessor to do all such repairs (r), and also a condition precedent; and, until the lessor has put all the demised premises into repair, the lessee is not liable for the non-repair of any part (s). So where the tenant covenants to repair, the landlord "finding, allowing and assigning timber sufficient" for the reparations; the landlord cannot maintain an action against the tenant for breach of such covenant to repair, without alleging that he did find, allow and assign sufficient timber (t). So where a tenant covenanted to repair and keep in repair the buildings on the demised premises, "being allowed" a certain class of timber; it was held, that in order to create an obligation on the tenant to repair, the landlord must supply, or at all events be ready and willing to supply, such timber (u). But where, in a lease for lives, the lessee covenanted that he "would from time to time, and at all times, during the estate thereby granted, at his own proper costs and charges, well and sufficiently repair, amend, maintain, uphold and keep all and singular the demised premises in all manner of needful and necessary reparations whatsoever, *having or taking* in and upon the premises competent and sufficient house-bote, hedge-bote, fire-bote, plough-bote and gate-bote for the doing thereof, without committing any waste or spoil:" in an action by the lessor for not repairing, it was held, that the lessee's covenant to repair was absolute, and that the words "having or taking, &c." "without committing waste or spoil" did not amount to a condition precedent that there should be a sufficient supply of that kind of timber on the premises, but only to a licence to the tenant to take it, if there were, for repairs, even if made necessary by his own default, without being liable for waste (x). Where a lessee covenants to complete the buildings "under the direction and to the satisfaction of the surveyor" of the lessor, the

CH. XVI. s. 1.
Express Contract to Repair (by Tenant).

Conditional
Covenant to
repair
(continued).

(g) *Slater v. Stone*, Cro. Jac. 645.

(r) *Cannock v. Jones*, 3 Exch. 233; 5 Id. 713.

(s) *Neale v. Ratcliff*, 15 Q. B. 916; 20 L. J., Q. B. 130; *Coward v. Gregory*, L. R., 2 C. P. 153, 172; 36 L. J., C. P. 1.

(t) *Thomas v. Cadwallader*, Willes, 496; cited 1 E. & E. 487; Smith L. & T. 272, 273 (2nd ed.).

(u) *Martyn v. Clue*, 18 Q. B. 661.

(x) *Dean and C. of Bristol v. Jones*, 1 E. & E. 484; 28 L. J., Q. B. 201.

CH. XVI. s. 1. appointment of such surveyor is a condition precedent to the performance by the lessee of his covenant to complete the buildings (*y*).
Express Contract to Repair (by Tenant).

Compulsory taking under Lands Clauses Acts.

When a company or corporation gives notice to the tenant that they are willing to treat for the purchase of his interest under the Lands Clauses Consolidation Act, 1845, the tenant is not thereby freed from his covenant to repair, but must continue the performance of such covenants until a conveyance of the demised premises to the company be executed (*z*).

(b) *By Landlord.*

Liability of Landlord on express Covenants to repair, &c.

A landlord may of course take upon himself to do all or any of the repairs during the term, by an express covenant or promise to that effect in the lease or agreement (*a*); but in the absence of any such stipulation he is not liable to do any repairs whatever (*b*). Whatever he agrees to do in this respect should be inserted in the lease or agreement (*c*): the tenant should not rely upon any oral promise made before the lease or agreement is executed (*d*). There is no implied duty in the owner of an *unfurnished* house which is in a ruinous and unsafe condition to inform a proposed tenant that it is unfit for habitation: and no action will lie against him for an omission to do so, in the absence of express warranty or active deceit (*e*).

Notice.

Makin v. Watkinson.

Where the lessor covenants to do repairs, the lessee cannot charge him with a breach of such covenant, without first giving notice of want of repair (*f*). A covenant by lessor to repair the external parts of a demised house comprises the partition wall between it and an adjoining house; and where the adjoining house was pulled down by other persons whereby the wall was damaged, and the lessor did nothing to prevent it sinking, and suffered it to continue in a ruinous state, and refused to repair it, he was held liable for the expenses the lessee was put to in rebuilding the wall, and for glass broken by the sinking of it, but not for rent and the expenses of the lessee for other premises during the progress of the repairs (*g*). If a lessor covenant to keep the demised premises in repair, he is not bound to cleanse an ornamental piece of water in the grounds (*h*). If a lessor covenant that he will, in case

(*y*) *Hunt v. Bishop*, 8 Exch. 675; 22 L. J., Ex. 337; *Hunt v. Remnant*, 9 Exch. 635; 23 L. J., Ex. 135; *Coombe v. Greene*, 11 M. & W. 480; 2 Dowl., N. S. 1023; but see *Cannock v. Jones*, 3 Exch. 233; 5 Id. 713.
 (*z*) *Mills v. East London Union*, L. R., 8 C. P. 79; 42 L. J., C. P. 46.

(*a*) *Neale v. Ratcliff*, 15 Q. B. 916; 20 L. J., Q. B. 130; *Cannock v. Jones*, 3 Exch. 233; 5 Id. 713; *Cuicard v. Gregory*, L. R., 2 C. P. 153; 36 L. J., C. P. 1; *Bird v. Elwes*, L. R., 3 Ex. 225; 37 L. J., Ex. 91.

(*b*) Post, Sect. 2 (*b*); *Arden v. Pullen*, 10 M. & W. 321; *Gott v. Gandy*, 2 E. & B. 845; *Loft v. Dennis*, 1 E. & E. 474;

28 L. J., Q. B. 168.

(*c*) *Tudcy v. Mollett*, 16 C. B., N. S. 298; 33 L. J., C. P. 235.

(*d*) *Seago v. Drane*, 4 Bing. 459; *Haldane v. Newcomb*, 12 W. R. 135.

(*e*) *Keates v. Earl Cadogan*, 10 C. B. 591. As to furnished house, see 159, ante.

(*f*) *Makin v. Watkinson*, L. R., 6 Ex. 25; 40 L. J., Ex. 33; 19 W. R. 286; 23 L. T. 592 (diss. Martin, B.).

(*g*) *Green v. Elwes*, 2 Q. B. 225.

(*h*) *Bird v. Elwes*, L. R., 3 Ex. 225; 37 L. J., Ex. 91.

the demised premises be burnt down, rebuild and replace the same in the same state they were in before the fire, he is only bound to rebuild what he let, and not any additional parts which may have been erected by the lessee (*i*). If a lessor sell premises let under a lease not expired, and bind himself to do repairs "at the expiration of the tenancy," it appears that he is liable to do the repairs whenever and however the tenancy is determined (*k*).

CH. XVI. s. 1.
*Express Con-
tract to Repair
(by Landlord).*

SECT. 2.—*Implied Contract to Repair, &c.*(a) *By Tenant.*

No covenant or promise as to repairs, &c. can be implied where there is any express stipulation on the subject; the maxim being, *expressum facit cessare tacitum* (*l*). But an express covenant or promise may sometimes be insufficient to exclude the custom of the country to use the premises in a tenantlike manner (*m*).

An express
Covenant ex-
cludes an im-
plied one.

Where buildings and land are demised without any express stipulation as to repairs, cultivation, &c., a covenant or promise on the part of the lessee is implied by law, that he will use the demised premises in a tenantlike and proper manner (*n*); and that he will manage and cultivate the lands in a good and husbandlike manner according to the custom of the country (*o*).

Implied Cove-
nant by
Tenant to
repair, &c.

In an action for not cultivating according to the custom of the country, a strict legal custom from time immemorial need not be proved, but only the prevailing course of good husbandry and management in the neighbourhood, and a breach or breaches thereof (*p*). The agricultural customs in different counties in England and Wales vary very much: they are stated with more or less accuracy in the works mentioned below (*q*). The onus of proving any such custom lies upon the party claiming under it (*r*). The witnesses to prove any such custom must speak to facts, and not to mere matter of opinion (*s*). A custom at A. will not extend to another place some miles distant, unless shown by evidence to extend to that place also (*t*). A custom confined to any particular estate (however large) is not sufficient (*u*).

Proof of Cus-
tom of
Country.

(*i*) *Loader v. Kemp*, 2 C. & P. 375; 1 Selw. N. P. 434 (13th ed.).

(*k*) *Goodson v. Goldsmith*, 2 C. & P. 555.

(*l*) *Merrill v. Frame*, 4 Taunt. 329; *Line v. Stephenson*, 4 Bing. N. C. 678; 5 Id. 183; *Messent v. Reynolds*, 3 C. B. 194; *Standen v. Christmas*, 10 Q. B. 135.

(*m*) Post, Chap. XX.

(*n*) *Morrison v. Chadwick*, 7 C. B. 266; 6 D. & L. 567; *White v. Nicholson*, 4 M. & G. 95.

(*o*) *Legh v. Hewitt*, 4 East, 154.

(*p*) *Legh v. Hewitt*, 4 East, 154; *Dalby v. Hirst*, 1 Brod. & B. 224; *Senior v.*

Armystage, Holt, N. P. C. 197.

(*q*) G. Wingrove Cook on Agricultural Tenancies (1850), pp. 53—120; Dixon's Law of the Farm (1863), Chap. I., pp. 1—37 (3rd ed.). And see post, Chap. XX., Sect. 5.

(*r*) *Caldecott v. Smythies*, 7 C. & P. 808.

(*s*) *Roe d. Henderson v. Charnock*, Peake, 4.

(*t*) *Roe d. Brown v. Wilkinson, Co.* Lit. 270 b, noto (228).

(*u*) *Womersley v. Dally*, 26 L. J., Ex. 219.

CH. XVI. s. 2.

Implied Contract to Repair (by Tenant).

To what Tenancies applicable.

Where a custom of the country is proved to exist, it will be considered applicable to all tenancies in whatever way created, whether orally or by writing, or even by deed, unless expressly or impliedly excluded by the terms actually agreed on (x). But if the lease or agreement contains terms or stipulations which are inconsistent with the custom of the country, such custom will be thereby excluded, upon the principle *expressum facit cessare tacitum* (y). If, however, the custom and stipulations of the lease or agreement are not wholly inconsistent with each other, both of them may sometimes prevail (z). Whether the custom, as proved, be or be not excluded by the terms of the contract, is a question of law for the court (a).

Covenants to repair, &c. when implied as Matter of Fact.

Sometimes a covenant as to repairs, cultivation, &c. may be implied from words used in other covenants in the lease (b), or from the recitals (c). But such covenants are implied and found as matter of fact, and are *not covenants implied by law* from the mere relation of the parties as landlord and tenant.

On implied new Tenancies.

Martin v. Smith.

We have already seen that a person let into possession under a mere agreement for a lease, or a *void* lease, ex. gr. a lease for more than three years not made by deed, and pays or expressly agrees to pay rent, he becomes a tenant from year to year, *upon the terms of the agreement or lease*, so far as they are applicable to and not inconsistent with a yearly tenancy, so as to be liable as upon a covenant to repair (d).

Implied Liability of Tenant at Will, or from Year to Year, as to Repairs, &c.

In the absence of any express or implied stipulation on the subject, a tenant at will, or a tenant from year to year, is not liable to general repairs; nor for *permissive* waste; nor to make good mere wear and tear of the premises; but only to keep them wind and water tight (e). He is bound to *commit* no waste, and to make fair tenantable repairs, such as putting in windows or doors that have been broken by him, so as to prevent waste and decay of the premises: but he is not bound to do substantial and lasting repairs, such as new roofing, &c. (f). A tenant from year to year of farming premises is bound by law only to fair and tenantable repairs, so as to prevent waste or decay of the premises, and not to substantial and lasting repairs, in

(x) *Wigglesworth v. Dallison*, 1 Sm. L. C. 598.

(y) *Webb v. Plummer*, 2 B. & A. 746; *Roberts v. Barker*, 1 Cr. & M. 808; *Clarke v. Royston*, 13 M. & W. 752.

(z) *Hutton v. Warren*, 1 M. & W. 466; *Holding v. Pigott*, 7 Bing. 465; *Sutton v. Temple*, 12 M. & W. 63; *Faviell v. Gasloin*, 7 Exch. 273; *Muncey v. Dennis*, 1 H. & N. 216; *White v. Nicholson*, 4 M. & G. 95; *Martyn v. Chae*, 18 Q. B. 661, 682.

(a) *Parker v. Ibbetson*, 4 C. B., N. S. 846.

(b) *Ante*, 160.

(c) *Ante*, 161.

(d) *Ante*, Chap. V., Sect. 2. And see especially *Martin v. Smith*, L. R., 9 Ex. 50.

(e) *Leach v. Thomas*, 7 C. & P. 327; *Torriano v. Young*, 6 C. & P. 8; *Auworth v. Johnson*, 5 C. & P. 239; *Horsefall v. Mather*, Holt N. P. C. 7; *Countess of Shrewsbury's case*, 5 Co. R. 13 a; Cro. Eliz. 777, 784; *Gibson v. Wells*, 1 B. & P., New. R. 290; *Martin v. Gilham*, 7 A. & E. 540; *Harnett v. Maitland*, 16 M. & W. 267.

(f) *Id.*; *Ferguson v.* —, 2 Esp. 590.

the absence of any stipulation in that behalf (g): for the law will not imply a contract on the part of such a tenant to repair generally, or to do any particular acts; but merely to use the farm in a tenantlike and husbandlike manner, according to the custom of the country in which the farm is situated (h). He is liable for commissive but not for permissive waste, and as the suffering buildings to be out of repair is of the latter description, he is not liable for such want of repairs as arise from mere neglect (i). Tenants for life or lives, or *for years*, are liable for permissive waste (k). But a tenant from year to year is only a tenant at will, subject and entitled to the customary or agreed notice to quit, and is not liable for permissive waste in the absence of any express stipulation on the subject (l).

CH. XVI. s. 2.
Implied Contract to Repair (by Tenant).

(b) *By Landlord.*

There is no covenant or promise *implied by law* on the part of the lessor of an unfurnished (m) house or land (n) that it is reasonably fit for habitation, occupation or cultivation: nor that the house will endure during the term: nor that the lessor will do any repairs whatever (o). Nor is there any implied covenant by the lessor of two adjoining houses, the occupiers of which are under covenant to repair, that he will keep either house in such state as to enable the covenants with respect to the other to be performed (p). Much less is there an implied covenant by the landlord to repair fences separating the demised land from his own (q).

No implied Covenant by Landlord.

Although in letting a furnished house the lessor impliedly promises that it is reasonably fit for occupation (r), in the absence of any agreement on the subject, a person who agrees to take a house unfurnished must take it as it stands, and cannot call on the lessor to put it into a condition which makes it fit for living in (s). Before a person takes, or agrees to take, a lease of a house for a long term, with the usual covenants to keep it in repair during the term, he should have the premises carefully examined and reported on by an experienced surveyor; otherwise he may unwittingly incur very serious liabilities, especially if the foundations are defective, or the house is so slightly

(g) *Ferguson v. —*, supra.
(h) *Horaeafall v. Mather*, Holt, 7; *Gibson v. Wells*, 1 B. & P., New R. 261.
(i) *Herre v. Benbow*, 4 Taunt. 764.
(k) 6 Edw. 1, c. 5; post, Sect. 5; Co. Lit. 53; 2 Wms. Saund. 252, notes; *Harnett v. Maitland*, 16 M. & W. 257, 262; *Yellowly v. Gower*, 11 Exch. 294.
(l) Ante (e); post, Sect. 5.
(m) *Hart v. Windsor*, 12 M. & W. 68; *Murray v. Mace*, 8 Ir. C. L. 396.
(n) *Sutton v. Temple*, 12 M. & W. 52; *Erskine v. Adeane*, 42 L. J., Ch. 835.

(o) Ante, 159; *Pomfret v. Ricraft*, 1 Wms. Saund. 321, 322, note (1); *Pindar v. Ainsley*, cited 1 T. R. 310, 312. As to fire, see *Lofft v. Dennis*, 1 E. & E. 474, 168; and ante, 380.
(p) *Colebeck v. Girilliers' Co.*, 45 L. J., Q. B. 225.
(q) *Erskine v. Adeane*, 42 L. J., Ch. 835.
(r) *Smith v. Marrable*, 11 M. & W. 5; *Wilson v. Halton*, 36 L. T. 373; ante, 159.
(s) *Chappell v. Gregory*, 34 Beav. 250.

CH. XVI. s. 2.
*Implied Con-
 tract to Repair
 (by Landlord).*

and cheaply built as not to be likely to last during the whole term, without considerable repairs, which is not unfrequently the case. Even where the premises become in a dangerous state for want of substantial repairs, and the landlord has notice to that effect, there is no implied obligation on his part to do any such repairs (*t*).

Where the landlord expressly binds himself to do any repairs, there is no implied condition that if such repairs be not done the tenant may quit (*u*): nor that if the landlord omit to do the repairs according to his covenant, the tenant may do them, and deduct the amount from his rent (*x*).

SECT. 3.—*Remedies for Non-repair.*

(a) *By Exercise of Right of Entry to Repair.*

Right to enter
to Repair.

A stipulation that the landlord may re-enter for the purpose of viewing the state of repair is very commonly inserted in leases, and a further stipulation is not unfrequently added, that the landlord may upon breach of the tenant's covenant himself execute necessary repairs at the tenant's expense. Without a distinct stipulation to that effect a landlord has no right to enter his tenant's premises to repair them (*y*): although the breach of the tenant be clear, although the landlord be liable to a forfeiture under a superior lease, and although the entry be by leave of sub-tenants, he commits a trespass which will be restrained by injunction (*z*). Where premises which were sublet became out of repair, and the superior landlord gave notice to his immediate lessee to repair them at the peril of forfeiting his lease; and the sublessee, after receiving notice to repair, neglected to do so, whereupon the lessee, in order to avoid a forfeiture of his whole estate, entered on the premises, and put them in tenantable repair; it was held that though he might be a trespasser for so doing, yet that he might recover against his subtenant the whole expense so incurred, notwithstanding that the premises were afterwards entirely rebuilt before the action for the recovery of such expense was brought (*a*).

Liability to
Third Per-
sons.

Generally speaking, the tenant or occupier, and not the landlord, is liable to third persons for any accident or injury occasioned to them by the premises being in a dangerous condition from non-repair (*b*).

(*t*) *Gott v. Gandy*, 2 E. & B. 845.

(*u*) Ante, 159.

(*x*) *Hoult v. Strickland*, Cowp. 56; *Weigall v. Waters*, 6 T. R. 488; *Smith v. Mapleback*, 1 T. R. 446.

(*y*) *Barker v. Barker*, 3 C. & P. 557; *Neale v. Wyllie*, 3 B. & C. 533; *Worcester School Trustees v. Rowlands*, 9 C. & P. 739.

(*z*) *Stocker v. Planet Building Society*, 27 W. R. 877—C. A., affirming decision of Jessel, M. R.

(*a*) *Colley v. Streeton*, 2 B. & C. 273.

(*b*) *Cheetham v. Hampson*, 4 T. R. 318; *Gwynnall v. Eamer*, L. R., 10 C. P. 668. See this question fully discussed, Chap. XIX., post.

(b) *By Action for Damages.*

CH. XVI. s. 3.

*Remedy for
Non-repair (by
Action).*

*By Action for
Damages.*

If the demise be under seal, the remedy for non-repair, &c. is by action on the covenant. In the case of reciprocal covenants cross-actions would have to be brought (c) before the Judicature Act, but a counter-claim may now be set up by the defendant. If the demise be not under seal, the remedy is by action on the simple contract. The tenant cannot, without the consent of his landlord, or some express stipulation in that behalf, deduct and retain from his rent the amount of any repairs which the landlord agreed to do (d).

An action for non-repair may be maintained by the landlord during the continuance of the term (e), and in such action the proper measure of damage is, not the amount that would be required to put the premises into repair, but the amount to which the reversion is depreciated in marketable value by the premises being out of repair (f)—an amount which might be practically equivalent to nominal damages in the case of a lease having many years to run, but which would be larger and larger, the shorter the residue of the term happened to be. The landlord is not bound to expend the damages recovered in repairing the premises (g), and yet continues to have the benefit of the covenant to repair, upon which he may sue again, if the tenant continue to break it: it is conceived, however, that in such second action, he could only recover damages in respect of additional non-repair. In an action for breach of covenant in a sublease to repair, whereby the plaintiff's term in the premises was forfeited, the plaintiff cannot recover the value of his term if the superior landlord has brought his ejectment for the non-repair, as well as for breach of other covenants not contained in the sublease, if it is not proved that the forfeiture was caused by the acts of the defendant; but he may recover the amount of dilapidations at the time of the ejectment, though his own term is determined (h). He may recover substantial damages for non-performance of the covenant to repair, &c. contained in the sublease, notwithstanding both he and the defendant have been ejected by the superior landlord for non-payment by himself of the rent reserved in the original lease (i); but if he do repairs himself to save a forfeiture, he cannot recover the cost of such repairs from the subtenant (k). Where the covenants differ from those in the original leases, and there is no covenant to indemnify the lessee

*Measure of
Damages,
injury to
Reversion.*

(c) *Loods v. Cheetham*, 1 Sim. 151.

(d) *Smith v. Mapleback*, 1 T. R. 446; *Weigall v. Waters*, 6 T. R. 488; *Howlet v. Strickland*, Cowp. 56.

(e) *Luxmore v. Robson*, 1 B. & A. 584.

(f) *Smith v. Peat*, 9 Ex. 161; 23 L. J., Ex. 84; *Turner v. Lamb*, 14 M. & W. 412; *Worcester School Trustees v. Rowlands*, 9 C. & P. 734, 739; *Coward v. Gregory*, L. R., 2 C. P. 153; *Mills v. East London Union*,

L. R., 8 C. P. 79; 42 L. J., C. P. 46.

(g) *Worcester School Trustees v. Rowlands*, 9 C. & P. at p. 639.

(h) *Clow v. Broyden*, 2 M. & G. 39.

(i) *Davis v. Underwood*, 2 H. & N. 570; 27 L. J., Ex. 113.

(k) *Williams v. Williams*, 43 L. J., C. P. 382; L. R., 9 C. P. 659; 30 L. T. 638; 22 W. R. 706.

CH. XVI. s. 3. *Remedy for Non-repair (by Action).* against breach of covenants in the original lease, the lessee cannot recover the costs of an action brought against him by the original lessor for the mere dilapidations which he might have paid for before that action was commenced (*l*); or which he might have afterwards paid into court (*m*). A covenant to repair contained in a sublease, though in the same language as the covenant in the original lease, yet may be different in effect, owing to the sublease having been granted subsequently to the original lease, and when the premises had become in a different condition (*n*). If a lessee assign over, subject to the performance by the assignee of the covenants in the lease from the day of assignment, and one of the covenants is a general one to repair and keep in repair, on which the lessor afterwards recovers against the lessee, the latter can recover over against his assignee for those dilapidations only which have taken place after the assignment (*o*). Where an assignee covenanted to indemnify the lessee, and the lessee, being sued by the lessor, paid money into court, but incurred extra costs, it was held that these extra costs were recoverable under the covenant of indemnity, as being the necessary result of the breach (*p*). Upon the execution of a writ of inquiry in an action for dilapidations, two surveyors were called on each side. Those called by the plaintiff estimated the dilapidations, the one at 119*l*., the other at 124*l*.. Those called for the defendant estimated them, the one at 65*l*. 15*s*., the other at 68*l*.. The jury returned a verdict for only 36*l*. 10*s*.. The court ordered the inquisition to be set aside without costs, unless the defendant would consent to the verdict being entered for 65*l*. 15*s*. (*q*). In an action for non-repair, and leaving out of repair at the end of the term, the jury may give to the landlord not only the amount of the actual expense of the repairs, but also a compensation for the loss of the use of the premises whilst they are necessarily undergoing repair (*r*).

(c) *Remedy for Non-repair by Re-entry.*

Entry or
Ejectment
for Non-
repair, &c.

Unless there be a proviso for re-entry applicable to the covenants to repair, &c., a breach of such covenants will not warrant a re-entry for a forfeiture, but only an action for damages (*r*). Where there is such a proviso, the lessor or his assigns may re-enter or maintain an ejectment for the whole of the demised premises, if any part thereof be out of repair, at any time during the term; and that without giving any previous notice to the lessee or his assignee, or subtenant, to

(*l*) *Pendley v. Watts*, 7 M. & W. 601;
Logan v. Hall, 4 C. B. 598.

(*m*) *Walker v. Hatton*, 10 M. & W. 249;
2 Dowl., N. S. 263; *Smith L. & T.* 276
(2nd ed.).

(*n*) *Hackins v. Sherman*, 3 C. & P. 459.

(*o*) *Howard v. Lorgegrove*, 23 L. T. 396.

(*p*) *Wedding v. Mason*, 2 C. B., N. S.
382.

(*q*) *Woods v. Pope*, 6 C. & P. 782; 1
Bing. N. C. 467.

(*r*) *Colo Ejec.* 403, 422.

repair (s). The same rule applies where there is merely an agreement (not under seal) for a lease, with a proviso for re-entry on non-performance of covenants (t).

CH. XVI. s. 3.
Remedy for
Non-repair (by
Re-entry).

Where a lease contained a general covenant to repair and keep in repair the demised premises during the term, and another covenant to repair specific defects within three months after notice, and a proviso for re-entry on breach of any covenant; it was held, that such covenants were perfectly distinct, and that the landlord might lawfully re-enter for a forfeiture created by the non-repair pursuant to the general covenant, without giving any previous notice to repair (u). And even where a notice is given, it will be taken to apply to the general and not to the specific covenant, if the words be general. Therefore, where the landlord gave the tenant a notice requiring him *forthwith* to put all the demised premises into repair, agreeable to the covenant in that behalf, it was held, that such notice would not prevent an ejectment being brought within three months afterwards for breach of the general covenant to repair (x). But if the words be specific, the notice will be taken to give the time specified, and apply to the specific covenant to repair after notice. Therefore, where the landlord gave the tenant *notice to repair within three months* then next, it was held that such notice amounted to a waiver of any forfeiture during the three months for breach of the general covenant to repair, and that no ejectment could be maintained until after the expiration of that period (y): and where a lease contained a general covenant to repair, &c., with a proviso for re-entry *in case of non-repair for three months after notice*, or on breach of any other covenant, that no ejectment could be maintained for non-repair until after the expiration of a three months' notice (z). A lease from A. to B. contained a general covenant to repair; also a covenant to repair specific defects within two months after notice thereof, in failure whereof A. might re-enter and do such repairs at B.'s expense, with power to distrain for the amount as for rent in arrear; also a proviso for re-entry on breach of any covenant. It was held, that a notice by A. to B. to do certain repairs, in default whereof A. would do them, and charge B. with the expense, pursuant to the lease, amounted to a waiver of any forfeiture for breach of the general covenant to repair

Effect of
Double Cove-
nant to repair,
and to repair
after Notice.

*Baylis v. Le
Gros.*

(s) *Doe d. Hills v. Morris*, 11 L. J., Ex. 313; *Bennett v. Herring*, 3 C. B., N. S. 370. *Baylis v. Le Gros*, 4 C. B., N. S. 537. As to re-entry by assignee without notice to tenant of assignment, see *Sealock v. Harston*, L. R., 1 C. P. D. 106; and 236, ante. As to suspension of a notice to repair, see *Hughes v. Met. Ry. Co.*, L. R., 2 App. Cns. 439.

(t) *Hayne v. Cummings*, 16 C. B., N. S. 421.

(u) *Baylis v. Le Gros*, 4 C. B., N. S. 537.

(x) *Roe d. Goatley v. Paine*, 2 Camp. 520; *Few v. Perkins*, L. R., 2 Ex. 92; 36 L. J., Ex. 62. In the latter case, the notice was to repair "in accordance with the covenants," in the plural.

(y) *Doe d. Morecraft v. Meux*, 4 B. & C. 606.

(z) *Doe d. Rankin v. Brindley*, 4 B. & Ad. 84.

CH. XVI. s. 3.
*Remedy for
 Non-repair (by
 Re-entry).*

committed prior to the expiration of the notice; and that after the expiration of such notice, although A. might enter and do the repairs at B.'s expense, yet he could not maintain ejectment for any previous breach of the general covenant to repair (a).

Non-repair is
 a continuing
 Breach.

Where there is a general covenant to repair and *keep* in repair during the term, non-repair is a *continuing* breach of covenant, for which an ejectment may be maintained, if the lease contain a proviso for re-entry applicable to such covenant (b). But a covenant to *put* in repair is not a covenant the breach of which is continuing (c). Acceptance of rent, which becomes due pending a notice to repair, is no waiver of a subsequent forfeiture occasioned by non-compliance with such notice (d). Acceptance of rent after the commencement of an ejectment is no waiver of the forfeiture for which such action was brought (e).

(d) *By Action for Specific Performance.*

Specific Per-
 formance.

Courts of Equity never decreed the specific performance of a general covenant to repair, but always left the party to his remedy by action at law for damages (f). It was otherwise with respect to a covenant to build (g); unless, indeed, the buildings were to be erected under the direction or superintendence of some architect, surveyor or other person over whom the Court has no control (h). The same rule will no doubt be followed by the High Court under the Judicature Act.

SECT. 4.—*Obligations to Cultivate.*

Under what
 Circum-
 stances the
 Liability
 arises.
*Wigglesworth
 v. Dallison.*

The mere relation of landlord and tenant creates an implied obligation on the part of the tenant to manage and use a farm in a husbandlike manner according to the custom of the country where the premises are situated (i), unless, indeed, the lease or agreement contains some express covenant or promise *inconsistent* with such custom and sufficient to exclude it (k). A covenant to cultivate a farm

(a) *Doe d. Rutzen v. Lewis*, 5 A. & E. 277; and see *Doe d. Pittman v. Sutton*, 9 C. & P. 706; *Cole Ejec.* 423.

(b) *Doe d. Hemmings v. Durnford*, 2 C. & J. 667; *Doe d. Baker v. Jones*, 5 Exch. 498; *Bennett v. Herring*, 3 C. B., N. S. 370.

(c) *Coward v. Gregory*, L. R., 2 C. P. 163.

(d) *Doe d. Rankin v. Brindley*, 4 B. & Ad. 84.

(e) *Doe d. Morecraft v. Meux*, 1 C. & P. 346; *Jones v. Carter*, 15 M. & W. 725.

(f) See *Hill v. Barclay*, 16 Ves. 405; *City of London v. Nash*, 1 Ves. 12; 3 Atk. 515; *Lucas v. Commerford*, 3 Bro. C. C. 166;

Paxton v. Newton, 2 Sm. & Giff. 437; *Moseley v. Virgin*, 3 Ves. 184; Fry, s. 48. (g) 4 Jarm. Prec. 407 (3rd ed.).

(h) See Form, App. C., Sect. 14.

(i) *Powley v. Walker*, 5 T. R. 373; *Halifax v. Chambers*, 4 M. & W. 662; 7 Dowl. 342; *Beale v. Sanders*, 3 Bing. N. C. 850; *Smith L. & T.* 276 (2nd ed.).

(k) *Hutton v. Warren*, 1 M. & W. 466; *Wigglesworth v. Dallison*, 1 Doug. 201; 1 Smith L. C. 598 (7th ed.); *Senior v. Armytage*, Holt, 197; *Clarke v. Royston*, 13 M. & W. 752; *Wilkins v. Wood*, 17 L. J., Q. B. 319; 12 Jur. 583. As to "custom of country," see Chap. XX., Sect. 5, post.

according to the custom of the country on the four-course system, means only so far as such custom is universally obligatory in that part of the country (*l*). In order to constitute such a custom, or, more properly speaking, usage, as is binding on the tenant, it is not necessary that it should have been immemorially adopted; it is sufficient if there be a general usage applicable to farms of a similar description (*m*). In an action against a tenant on a promise that he would occupy a farm in a good and husbandlike manner, according to the custom of the country; an allegation that he had treated the estate contrary to good husbandry and the custom of the country, is proved by showing that he had treated it contrary to the *prevailing* course of good husbandry in that neighbourhood; as by tilling half his farm at once when no other farmer tilled more than a third, though many tilled only a fourth; and it is not necessary to show any precise definite custom or usage in respect to the quantity tilled (*n*). The implied obligation to manage a farm in a husbandlike manner was held to be broken, when evidence was given of dung and compost having been carried off the premises, without any stipulation or agreement to that effect having been entered into (*o*).

CH. XVI. s. 4.
Tenant's Obligation to Cultivate.

Covenants respecting the mode of tillage to be adopted by the tenant must necessarily vary so much in their terms, according to the agreement of the parties, that little can be said on the subject. They are generally framed in accordance with the custom of the country where the lands are situated, with such variations as the parties specially agree on. Such covenants are introduced, in nearly every instance, for the protection and benefit of the landlord, and to prevent the tenant from overcropping and deteriorating the property during the term, and leaving it in an impoverished state at the expiration thereof. Upon a covenant not to plough any ancient meadow, and, if done, to pay an additional yearly rent per acre, the increased rent is not a penalty, but a liquidated satisfaction fixed and agreed upon by the parties (*p*). On a covenant in a farming lease that the lessee would not sell or carry away from the demised premises any hay, straw or manure which should be grown or produced thereon, without the consent of the lessor first had and obtained, under the increased rent of 10*l*. for every ton so sold or carried away, and so in proportion for any greater or less quantity, but that the lessee would eat and consume the hay and straw by his cattle, the breach alleged was that the lessee, without the consent of the lessor, did sell a large quantity of hay and straw grown and produced on the demised premises: it was held, that the covenant was one covenant which gave the lessee

Contracts respecting Mode of Tillage.

(*l*) *Newson v. Smythies*, 1 F. & F. 477; 3 H. & N. 840.

(*m*) *Dalby v. Hirst*, 1 B. & B. 224.

(*n*) *Legh v. Hewitt*, 4 East, 154.

(*o*) *Powley v. Walker*, 5 T. R. 373.

(*p*) *Rolfe v. Peterson*, 2 Bro. P. C. 436; 6 Id. 470; *Jones v. Green*, 3 Y. & J. 298.

CH. XVI. s. 4. the right to sell the hay and straw, on payment of the increased rent, and that, therefore, the breach was not well assigned (*g*).
Tenant's Obligation to Cultivate.

Contracts respecting Manure.

Where the outgoing tenant covenants with his landlord to leave the manure made by him on the farm, and sell it to the incoming tenant at a valuation to be made by certain persons, the effect of such covenant is to give the outgoing tenant the right of on-stand for his manure upon the farm, and the possession of and property in it remains in him in the meantime. Therefore, if the incoming tenant remove and use it before such valuation, he is answerable to the outgoing tenant in trespass (*r*). Where a lessee covenanted to leave fodder, &c. on the determination of his lease, and he became bankrupt, and his assignees refused the lease, it was held that they were not entitled to take the fodder (*s*). A covenant by the lessee that he would sufficiently muck and manure the land demised with two sufficient sets of muck within the last six years of the term, the last set to be laid on the premises within three years of the expiration of the term, is satisfied with the tenant's laying on two sets of muck within the last three years of the term, if he should think proper so to do (*t*). A condition not to sell, cart, or convey away any dung, compost, or manure from a farm, is broken by the removal of the dung of two cows which had been sold by the tenant, but were permitted by him to remain on the premises, they being entirely provided by the buyer with provender from elsewhere (*u*). Where a farm lease contained a covenant by the lessee that "he should not nor would, during the last year of the term thereby granted, sell or remove from the said farm and lands any of the hay, straw and fodder which should arise and grow on the said farm and lands:" it was held, that the prohibition was not restricted to hay, straw and fodder which arose and grew on the farm in the last year of the term, but extended to that which had arisen and grown at any time during the term (*x*).

SECT. 5.—*Waste (y).*

(a) *What is Waste.*

Nature and Definition of Waste.

Waste (*vastum*) is defined to be a spoil or destruction to houses, gardens, trees, or other corporeal hereditaments, to the injury of the reversion or inheritance. Waste is either voluntary, i. e. actual or commissive, as by pulling down houses, &c.; or permissive, which is a matter of negligence and omission only, as by suffering buildings

(*g*) *Legh v. Lillie*, 6 H. & N. 165; 30 L. J., Ex. 25.

(*r*) *Beaty v. Gibbons*, 16 East, 116.

(*s*) *Ex parte Nixon*, 1 Rose, 445; *Ex parte Whittington*, Buck, 87.

(*t*) *Pournall v. Moores*, 5 B. & A. 416.

(*u*) *Hindle v. Pollitt*, 6 M. & W. 529.

(*x*) *Gale v. Bates*, 3 H. & O. 84; and see *Massey v. Goodall*, 17 Q. B. 310.

(*y*) For the law of Waste, generally, see *Yool on Waste, &c.* (1863, Maxwell).

to fall or rot for want of necessary reparations (z). It is not waste to omit to perform a covenant to put the demised premises into such repair as A. B. had previously put them into (a). The action for waste can only lie for that which would be waste, if there were no stipulation respecting it (b). CH. XVI. s. 5.
Waste (Definition of).

Voluntary waste chiefly consists in felling timber trees (c), pulling down houses (d), opening mines or pits (e), or changing the course of husbandry (f). Whatever does a lasting damage to the freehold or inheritance is waste; therefore, removing wainscots, floors, or other things once fixed to the freehold of a house, is waste (g); and if the windows be broken or carried away, it is waste, although they were glazed by the tenant himself, for the glass is part of the house (h). If a house be destroyed by tempest, lightning, or the like, which is the act of God, it is not waste (i); but if the house be uncovered by tempest, it is said that the tenant must repair it, even though there be no timber growing upon the ground, for the tenant must at his peril keep the house from wasting (k). Waste may be done in houses by pulling them down, or suffering them to be uncovered, whereby the rafters or other timber of the house become rotten (k); but merely suffering them to be uncovered without rotting the timber, is not waste: or if the house be uncovered when the tenant comes in, it is no waste to suffer it to fall down (k), although it would be otherwise if the tenant were to pull it down, unless he re-erect it again forthwith (l); but if a house built *de novo* was never covered in, it is not waste to abate it (m). If a lessee permit the walls to decay for default of daubing or plastering, that is waste (n), and if he suffer the houses to be wasted, and then fell down timber to repair the same, it is double waste (o); it is also waste not to repair fences (p). What Acts
constitute
Waste.

If the tenant of a dovehouse, warren, park, fishpond, or the like, take so many that such sufficient store be not left as he found when he came in, it is waste (q); and to suffer the pale to decay, whereby the deer are dispersed, it is waste (q). If the lessee of a warren by charter or prescription plough the land, it is waste: but it is otherwise if it be only land stored with conies, and not a legal warren; and stopping and digging coney-burrows is not waste in a warren (r). Waste in
Warrens,
Parks, &c.

(z) Co. Lit. 53; Wood's Inst. 521; Bac. Abr. tit. *Waste* (B.).

(a) *Jones v. Hill*, 7 Taunt. 393, 396.

(b) Id. 396.

(c) Bac. Abr. tit. *Waste* (C. 2). See *Phillippe v. Smith*, 14 M. & W. 589; *Channon v. Pateh*, 5 B. & C. 897.

(d) Bac. Abr. tit. *Waste* (C. 5); Co. Lit. 53.

(e) Bac. Abr. tit. *Waste* (C. 3).

(f) Id. (C. 1).

(g) Id. (C. 6).

(h) Co. Lit. 53.

(i) Bac. Abr. tit. *Waste* (E.); Co. Lit. 53 a; Smith L. & T. 261 (2nd ed.).

(k) Co. Lit. 53 a; Bac. Abr. tit. *Waste* (C. 5); Smith L. & T. 262 (2nd ed.).

(l) Co. Lit. 53 a.

(m) Co. Lit. 53 a [note 345].

(n) 2 Roll. Abr. 816, pl. 36, 37.

(o) Co. Lit. 53 b.

(p) *Cheetham v. Hampson*, 4 T. R. 318.

(q) Co. Lit. 53 b.

(r) Id.; *Moyle v. Moyle*, Owen, 60; *Lurting v. Conn*, 1 Ir. Ch. Rep., N. S. 273.

CH. XVI. s. 5.
Waste (Definition of).

Waste by
digging
Mines, &c.

Digging for gravel, lime, clay, brick-earth, stone, or the like, or for mines of metal, coal, or the like, hidden in the earth, and not open when the tenant came in, is waste (s): but the tenant may dig for gravel or clay for the reparation of the house (though no pit were open at the time of the lease), as well as he may take convenient timber trees (t). If the pit or mines were open before, it is no waste if the tenant continue to dig them for his own use; for it has become the mere annual profit of the land (u). It is a question of degree to be established by evidence, whether the working of a dormant or abandoned mine by a tenant for life is waste or not (x). It would seem that a mine, the working of which has been discontinued for twenty or thirty years in consequence of its not having been remunerative, might, after that time, be worked by a succeeding tenant for life; but a mine, the working of which has been abandoned by the owner of the inheritance for the advantage of the property, cannot be worked by a succeeding tenant for life (y).

By not re-
pairing Sea-
walls, &c.

It is waste to suffer a wall of the sea to be in decay, so as by the flowing and re-flowing of the sea the meadow or marsh be surrounded whereby it becomes unprofitable (z); but if it be surrounded suddenly by the rage or violence of the sea, as by tempest, without any default of the tenant, it is not waste (a): so if the tenant do not repair the banks or walls against rivers, or other waters, whereby the meadows or marshes are surrounded and become rushy and unprofitable, it is waste (b).

By changing
the Nature of
the Property.

If the tenant convert arable land into wood, or è converso, or meadow into arable, it is waste; for it changes not only the course of husbandry, but creates a difficulty in the proof of the title (c); and this would appear to be the case even where the act is done according to the custom of the country, for the purpose of amelioration (d). If a tenant suffer arable land to lie fresh, and not manured, this is not waste, but ill husbandry (e). If he pull down a malt-mill and build a corn-mill, it is waste (f): so if he convert a corn-mill into a fulling-mill, it is waste, though the conversion be to the lessor's advantage (g): so the conversion of a brewhouse worth 120*l.* per annum into other houses worth 200*l.* per annum is waste (f).

(s) Bac. Abr. tit. *Waste* (C. 3); Co. Lit. 53 b; *Tiner v. Faughan*, 2 Beav. 466.

(t) Co. Lit. 53 b.

(u) 1 Wood's Inst. b. 2, c. 5, s. 41; 2 Blac. Com. 282; Co. Lit. 53 b, 54 b; *Clavering v. Clavering*, 2 P. Wms. 388.

(z) *Bagot v. Bagot* and *Legge v. Legge*, 32 Beav. 509.

(y) Id.

(x) Co. Lit. 53 a.

(a) Id. 53 b; Bac. Abr. tit. *Waste* (C. 1).

(b) Co. Lit. 53 b; Callis on Sewers, 146.

(c) *London (City) v. Greyne*, Cro. Jac. 182; Bac. Abr. tit. *Waste* (C. 1); Co. Lit. 53 b; Hob. 234; *Murphy v. Daly*, 13 Ir. Com. L. R. 239.

(d) *Simmons v. Norton*, 7 Bing. 640.

(e) 2 Roll. Abr. 814; *Hutton v. Warren*, 1 M. & W. 472.

(f) *Cole v. Green*, 1 Lev. 309; *S. C.*, nom. *Cole v. Forth*, 1 Mod. 95.

(g) *London (City) v. Greyne*, supra.

Converting two chambers into one, or *à converso*, or converting a hand-mill into a horse-mill, is waste (*h*). CH. XVI. s. 5.
Waste (Definition of).

It was laid down by Lord Coke, that if the tenant build a new house, it is waste; and if he suffer it to be wasted, it is new waste (*i*). But such is not the law at the present time. To build a new house on the demised land is not waste, unless it be an injury to the inheritance in the sense of destroying identity, "by what is called destroying evidence of the owner's title, and that is a very peculiar head of the law, which has not been extended in modern times" (*h*). By building a House.
Jones v. Chappell.

Where a power of leasing was given, so that no clause should be contained in the lease, giving power to the lessee to commit waste, or exempting him from punishment for committing it; it was held, that a lease was good, though it contained a stipulation that the lessee should erect a new dwelling-house, with liberty to pull down some outbuildings, and to use the materials in erecting the house (*l*). Construction of Leasing Power against Waste.

A tenant for life "without impeachment of waste" has as full power to cut down trees and open new mines, for his own use, as if he had an estate of inheritance; and is in the same manner entitled to the timber, if severed by others (*m*). He may sell and assign to a purchaser all the timber and timberlike trees, which will include the thinnings to be selected by the purchaser (*n*). But the words "without impeachment of waste" will not permit a tenant for life to unlead a house and pull down the tiles (*o*). The intention of the clause "without impeachment of waste" is to enable the tenant to do many things—such as opening new mines—which would at common law amount to waste; but it does not authorize such destructive waste as cutting down ornamental timber (*p*). The privilege thus given by the words "without impeachment of waste" is annexed to the privity of estate; so that if the person to whom that privilege is given changes his estate, he loses the privilege (*q*). But while his estate continues he may by lease or licence authorize others to do whatever he is entitled to do himself (*r*). Meaning of "without Impeachment of Waste."

By sect. 19 of the Agricultural Holdings Act, 1875 (38 & 39 Vict. c. 92), "where a tenant commits or permits waste," and claims compensation under that act in respect of an improvement, "then the landlord shall be entitled, by counter-claim, but not otherwise," to Counter-claim in respect of Waste under Agricultural Holdings Act.

(*h*) Co. Lit. 53 a [note 344]. And see *Young v. Spencer*, 10 B. & C. 145; *Queen's College, Oxford v. Hallett*, 14 East, 489.

(*i*) Co. Lit. 53 a.

(*h*) *Jones v. Chappell*, L. R., 20 Eq. 539; 44 L. J., Ch. 668, per Jessel, M. R., citing *Doe v. Earl of Burlington*, 5 B. & Ad. 517.

(*l*) *Doe d. Earl of Egremont v. Stephens*, 6 Q. B. 208; Cole Ejcc. 427.

(*m*) *Payne v. Dor*, 1 T. R. 54.

(*n*) *Gordon v. Woodford*, 27 Beav. 603; 29 L. J., Ch. 222.

(*o*) *Vane v. Lord Barnard*, 1 T. R. 56, n.; 2 Vern. 738.

(*p*) *Packington's case*, 3 Atk. 215; *Turner v. Wright*, Johns. 740; 8 W. R. 675; *Ford v. Tynte*, 2 Johns. & H. 150; 31 L. J., Ch. 177; *Tudor L. C. Real Prop.* 90 (2nd ed.).

(*q*) Co. Lit. 53 b, 220, n. 1.

(*r*) *Gordon v. Woodford*, 27 Beav. 603; 29 L. J., Ch. 222.

CH. XVI. s. 5. obtain compensation on his part, provided that the waste was not committed or permitted more than 4 years before the determination of the tenancy.

Waste (Definition of).

(b) *Remedies for Waste.*

At Common Law.

At common law an action for waste lay only against tenants by the curtesy, tenants in dower and guardians, whose estates were created by act of law (s). But tenants for life or years had an interest in the land by the act of the lessor, who might and ought to have provided against waste by some express covenant or condition; in the absence of which such tenants were not liable at common law for negligence or permissive waste (t).

52 Hen. 3, c. 23, s. 2.

The Statute of Marlebridge (52 Hen. 3, c. 23), s. 2, enacted, "that farmers during their terms shall not *make waste* or exile of houses, woods or men, nor of anything belonging to the tenements that they have to farm, *without special licence* had by writing of covenant, making mention that they may do it; which thing if they do, and thereof be convict, they shall yield full damage, and shall be punished by amerciamment grievously."

6 Edw. 1, c. 5.

By the Statute of Gloucester (6 Edw. 1, c. 5) it was enacted that a man "from henceforth shall have a writ of waste in the Chancery against him that holdeth by law of England or otherwise for term of life, or for term of years, or a woman in dower; and he which shall be attainted of waste, shall lose the thing which he hath wasted, and moreover shall recompence thrice so much as the waste shall be taxed at" (u). This statute is still unrepealed. It has been construed as working a forfeiture of the *demised premises* (x), but the abolition of the writ of waste, along with real actions generally, by 3 & 4 Will. 4, c. 27, s. 36, has also been generally considered to carry with it the abolition of the special penalties of forfeiture and treble damages (y).

3 & 4 Will. 4, c. 27, s. 36.

Liability of Tenant for Years for Waste.

A tenant for years is clearly within the Statute of Gloucester, and consequently liable not only for commissive but also for permissive waste (z); and it has been said that a tenant for one year, or for half a year, or for a quarter of a year (a), and that a tenant for one year, and so on from year to year, (who is a tenant for two years at least with reference to notice (b)), is a tenant for years within the statute (c).

An action lies against a tenant for years, after the expiration of his

(a) *Greene v. Cole*, 2 Wms. Saund. 252; Smith L. & T. 259 (2nd ed.).

(t) *Countess of Shrewsbury's case*, 5 Co. R. 13 a; Cro. Eliz. 777, 784; 2 Inst. 145, 299; 2 Blac. Com. 282; Tudor, L. C., Real Prop. 90 (2nd ed.); Smith L. & T. 259 (2nd ed.).

(u) Co. Lit. 53; *Greene v. Cole*, 2 Wms. Saund. 252; *Harnett v. Maitland*, 16 M. & W. 262; 4 D. & L. 545.

(x) 3 Steph. Com. 408.

(y) See Williams on Real Property, 23, 24.

(z) *Yellowley v. Gower*, 11 Exch. 294; *Harnett v. Maitland*, supra; Smith L. & T. 267 (2nd ed.).

(a) Lit. s. 67; 2 Inst. 302.

(b) *Doe d. Chadborn v. Green*, 9 A. & E. 658.

(c) Bac. Abr. tit. *Waste*, p. 401, citing Bro. Abr. tit. *Waste*, pl. 52.

term, for committing waste, as well as covenant for the breach of the covenants contained in his lease (*d*); but not for *permissive* waste against a tenant by lease who has not covenanted to repair (*e*). An action for waste cannot be supported against the assignee of a lease, in which the lessee had covenanted from time to time, and at all times during the term, when need should require, sufficiently to repair the premises, with all necessary reparations, and to yield up the same so well repaired at the end of the term, in as good condition as the same should be in when finished under the direction of J. M., upon a breach that the defendant suffered the premises to become and be in decay and ruinous during a large part of the term, and after the term wrongfully yielded them up in much worse order and condition than when the same were finished under the direction of J. M. (*f*). An action for waste lies against an executor of a tenant for waste committed by his testator within six calendar months before his death (*g*).

CIV. XVI. s. 5.
Waste (Remedies for).

A strict tenant at will is not within the statute, and therefore not liable to an action for *permissive* waste (*h*). But if he *commit* waste, he thereby in effect determines his tenancy, and renders himself liable to an action of trespass at the suit of the landlord (*i*).

Tenant at Will.

Tenants from year to year are not considered tenants for years, but only as tenants at will (subject and entitled to the usual or agreed notice to quit); consequently they are not liable for *permissive* waste (*j*). In the absence of any express stipulation as to repairs &c., they are only bound to use the premises in a tenantable and proper manner, and to keep them wind and water tight, and *not to commit waste* (*k*). Where there is any express covenant or agreement to do repairs, or not to commit waste, the remedy must be *upon that*, and not for the breach of any implied contract to use the demised premises in a tenantlike manner (*l*).

Tenant from Year to Year.

A person who has a life interest by survivorship cannot sue for waste committed before his life interest vested (*m*). One tenant in common cannot maintain an action on the case, in the nature of waste, against another tenant in common (in possession of the whole, having a demise of the moiety from the first), for cutting down trees of proper age and growth for being cut; for it is no hurt to the

Tenant in Common, &c.

(*d*) *Kinlyside v. Thornton*, 2 W. Blac. 1111; *Marker v. Kenrick*, 13 C. B. 188.

(*e*) *Horne v. Benbow*, 4 Taunt. 764.

(*f*) *Jones v. Hill*, 7 Taunt. 392.

(*g*) 3 & 4 Will. 4, c. 42, s. 2.

(*h*) Co. Lit. 57 a; *Countess of Shrewsbury's case*, 5 Co. R. 13 a; Cro. Eliz. 777, 784; *Gibson v. Wells*, 1 B. & P., New R. 290; *Harnett v. Mailand*, 16 M. & W. 254; 4 D. & L. 645.

(*i*) Lit. s. 71; *Countess of Shrewsbury's case*, *supra*; Bro. Abr. tit. *Trespass*, pl.

147; *Smith L. & T.* 267, 268 (2nd ed.).

(*j*) *Runcorth v. Johnson*, 5 C. & P. 239; *Torriano v. Young*, 6 C. & P. 8; *Leach v. Thomas*, 7 C. & P. 327; *Horsefall v. Mather*, Holt N. P. C. 7. *Burchell v. Hornaby*, 1 Camp. 360, *contra*, appears to be incorrect.

(*k*) *Ante*, 570.

(*l*) *Standen v. Christmas*, 10 Q. B. 135; *Bickford v. Parson*, 5 C. B. 920; *Line v. Stephenson*, 4 Bing. N. C. 678; 5 Ind. 183.

(*m*) *Bacon v. Smith*, 1 Q. B. 345.

CH. XVI. s. 5. inheritance. If, however, the trees were not fit to be cut, he might maintain such action (*n*). One tenant in common cannot maintain against another an action of trespass for cutting down in due season and carrying away the whole produce of the common property, viz. a crop of hay (*o*). But one tenant in common of a close is not entitled to dig and carry away the turf, as such act amounts to a destruction of the property, and therefore constitutes an ouster (*p*).

Joint Tenants. Where a farm was demised to A. and B. jointly, and A. sublet to C., and gave receipts for rent and a notice to quit in his name alone, it was held that A. and B. could not maintain a joint action against C. for pulling down a shed which stood on part of the demised premises (*q*).

Injunction
against
Waste.

In an action for commissive waste, the plaintiff may claim a writ of injunction against the repetition or continuance of the injury complained of. It will be desirable to indorse the writ of summons accordingly, if an injunction be wished for (*r*); but the claim may be added afterwards by leave of the court or a judge (*s*), and an injunction may be granted by an interlocutory order in "any case in which it shall appear just or convenient" (*t*). Before the Judicature Act, such an application was usually made to the Court of Chancery (*u*). It seems that where a lessee commits acts of waste, for which damages merely nominal would be given, the High Court will not grant an injunction against him, if it appear that he does not contemplate committing any further waste, nor assert a right to commit it (*x*). Nor would the court interfere to make a tenant for life liable in respect of *permissive waste* (*y*), unless, indeed, there be an express covenant (*z*), nor as between tenants in common, except in cases of destructive waste (*a*). The remedy by injunction is ordinarily the most efficient which can be adopted, as it prevents that injury which, by the other remedies, can only be compensated for after it is done.

A lessee will be restrained from working mines by instroke from adjoining mines if he has covenanted to sink a pit, and work through that only; but not otherwise (*b*). A tenant will be restrained from pulling down a house, and building another which the landlord objects to (*c*), or from making material alterations in a dwelling-

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| (n) <i>Martin v. Knowllys</i> , 8 T. R. 145. | (x) <i>Doran v. Carroll</i> , 11 Ir. Ch. R. 379. |
| (o) <i>Jacobs v. Seward</i> , L. R., 4 C. P. 328. | (y) <i>Wood v. Gaynon</i> , Ambl. 395; <i>Pouys v. Blagrave</i> , 4 De Gex, M. & G. 448; 24 L. J., Ch. 142. |
| (p) <i>Wilkinson v. Haygarth</i> , 12 Q. B. 837. | (z) <i>Re Skingley</i> , 3 Mac. & Gor. 221. |
| (q) <i>Steel v. Western</i> , 7 Moore, 29. | (a) <i>Arthur v. Lamb</i> , 2 Drew. & Sm. 428. |
| (r) R. S. C., Ord. II., Rule 1; Appendix (A.), Part II., Sect. 4. | (b) <i>Lewis v. Fothergill</i> , L. R., 5 Ch. Ap. 103. |
| (s) R. S. C., Ord. III., Rule 2. | (c) <i>Smith v. Carter</i> , 18 Beav. 78. |
| (t) Judicature Act, 1873, s. 25, subsect. 8. | |
| (u) See <i>Smyth v. Carter</i> , 18 Beav. 78; <i>Duke of Beaufort v. Bates</i> , 31 L. J., Ch. 481. | |

house, as by changing it into a shop or warehouse (*d*); or removing plate-glass windows from the shop or front of the house (*e*); or from throwing down inclosures, or pulling down houses (*f*); or from ploughing up meadow or pasture which has not been ploughed for twenty years (*g*), unless indeed a penal rent of so much per acre is reserved (*h*). So an injunction will be granted to restrain a tenant from year to year, under notice to quit, as in the case of a lessee for a longer term, from doing damage and from removing crops, manure, &c., except according to the terms of his lease or the custom of the country (*i*). An injunction has been granted to restrain a tenant from year to year, his servants, agents and workmen "from pulling down, damaging or destroying any of the buildings upon the farm and premises; and from cutting down, injuring or destroying any of the timber or other trees, timberlike trees, bark, wood or underwood, hedges or fences now standing upon the said farm and premises; and from ploughing up any of the ancient meadow, or any of the old pasture land belonging to the said farm; and from sowing any part of the said farm and lands with mustard-seed or any other pernicious crop; and from removing off the said farm and lands any of the hay or straw, dung or manure produced or made thereon; and from doing any other waste or destruction to the said farm, lands and premises, or any part thereof." until, &c. (*k*). So an injunction has been granted against ploughing up pasture, where there was only a covenant to manage the farm in a husbandlike manner (*l*). Also to restrain a tenant from breaking up meadow for the purpose of building, contrary to an express covenant (*m*). Also to prevent a tenant from injuring fish-ponds (*n*), or a dovecote, or fixtures annexed to and forming part of the freehold; but not articles commonly called fixtures which are not so annexed (*o*), nor fixtures which the tenant is entitled to remove during the term, unless his lessor will purchase them according to the terms of the lease (*p*); but an injunction has been granted to restrain a tenant from removing trade fixtures, during the term, contrary to an express covenant in the lease (*q*).

CH. XVI. s. 5.
Waste (Remedies for).

Where a lease is made "without impeachment of waste," equity will not restrain the lessee from cutting timber, ploughing up meadow or pasture, opening mines, or the like; but he will, if necessary, be

Where Lease is made "without Impeachment of Waste."

(*d*) *Douglass v. Wiggins*, Johnson Ch. R. (American), 435; 2 Story Eq. Jur. s. 913.

(*e*) *Brocklesby v. Munn*, W. Notes, 1870, p. 42 (not further reported).

(*f*) Com. Dig. tit. *Chancery* (D. 11); *Mayor, &c. of London v. Hedger*, 18 Ves. 355; *Hindley v. Emery*, L. R., 1 Eq. 52; 35 L. J., Ch. 6.

(*g*) Com. Dig. tit. *Chancery* (D. 11).

(*h*) *Woodward v. Giles*, 2 Vern. 119; ante, 361.

(*i*) *Onslow v. —*, 16 Ves. 173.

(*k*) *Pratt v. Brett*, 2 Madd. 62.

(*l*) *Drury v. Molins*, 6 Ves. 328.

(*m*) *Ld. Grey de Wilton v. Saron*, 6 Ves. 106; *Kimpton v. Eve*, 2 V. & B. 349.

(*n*) *Earl Bathurst v. Burden*, 2 Bro. C. C. 64.

(*o*) *Kimpton v. Eve*, 2 V. & B. 349; *Amos & F.* 287 (2nd ed.).

(*p*) *Rolleston v. New*, 4 K. & J. 640.

(*q*) *Bidder v. Trinidad Petroleum Co.*, 17 W. R. 53.

CH. XVI. s. 5. restrained from pulling down houses, defacing seats, &c. (r). A tenant for life, without impeachment of waste, will be restrained from cutting down trees in lines or avenues, or ridings in a park, whether planted or growing naturally, if they serve for ornament or shelter, and were planted or left standing for that purpose (s). This extends to a clump of firs planted on a common two miles from the house for ornament (t). What a prudent owner would do in the proper course of management is no measure of what a tenant for life without impeachment of waste may do as to cutting timber planted or left standing for ornament (u). An injunction against cutting ornamental timber must be confined to timber standing for ornament or shelter, and will not be extended to trees which "contribute to ornament" (x). It seems that it is not enough for the affidavits for the injunction to show that the trees *are* ornamental, but it must be shown that they were planted or left standing for the purpose of ornament (y). The relief by injunction will not be granted on slight or uncertain grounds; for in the affidavit upon which it is founded, it is not sufficient that the plaintiff merely swears that he apprehends, or has been informed, that the defendant intends to commit waste; but there must appear an actual waste, or some act from which the intention is fully evinced (z). Sending a surveyor to mark out trees to be felled is sufficient, without waiting till some of them are cut down (a). So a threat by the tenant to open mines entitles the landlord to come into court to restrain him. Even if a tenant for life insist on a right to commit waste (having no such right) the reversioner may have an injunction, though no proof of waste appears (b).

Affidavits for
the Injunction.

Waste (Remedies for).

SECT. 6.—Fences and Party-walls.

Ownership of
Agricultural
Fences.

Jowles v.
Miller.

Where there are two adjacent fields, separated by a hedge and ditch, the ditch *prima facie* belongs to the owner of the field in which the hedge is; and if there are two ditches, one on each side of the hedge, then the ownership of the hedge must be ascertained by proving acts of ownership (c). The rule about ditching is this—"No man making a ditch can cut into his neighbour's soil, but usually he cuts it to the very extremity of his own land; he is of course bound

(r) *Williams v. Day*, 2 Cas. Ch. 32; Com. Dig. tit. *Chancery* (D. 11); Bac. Abr. tit. *Waste* (N.).

(s) *Packington's case*, 3 Atk. 215; *Garth v. Cotton*, Id. 756; *Chamberlayne v. Dunorier*, 1 Bro. C. C. 166; 3 Id. 549.

(t) *Marquis of Downshire v. Lady Sandys*, 6 Ves. 107.

(u) *Ford v. Tynte*, 2 De Gex, J. & S. 122.

(x) *Williams v. M'Namara*, 8 Ves. 70.

(y) *Coffin v. Coffin*, Jacob, 70.

(z) *Amos & F.* 284 (2nd ed.).

(a) *Jackson v. Cator*, 5 Ves. 691.

(b) *Gibson v. Smith*, 2 Atk. 182.

(c) *Guy v. West*, 2 Selw. N. P. 1244 (13th ed.); *Cole Ejec.* 242, 243.

to throw the soil which he digs out upon his own land, and often, if he likes it, he plants a hedge upon the top of it; therefore, if he cuts afterwards beyond the edge of the ditch, which is the extremity of his land, he cuts into his neighbour's land, and is a trespasser" (*d*): proof, therefore, of the ancient width of the ditch is evidence that the owner's land did not extend beyond the outer edge thereof (*d*). One tenant in common of a hedge may maintain trespass against his co-tenant if the latter grub it up; but not for a mere clipping of the hedge (*e*).

CH. XVI. s. 6.
*Fences and
Party-walls.*

The common use of a wall separating adjoining lands belonging to different owners (the origin of which wall is unknown), is *prima facie* evidence that the wall and the land on which it stands belong to the owners of those adjoining lands, in equal moieties as tenants in common. Where such an ancient wall was pulled down by one of the two tenants in common, with the intention of rebuilding the same, and a new wall was built of greater height than the old one, it was held not to be such a total destruction of the wall as to entitle one of the two tenants in common to maintain an action of trespass against the other (*f*). But where a tenant in common of a wall took off the coping-stones and heightened it, and built a washhouse against it, the roof of which occupied the whole width of the top of the wall, and also let a stone into the wall, with an inscription on it stating that the wall and the land on which it stood belonged to him, it was held, that on these facts the jury might find an actual ouster of the co-tenant (*g*). Where a party-wall was built at the joint expense of the two adjoining proprietors, and half its thickness stood on the land of each, the property in the wall follows the land on which it stands, and the two proprietors are not tenants in common of the wall (*h*). In contemplation of law such wall constitutes two distinct walls, and had to be so described under the old system of pleading (*i*). If a house or office be separated from other premises by a wall, and that wall belongs to the owner of the house or office, he is of common right bound to repair it; and an action will lie against him for any damages occasioned by his not doing so.

Ownership of
Party-walls.

An action for not repairing fences, whereby another party is damaged, can, in ordinary cases, only be maintained against the occupier, and not against the owner of the fee, who is not in possession (*k*).

(*d*) *Vowles v. Miller*, 3 Taunt. 137.

(*e*) *Voyce v. Voyce*, Gow, 201.

(*f*) *Cubitt v. Porter*, 8 B. & C. 267; *Wiltshire v. Sidford*, Id. 259, n.; *Murley v. M'Dermott*, 8 A. & E. 138.

(*g*) *Stedman v. Smith*, 8 E. & B. 1; 26 L. J., Q. B. 314; and see *Doe d. Wain v. Horn*, 3 M. & W. 333; 5 Id. 564.

(*h*) *Matts v. Hawkins*, 5 Taunt. 20; *Taylor v. Stendall*, 7 Q. B. 634; 3 D. & L. 161.

(*i*) *Murley v. M'Dermott*, 8 A. & E. 138, 143; *Cole Ejeo*, 242.

(*k*) *Cheetham v. Hampson*, 4 T. R. 318; *Russell v. Shenton*, 3 Q. B. 449. See post, Chap. XIX.

CH. XVI. s. 6.

*Fences and
Party-walls.*Action by
Landlord
against
Tenant.

It is so notoriously the duty of the actual occupier of lands to repair the fences, and so little the duty of the landlord, that without any agreement to that effect, the landlord may maintain an action against his tenant for not so doing, upon the ground of the injury done to his inheritance (*l*). If two persons are possessed of adjoining closes, neither being under any obligation to fence, each must take care that his cattle do not enter the land of the other; but it may be doubted, if two persons have the concurrent possession of land, for the purpose that each may take profits of a special nature, and distinct from, but not inconsistent with, the right of the other, whether either one is bound to guard against casual damage, which, during and by fair enjoyment of his right, may happen to the other (*m*). A person entitled to the minerals under the land of another, with licence to make a shaft opening into it, is, in the absence of any stipulation to the contrary, under a legal obligation to the owner of the surface soil to fence the shaft so as to prevent its being a source of danger to his cattle which may be upon it, and is liable to an action for injury occurring to those cattle for want of such fencing (*n*). Where the owner of two adjoining closes (A. and B.) separated by a fence and gate, which had always been repaired by the occupier of B., sold A. to the plaintiff, and two years afterwards sold B. to the defendant; it was held, that the latter was not bound to repair the gate, unless he or his vendor had made some specific bargain with the plaintiff to that effect; and that the doing of occasional repairs was not evidence of such bargain (*o*). The liability of railway companies under 8 Vict. c. 20, s. 68, to make and repair fences between their railway and the adjoining land, is not more extensive than that imposed on ordinary tenants by the common law. They are not bound to fence as against mere trespassers and wrongdoers, but only as against the owners and occupiers of the land adjoining the railway (*p*). If any accident which occurs be attributable partly to their neglect to fence properly, and partly to want of ordinary care and caution on the part of the plaintiff or his servants, the company are entitled to a verdict (*q*). The owner of land adjoining a public road is under no obligation to fence excavations in his land, unless they are so near the road as to be dangerous to persons lawfully using it (*r*).

Railway
Fences under
Railways
Clauses Act.

(*l*) *Cheetham v. Hampson*, 4 T. R. 319, per Lord Kenyon, C. J.; and see *Whitfield v. Weedon*, 2 Chit. R. 685.

(*m*) *Churchill v. Evans*, 1 Taunt. 529.

(*n*) *In re Williams v. Groucott*, 4 B. & S. 149; 32 L. J., Q. B. 239.

(*o*) *Boyle v. Tamlyn*, 6 B. & C. 329.

(*p*) *Ricketts v. East and West India Docks and Birmingham Junction R. Co.*, 12 C. B. 160; *Manchester, Sheffield and Lincolnshire R. Co.*, app., *Wallis*, resp., 14 C. B. 213; *Midland R. Co.*, app., *Daykin*, resp., 17

C. B. 126; *Roberts v. Great Western R. Co.*, 4 C. B., N. S. 506; 27 L. J., C. P. 266; *Hardcastle v. South Yorkshire Railway and River Dun Co.*, 4 H. & N. 67; *Bemant v. Great Western R. Co.*, 8 C. B., N. S. 368; *Marfell v. South Wales R. Co.*, Id. 525.

(*q*) *Haigh v. London and North-Western R. Co.*, 1 F. & F. 646; *Ellis v. London and South-Western R. Co.*, 2 H. & N. 424.

(*r*) *Binks v. South Yorkshire Railway and River Dun Co.*, 3 B. & S. 244; 32 L. J., Q. B. 26.

All owners of lands adjoining and exposed to the inroads of the sea, or commissioners of sewers acting for a number of landowners, have a right to erect such works and defences as are necessary for the protection of their own land, even although they may be prejudicial to others by rendering it necessary for them to do the same (s).

A tenant is obliged to preserve the boundaries of the land demised to him, and if he permit them to be destroyed, so that his landlord's land cannot be distinguished from his own, he must either restore the land specifically, or give other land of equal value in lieu (t); and this obligation is not merely to leave the boundary distinct at the end of the term, but to keep it distinct during the term, the court having jurisdiction during the term to ascertain the boundary if the tenant has confused it (u), and the obligation extends to cases where there are several co-lessees (v). A person has no right to undermine a party-wall between his own house, which he has pulled down, and his neighbour's, unless it can be done without injury to his neighbour's house; even although it is doubtful whether the interests of the parties in the wall are several or whether they are tenants in common of it (x). To an action of covenant for non-repair of a messuage, the defendant may plead performance, except as to the repairs of a party-wall, and that those were rendered necessary and were done under 14 Geo. 3, c. 78, and did not become necessary by the defendant's default, and that the defendant was not the owner of the improved rent (y).

Although a tenant from year to year is not bound to put the premises into repair, he is not, on the other hand, at liberty to do any thing which amounts to waste, or to a breach of the rules of good husbandry; he is not, therefore, entitled to cut and sell hedgerows, or, at least, not without making up the hedges and fences according to the course of good husbandry. If there be a quickset fence of white thorn, and the tenant stub it up or suffer it to be destroyed, that is destruction; but cutting quickset hedges is not waste, but "rather good husbandry, because they will grow the better" (z).

CH. XVI. s. 6.
Fences and Party-walls.

Rights respecting
Fences,
Boundaries
and Party-walls.

Tenant must preserve
Boundaries of
Land demised.

Waste and
Destruction
of Fences.

(s) *Rex v. Pagham*, 8 B. & C. 355; and see *Hudson v. Tabor*, L. R., 1 Q. B. D. 225, aff. by C. A., id. 2 Q. B. D. 290.

(t) *Att.-Gen. v. Fullerton*, 2 V. & B. 263.

(u) *Spike v. Harding*, L. R., 7 Ch. D. 871; 47 L. J., Ch. 323; 38 L. T. 385; 26 W. R. 420; in this case a reference

was directed to chambers to ascertain the boundaries.

(v) *Willis v. Parkinson*, 1 Swanst. 49.

(x) *Bradbee v. Governors of Christ's Hospital*, 4 M. & G. 714; 2 Dowl. N. S. 164.

(y) *Moore v. Clark*, 5 Taunt. 90.

(z) *Gage v. Smith*, Godb. 209.

CH. XVI. s. 7.

Trees and Timber (Definition of Timber).

Definition of "Timber."

By the Custom of the Country.

SECT. 7.—*Trees and Timber (a).*(a) *What is Timber.*

By the term *timber* is meant properly such trees only as are fit to be used in building and repairing houses; thus, oak, ash, and elm trees are considered timber in all places, and under whatsoever circumstances they are grown (*b*). But only trees of not less than six inches in diameter or two feet girth (allowing for irregularities of shape) appear to be reckoned or considered as "timber" (*c*).

Many descriptions of trees, which are not generally considered as timber, are so in some places by the custom of the country, being there used for the purpose of building; thus it has been laid down that horse-chestnuts, limes, birch, beech, asp, walnut trees, and the like, may under such circumstances be deemed timber, and are therefore protected by the law as such (*d*). It has been determined that in the county of York birch trees are timber, because they are used in that county for building sheep-houses, cottages, and such mean buildings (*e*): and it would seem that in Hampshire willows have been considered as timber by the custom of the country (*f*). Where beech is admitted to be timber by the custom of the country, the general rule of law applicable to timber trees in general attaches upon it, so as to give it the properties and privileges of timber at twenty years' growth; and therefore upon an issue whether certain beech trees in the county of Bucks were or were not timber according to the custom of the country, the inquiry is confined to the nature of the wood and the period of its growth, whether of twenty years; and no evidence can be received to qualify its character of timber by showing that it was not deemed to be such in the county unless the tree contained ten feet of solid wood (*g*). But beech trees of thirty years' growth might be cut and managed as "saleable underwood," so as to render them liable to poor rates under 43 Eliz. c. 2 (*h*).

Pollards.

Although pollards have been said not to be timber (*i*), yet Lord King inclined to think them timber, provided their bodies were sound and good; and in an action to recover the value of pollards under

(a) As to the Law of Trees and Woods generally, see an excellent Treatise by R. D. Craig, Q.C. (1866, Maxwell).

(b) Co. Lit. 53 a; Craig on Trees and Woods, 11.

(c) *Whitty v. Id. Dillon*, 2 F. & F. 67.

(d) *Duke of Chandos v. Talbot*, 2 P. Wms. 606; *Palmer's case*, Co. Lit. 53 a, note (10).

(e) *Countess of Cumberland's case*, Moore, 813.

(f) *Layfield v. Cowper*, 1 Wood, Ex. R. 330; *Gruffy v. Pindar*, Hob. 219.

(g) *Aubrey v. Fisher*, 10 East, 446; *Duke of Chandos v. Talbot*, 2 P. Wms. 606; Co. Lit. 53; Craig on Trees and Woods, 11.

(h) *Lord Fitzhardinge v. Pritchett*, 8 B. & S. 216; L. R., 2 Q. B. 135; 36 L. J., M. C. 49. The provisions of 43 Eliz. c. 2, as to saleable underwoods, are repealed by the Rating Act, 1874. As to the rateability of plantations under that act, see Chap. XV., Sect. 5, ante, 547.

(i) *Plowd.* 470; Craig on Trees and Woods, 12, 13; *Phillips v. Smith*, 14 M. & W. 589.

the description of timber and timberlike trees, the plaintiff recovered a verdict (*j*). CH. XVI. s. 7.

(b) *Implied Rights as to Trees.*

Trees and Timber (Implied Rights as to).

The property in trees is vested in the owner of the inheritance of the land upon which they grow; for the property in trees, or of that which is likely to become timber, is in the landlord, and the property in bushes in the tenant, even when they are cut down by a stranger (*k*). Trees belong to Landlord, Bushes to Tenant.

If a tree grow near the confines of the land of two parties, so that the roots extend into the soil of each, the property in the tree belongs to the owner of that land in which the tree was first sown or planted (*l*), but formerly the parties in such a case were held to be tenants in common (*m*). A farmer who raises young fruit trees on the demised land, for filling up the orchards, is not entitled to sell them; but it is otherwise of a nurseryman by trade (*n*). Therefore a nurseryman, who has planted fruit trees in the way of his trade, may remove them, if not of larger growth than could be dealt with in his trade, even though they are producing fruit (*o*). A tenant, not being a gardener, cannot remove a border of box planted on the demised premises by himself, unless by special agreement with his landlord (*p*). A tenant of a garden may not plough up and destroy the strawberry beds, although he paid the preceding tenant for them (*q*).

Windfalls of sound timber trees belong to the landlord, but windfalls of trees which are not timber, and of decayed timber trees, belong to the tenant (*r*). The same rule will apply to trees severed by the act of a trespasser. *Windfalls. Herlakenden's case.*

(c) *Express Contracts as to Trees.*

The effect and construction of exceptions and reservations (in a demise) of trees, &c. have been already considered (*s*). Woods, which were excepted out of the lease, but subsequently granted by the lessor to the lessee, have been held not to pass by an assignment of the lease (*t*). *Exceptions and Reservations of Trees, &c.*

(*j*) *Rabbett v. Raikes*, Suffolk Sum. Ass. 1803, cor. Macdonald, C. B.; *Channon v. Patch*, 5 B. & C. 893.

(*k*) *Berriman v. Peacock*, 9 Bing. 384.

(*l*) *Holder v. Coates*, Moo. & M. 112; 2 Selw. N. P. 1244 (13th ed.).

(*m*) *Waterman v. Soper*, 1 Id. Raym. 737; *Masters v. Pollie*, 2 Roll. Rep. 141; *Anon.*, Id. 255.

(*n*) *Wyndham v. Way*, 4 Taunt. 316; *Penton v. Robart*, 2 East, 90.

(*o*) *Wardell v. Usher*, 3 Scott, N. R. 508.

(*p*) *Empson v. Soden*, 4 B. & Adol. 655.

(*q*) *Wetherell v. Howells*, 1 Camp. 227.

(*r*) *Herlakenden's case*, 4 Coke, 62; *Countess of Shrewsbury's case*, Moore, 812. And see *Channon v. Patch*, 5 B. & C. 897. In that

case a lessor during the term cut down some oak pollards which were unfit for timber, and it was held that as a tenant for life or years would have been entitled to them, if they had been blown down, the lessor could not, by wrongful severance, acquire any right to them. As to right of reversioner and tenant for life see *Bewick v. Wingfield*, 3 P. Wms. 268; *Legge v. Legge*, 32 Beav. 509; 33 L. J., Ch. 116, in which latter case it was held that the proceeds of windfalls must be invested and dealt with as part of the corpus of the settled estate.

(*s*) Ante, 163; see also Smith L. & T. 133—136 (2nd ed.).

(*t*) Godb. 188.

CH. XVI. s. 7.

*Trees and Timber (Express Contracts as to).**Construction of Covenants as to Trees, &c.*

A covenant not to remove or grub up trees is broken by removing trees from one part of the premises to another: and so it is by taking away trees, even if the lessee plant a greater quantity than he takes away, unless those taken away were dead (*u*). A covenant to keep all the trees standing in an orchard, whole and undefaced, "reasonable use and wear only excepted," is not broken by cutting down trees past bearing, provided the landlord is likely to get back the premises at the end of the term in an improved condition (*x*); but a covenant to leave all the timber which is growing on the land when the lessee took it, is broken if, at the end of the term, he cut it down, but leave it there, for that would be defeating the intent of the covenant, although a literal performance of it (*y*). A lease was granted of a farm, and quarries of stone thereon, with liberty to work the quarries; out of this demise were reserved timber saplings and underwood growing on the premises: there was a covenant not to commit waste by cutting down saplings or underwood: it was held that the cutting down saplings and underwood for the necessary purpose of working a quarry on the premises was no breach of the covenant, there being no excess of the right that it was intended the tenant should exercise (*z*). Where there was a liberty in a lease, for the lessee to cut down and dispose of all timber and coppice, and also a proviso to give notice in writing to the lessor of his intention, that the latter might have the option of purchasing; and the lessee gave a *bonâ fide* notice, and the lessor disclaimed any intention of purchasing; it was held that the lessee might afterwards proceed to cut down the whole, without giving a fresh notice, at such seasons as suited his convenience, even though the lessor had in the meantime parted with his interest to another (*a*).

(d) *Waste as to Trees.*

For what purpose Trees may be cut without Waste.

A tenant who is answerable for waste only, may cut down trees for the purposes of reparation without committing waste, either where the damage has accrued during the time of his being in possession, in the ordinary course of decay, or where the premises were ruinous at the time he entered; but if the decay happened by his default, to cut down trees to do the repair would be waste. And if a tenant having cut down trees for reparations, sell them, and afterwards buy them again and employ them about necessary reparations, it is waste by the sale (*b*): so, although he cut for repairs, if upon turning out unfit they are exchanged for others which are so applied (*c*). But the

(*u*) *Doe d. Wetherell v. Bird*, 6 C. & P. 195; 2 N. & M. 285.

(*x*) *Doe d. Jones v. Crouch*, 2 Camp. 449.

(*y*) 1 Esp. N. P. 271.

(*z*) *Doe d. Rogers v. Price*, 8 C. B. 894.

(*a*) *Goodtitle d. Luxmore v. Savile*, 10 East, 87.

(*b*) Co. Lit. 53 b, 220.

(*c*) *Simmons v. Norton*, 7 Bing. 640.

tenant may not cut timber for repairs which his lessor has covenanted to do (*d*). It is not waste for a tenant to cut timber for necessary botes (*e*). It is an inseparable incident to an estate tail, that the tenant shall not be punishable for committing waste by felling timber: but this power must be exercised during the life of the tenant in tail, for at the instant of his death it ceases: if, therefore, a tenant in tail sell trees, growing on the land, the vendee must cut them down during the life of the tenant in tail; for otherwise they will descend to the heir, as parcel of the inheritance (*f*).

CH. XVI. s. 7.
Trees and Timber (Waste as to).

Cutting down, destroying, or topping all trees which are timber, either by the general law or by the particular custom of the country, is waste; so is the doing of any act which has the effect of causing a decay of the wood; and cutting down willows, beech, birch, asp, maple, or any trees of that description, which, though not timber, afford a defence or shelter for the house, has been considered destruction. Upon the same principle, cutting down or destroying fruit-trees growing in the garden or orchard is waste; but if such trees grow upon any of the ground which the tenant holds out of the garden or orchard, it is not waste (*g*): and it has been laid down, that suffering the germins, or young shoots springing from trees which have been felled, to be destroyed, is waste (*h*); and that if it be done after previous waste in felling the trees, it is double waste (*i*). Cutting down willows and leaving the shoots to shoot afresh, has been held not to be waste, unless they are a shelter to the house or a support to the bank of a stream (*k*). In most places tenants may cut all trees, whether timber or underwood, which have, under the denomination of seasonable wood or *sylva cædua*, been cut within twenty years, without being guilty of waste (*l*). The cutting of hornbeams, hazels, willows, sallows, though of forty years' growth, is not waste, because they will never become timber (*m*). In some counties, especially in Kent, they are in the habit of cutting down wood as underwood, at twenty-six, twenty-eight, or thirty years, and which, if allowed to grow, would become valuable timber. If trees be excepted out of a demise, waste cannot be committed by cutting them down; and therefore ejectment cannot be maintained as for waste thereby committed in or upon the demised premises (*n*).

What Acts amount to Waste.

(*d*) Com. Dig. Pleader (3 O.), 14.
(*e*) Com. Dig. Pleader (3 O.), 12; Co. Lit. 53; Hob. 234; Fitz. N. B. 59 (N.); *Archdeacon v. Jenner*, Cro. Eliz. 604.
(*f*) Cruise Dig. tit. 2, C. I., s. 33.
(*g*) Co. Lit. 53 a; Id., note (6).
(*h*) 2 Roll. Abr. 825; *Gage v. Smith*, Godb. 210.

(*i*) Fitz. N. B. 59.
(*k*) *Phillips v. Smith*, 14 M. & W. 589.
(*l*) Godb. 4; 2 Roll. Abr. 815.
(*m*) Godb. 4, pl. 6.
(*n*) *Goodright d. Peters v. Vivian*, 8 East, 190; *Doe d. Rogers v. Price*, 8 C. B. 894.

CH. XVI. s. 8.

Fixtures
(general definition of).

SECT. 8.—*Fixtures* (o).(a) *Generally.*

Meaning of
"Fixtures."

The word "fixtures" is used by different writers to express different meanings, but it is always applied to articles of a personal nature which have been affixed to land (*p*). It is a modern word, and is not to be found in the *Termes de la Ley* (*q*). In its most extensive sense it means anything annexed to the freehold in such a manner as to become parcel of it. But as between landlord and tenant it has generally a more confined meaning (*r*), and may be divided into—1. Tenant's fixtures; 2. Landlord's fixtures. "Tenant's fixtures" are personal chattels annexed to the freehold by the tenant during the term, either for the purposes of his trade (*s*), or for mere ornament and convenience (*t*), and which he has a right to sever and remove during the term, in the absence of any express stipulation (*u*), or local custom to the contrary. "Landlord's fixtures" are those put up by the landlord before or during the term, or by any previous owner or tenant, or by any other person. The term also includes such fixtures put up by the tenant during the term as the tenant has no right to remove. All these constitute part of the freehold, and also part of the premises demised. In a more confined sense "landlord's fixtures" mean those fixtures which are on the premises at the time of the lease, and are demised therewith, and are usually specified in a schedule to the lease or agreement (*y*), to which may be added such erections and fixtures subsequently added by the tenant which he is not entitled to remove during the term.

"Tenant's
Fixtures."

"Landlord's
Fixtures."

Examples.

Barns, &c.

Sometimes machinery and other articles, and even buildings, may be so erected as not to be let into the soil, or annexed to it or to any building in such a manner as to become part of the freehold, or to lose their chattel character. Barns, granaries, sheds, or mills erected upon blocks, rollers, pattens, pillars, or plates, resting on brickwork, but not affixed to the freehold by being let into it, or united to it by mortar, nails, or otherwise, are not considered as fixtures, but only as chattels, and may be removed by a tenant during his term, notwithstanding they have sunk into the ground by their own weight (*s*). But a wooden windmill resting by its weight on a brick foundation does

(o) The law of fixtures generally, not only as between landlord and tenant, but also as between other persons, is mostly treated of in *Amos and Ferard on Fixtures* (2nd ed., A.D. 1847), to which frequent reference will be made. See also *Brown on Fixtures* (3rd ed., A.D. 1875), and the notes to *Elves v. Mawc* in *Smith's Leading Cases* (8th ed., A.D. 1879).

(p) *Amos & F. 1*; *Co. Lit.* 53 a.

(q) *Wiltshire v. Cotterell*, 1 E. & B. 674;

Sheen v. Rickie, 5 M. & W. 175; *Elliott v. Bishop*, 10 Exch. 507.

(r) *Amos & F. 2*; *Hallen v. Runder*, 1 C., M. & R. 266; *Elliott v. Bishop*, 10 Exch. 508; *Ex parte Barclay*, 5 De Gex, M. & G. 403; 25 L. J., Bkt. 1.

(s) *Post*, 599.

(t) *Post*, 602.

(u) *Post*, 608.

(y) *Ante*, 167.

(z) *Huntley v. Russell*, 13 Q. B. 572.

not constitute part of the freehold (*a*). So a wooden barn erected by a tenant on a foundation of brick and stone let into the ground, but the barn resting upon it by weight alone, is a mere chattel removable by the tenant on the expiration of his term, and for which he may afterwards maintain trover (*b*). So sheds or buildings called *Dutch barns*, having a foundation of brickwork in the ground, and uprights fixed in and rising from the brickwork, and supporting the roof, which was composed of tiles, and the sides open, have been held removable (*c*), and so has a *varnish house* having a brick foundation let into the ground, and a chimney belonging to it, upon which a superstructure of wood used as a varnish manufactory, but merely placed upon a wooden plate laid upon the brick foundation (*d*), and a wooden stable standing upon blocks and rollers, or a shed standing upon brickwork let into the ground (*e*). Stills set in brickwork have been considered as fixed to the freehold, though vats supported by and resting on brickwork and timber, but not fixed in the ground, were not (*f*). Iron salt-pans fixed with mortar to a brick floor, with furnaces under them, may be removed by the lessees of salt springs (*g*); but where a lessee of salt springs was to pay rent according to the number of pans, and he covenanted to deliver up all *works* erected or to be erected, at the end of the term; it was held that he could not remove iron salt-pans though merely resting on brickwork, and having iron rings in their sides, by which they were occasionally lifted up to be repaired (*h*). Where certain jibs, being parts of a machine, had been put up by the tenant during his term, and were capable of being removed without either injuring the other parts of the machine or the building, and had been usually valued between the outgoing and incoming tenant; it was held that these were the goods and chattels of the outgoing tenant, for which he might maintain trover (*i*). In all cases of this description, whatever may be the magnitude, or however substantial the nature of the erection, still if it is so constructed as not to be actually fastened to or let into the freehold, the tenant may always remove it, because the law considers it as a mere loose and movable chattel (*k*). But a *conservatory* erected on a brick founda-

CH. XVI. s. 8.

Fixtures
(*general defini-*
tion of).

Stills.

Salt-pans.

Conservatory.

(*a*) *Rea v. Otley*, 1 B. & Ad. 161.

(*b*) *Wansborough v. Maton*, 4 A. & E. 884.

(*c*) *Dean v. Allalley*, 3 Esp. 11; cited in *Elwes v. Mawe*, 3 East, 47; 2 Smith L. C.; *Amos & F.* 37.

(*d*) *Penton v. Robart*, 4 Esp. 33; 2 East, 88; *Amos & F.* 39.

(*e*) *Fitzherbert v. Shaw*, 1 H. Blac. 258. In *Martin v. Roe*, 7 E. & B. 237, a rector was held entitled to remove hothouses without incurring liability for dilapidations.

(*f*) *Horn v. Baker*, 9 East, 215; 2 Smith L. C. 207 (7th ed.); but see *Trappes*

v. Harter, 2 C. & M. 153; cited 6 Exch. 313.

(*g*) *Lawton v. Salmon*, 1 H. Blac. 259, n.

(*h*) *Earl of Mansfield v. Blackburn*, 6 Bing. N. C. 426.

(*i*) *Davis v. Jones*, 2 B. & A. 165; *Sunderland v. Newton*, 3 Sim. 450.

(*k*) *Amos & F.* 43; *Hellawell v. Eastwood*, 6 Exch. 312; *Huntley v. Russell*, 13 Q. B. 572; *Wood v. Hewett*, 8 Q. B. 913; *Wansborough v. Maton*, 4 A. & E. 884; *Martin v. Roe*, 7 E. & B. 237; *Parsons v. Hind*, 14 W. R. 860.

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Fixtures
(general defini-
tion of).

Examples—
contd.

“Mules.”
Hellawell v.
Eastwood.

tion, affixed to and communicating with rooms in a dwelling-house by windows and doors, cannot be removed by a tenant for years who erected it during his tenancy (*l*). So a *veranda*, the lower part of which is attached to posts fixed in the ground, cannot be removed (*m*). Nor greenhouses built in a garden, and constructed of wooden frames fixed with mortar to foundation walls of brickwork (*n*). Nor a boiler built into the masonry of a greenhouse, but it is otherwise with respect to the pipes of a heating apparatus connected with the boiler by screws (*n*). Gaseliers fixed to gas pipes cannot be removed; or, at all events, will pass by an assignment of the lease with all fixtures, &c. (*o*). It has been decided that an outgoing tenant has no right to remove pillars of brick and mortar built on a dairy floor to hold pans, although such pillars are not let into the ground (*p*). It is necessary, in order to constitute a fixture, that the article in question should be let into or united to the land, or to some substance previously connected with the land. It is not enough that it has been laid upon the land, and brought into contact with it; something more than mere juxtaposition is required; as, that the soil shall have been displaced for the purpose of receiving the article, or that the chattel should be cemented, or otherwise fastened to some fabric previously attached to the ground (*q*). The screwing of a stocking-frame to the floor to keep it steady will not make it a fixture (*r*). Cotton spinning machines called “mules,” some of which were fixed by screws to the wooden floor, and some by screws which had been sunk into holes in the stone flooring, and secured by molten lead, *merely to steady them for more convenient use as machines*, continue to be chattels, and as such are distrainable for rent (*s*). Whether a machine or any other article has been so fixed and attached to the freehold as to become parcel of it, is a question of fact depending on the circumstances of each case, and principally on two circumstances; first, the mode of annexation to the soil or fabric of the house, and the extent to which it is united to them, whether it can easily be removed *intégrè, salvè et commodè*, or not, without injury to itself or the fabric of the building; secondly, on the object and purpose of the annexation, whether it was for the permanent and substantial improvement of the dwelling, in the language of the Civil Law, *perpetui usûs causâ*, or in that of the Year Book, *per un profit del inheritance* (*t*), or merely for a

(*l*) *Buckland v. Butterfield*, 2 Brod. & B. 54; *Amos & F.* 76; and see *West v. Blakeway*, 2 M. & G. 729; 9 Dowl. 846.

(*m*) *Penry v. Brown*, 2 Stark. 403.

(*n*) *Jenkins v. Gething*, 2 Johns. & H. 520.

(*o*) *Sewell v. Angerstein*, 18 L. T., N. S. 300.

(*p*) *Leach v. Thomas*, 7 C. & P. 327; and see *Jenkins v. Gething*, 2 Johns. & H.

520.

(*q*) *Amos & F.* 2; *Wansborough v. Maton*, 4 A. & E. 884; *Huntley v. Russell*, 13 Q. B. 572.

(*r*) *Trappes v. Harter*, 2 Ck. & M. 177; cited 6 Exch. 313.

(*s*) *Hellawell v. Eastwood*, 6 Exch. 295 312.

(*t*) 20 Hen. 7, c. 13.

temporary purpose, or the more complete enjoyment and use of it *as a chattel* (*u*). If machines be attached slightly, by screws or otherwise, so as to be capable of removal without the least injury to the fabric of the building or to themselves, and the object and purpose of the annexation was, not to improve the inheritance, but merely to render the machines steadier and more capable of convenient use as chattels, they do not become “*fixtures*” or part of the freehold, any more than a carpet would be which is attached to the floor by nails for the purpose of keeping it stretched out, or curtains, looking-glasses, pictures and other matters of an ornamental nature, which have been slightly attached to the walls of the dwelling-house *as furniture*, and which is probably the reason why they and similar articles have been held in different cases to be removable (*v*). Machines so attached would pass to the executor as chattels rather than to the heir as part of the freehold (*x*). Fixtures which a tenant may sever from the freehold and take away during his term are not distrainable for rent (*y*): but machines which have not been sufficiently annexed to constitute them part of the freehold are considered as mere goods and chattels, and may be so distrained (*z*).

CH. XVI. s. 8.
Fixtures
(*general definition of*).

Questions respecting the right to what are ordinarily called *fixtures*, principally arise between three classes of persons:—1st. Between different descriptions of representatives of the same owner of the inheritance: viz., between his *heir* and *executor*. In this first case, i. e. as between heir and executor, the rule obtains with the most rigour in favour of the inheritance, and against the right to disannex therefrom, and to consider as a personal chattel anything which has been affixed thereto. 2ndly. Between the *executors of tenant for life or in tail*, and the *remainderman or reversioner*, in which case the right to fixtures is considered more favourably for executors than in the preceding case between heir and executor. The third case, and that in which the greatest latitude and indulgence has always been allowed in favour of the claim to have any particular articles considered as personal chattels as against the claim in respect of freehold or inheritance, is the case *between landlord and tenant* (*a*). Hence it may be received as a rule, that the decisions in favour of the executors of tenants for life, in tail, or in fee, as against the remainderman, reversioner, or heir, may in general be applied to cases between landlord and tenant, and are to be considered as governing authorities in support of a *tenant's* rights (*b*). But of course the converse does not hold.

Between
what Classes
of Persons
Questions as
to Fixtures
arise.

(*u*) *Hellawell v. Eastwood*, 6 Exch. 295.

(*v*) *Id.*

(*x*) *Trappes v. Harter*, 3 Cr. & M. 177; cited 6 Exch. 313.

(*y*) *Dalton v. Whitem*, 3 Q. B. 961;

Darby v. Harris, 1 Q. B. 895; ante, 407.

(*z*) *Hellawell v. Eastwood*, 6 Exch. 295.

(*a*) Per cur. in *Elwes v. Mawe*, 3 East, 51; 2 Smith L. C. 162 (8th ed.).

(*b*) *Amos & F.* 28, 29, 73.

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Fixtures
(general defini-
tion of).General Rule
as to Fix-
tures.

The general rule of law respecting fixtures is, that whatever is fixed to the freehold becomes part of it, and is subjected to the same rights of property as the land itself; the maxim being *Quicquid solo plantatur, solo cedit* (c). But the presumption that that which is annexed to the soil becomes part of the soil, may be rebutted by circumstances showing the intention of the parties to the contrary (d). Thus, where a chattel has been annexed by its owner to another's freehold, and may without injury be severed, it is not necessarily to be inferred from the annexation that such chattel becomes the property of the freeholder. Whether in a particular case it has become so or not, may be a question on the evidence; and the jury may infer, from user or other circumstances, an agreement, when the chattel was annexed, that the original owner should have liberty to take it away again at any time, and to use it in the meantime for the purposes of an easement (e). When the owner of the inheritance annexes thereto fixtures (which would in the ordinary case of landlord and tenant be removable by the latter during his term), for a permanent purpose, and for the better enjoyment of his estate, they become part of the freehold (f). The principle upon which the rule of law, that fixtures pass with the soil, is relaxed in favour of trade, has no application where the parties who affix the machinery are themselves owners in fee of the soil (g). Nor where a conveyance or mortgage in fee is made of the building or land, to which trade or other fixtures are then or subsequently annexed (h). Even an assignment of a lease, with all fixtures, &c., will pass fixtures which the tenant might remove during the term (i).

General Rule
as to Annexa-
tions by a
Tenant.*Elwes v.*
Mawc.

The general rule of law, with respect to annexations made by a tenant during the continuance of his term, has been established from a very remote period (k). It is, that whenever the tenant has affixed anything to the demised premises during his term, he can never again sever it, without the consent of his landlord. The property, by being annexed to the land, immediately belongs to the freeholder; the tenant, by making it part of the freehold, is considered to abandon all future right to it, so that it would be waste in him to remove it afterwards. It therefore falls in with his term, and comes to the reversioner as part of the land. This is the rule recognized in the

(c) *Amos & F.* 9; *Minshall v. Lloyd*, 2 M. & W. 459; *Elliott v. Bishop*, 10 Exch. 507; *Martin, B.*; *Lancaster v. Eve*, 5 C. B., N. S. 717, 720; 28 L. J., C. P. 235; *Climie v. Wood*, L. R., 3 Ex. 257, 260; 4 Id. 328; 37 L. J., Ex. 158; 38 Id. 223.

(d) *Lancaster v. Eve*, supra.

(e) *Wood v. Hewett*, 8 Q. B. 913; *Lancaster v. Eve*, 5 C. B., N. S. 717; 28 L. J., C. P. 235.

(f) *Walmesley v. Milne*, 7 C. B., N. S. 115; 29 L. J., C. P. 97; *Fisher v. Dixon*,

12 Cl. & F. 312.

(g) *Mather v. Fraser*, 2 K. & J. 536.

(h) *Culwick v. Swindell*, L. R., 3 Eq. 249; 36 L. J., Ch. 173; *Climie v. Wood*, L. R., 3 Ex. 257; 37 L. J., Ex. 158; affirmed L. R., 4 Ex. 328; 38 L. J., Ex. 223; 20 L. T. 1012; *Haley v. Hammersley*, 3 De Gex, F. & J. 587; 30 L. J., Ch. 771.

(i) *Seecoll v. Angerstein*, 18 L. T. 300.

(k) See *Year Book*, 17 E. 2, p. 618; *Herlakenden's case*, 4 Co. 64.

leading case of *Elves v. Mawc* (*l*), in which case the tenancy was agricultural, and the tenant removed the fixtures which he had erected at his own expense, without doing damage to the freehold.

CH. XVI. s. 8.
Fixtures
(general definition of).

But to this rule there are important *exceptions* with respect to fixtures erected by the tenant, (1) for mere ornament and convenience during his term (*m*), (2) for the purposes of his trade (*n*), and (3) by statute, under particular restrictions, for agricultural purposes (*o*). Whether the tenancy be for life, or for years, or from year to year, or only at will, makes no difference with respect to his right to remove fixtures; nor whether he holds under a lease by parol, or by writing, or under seal (except as to any stipulations on the subject therein contained). It is, however, to be observed, that every case, in which there is a right of severing a thing from the freehold by virtue of the law of fixtures, is considered as an exception to the general rule (*p*). Fixtures which may be removed by the tenant during his term constitute part of the freehold until severed therefrom (*q*). Until so severed they are not goods or chattels for which trover may be maintained (*r*). But sometimes a special action may be maintained for preventing a tenant or any person claiming under him from exercising his right to sever and remove the fixtures (*s*).

Exceptions to General Rule.

The exceptions to the general rule as to fixtures will be considered fully under the following heads, viz.:—1. Fixtures for purposes of trade. 2. Fixtures for agricultural purposes. 3. Fixtures for ornament and convenience.

(b) *Fixtures for Purposes of Trade.*

It is difficult to state the precise extent of the exception in favour of the removal of fixtures put up for the purposes of trade, so as to afford a safe guide as between landlord and tenant (*t*). "The old cases upon this subject," it is said in *Penton v. Robart*, "lean to consider as realty whatever was annexed to the freehold by the occupier; but in modern times the leaning has always been the other way, in favour of the tenant, in support of the interests of trade, which is become the pillar of the state. What tenant will lay out his money in costly improvements of the land, if he must leave everything behind him which can be said to be annexed to it? Shall it be said that the great gardeners and nurserymen in the neighbourhood of the

Exception in Favour of Trade.
Penton v. Robart.

(*l*) 3 East, 51; 2 Smith L. C. 162 (7th ed.).

(*m*) Post, 602.

(*n*) *Infra*.

(*o*) 14 & 15 Vict. c. 25, s. 3; Agricultural Holdings Act, 1875, s. 53; post, 605.

(*p*) *Amos & F.* 9; *Id.* 31; *Buckland v. Butterfield*, 2 Brod. & B. 54.

(*q*) *Lee v. Risdon*, 7 Taunt. 188; *Ex parte Lloyd*, 1 Mont. & Ayr. 508.

(*r*) *Green v. Cole*, 2 Wms. Saund. 259 o, note (*r*) (6th ed.); *Mackintosh v. Trotter*, 3 M. & W. 184; *Roffey v. Henderson*, 17 Q. B. 574; *Wilde v. Waters*, 16 C. B. 637.

(*s*) *London and Westminster Loan and Discount Co. (Limited) v. Drake*, 6 C. B., N. S. 798, 811; 28 L. J., C. P. 297.

(*t*) *Amos & F.* 48.

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*Fixtures (for
 Purposes of
 Trade).*

metropolis, who expend thousands of pounds in the erection of green-houses, hothouses, &c., are obliged to leave all these things upon the premises, when it is notorious that they are even permitted to remove trees, or such as are likely to become such, by the thousands, in the necessary course of their trade? If it were otherwise, the very object of their holding would be defeated" (*u*). The reason which induced the courts to relax the strictness of the old rules of law, and to admit an innovation in this particular instance, was, that the commercial interests of the country might be advanced, by the encouragement given to tenants to employ their capital in making improvements for carrying on trade, with the certainty of having the benefit of their expenditure secured to them at the end of their terms: *the benefit of the public* may be regarded as the principal object of the law in bestowing this indulgence (*x*). Whenever the following circumstances concur (and sometimes when they do not all concur) (*y*) the tenant may remove the article: viz., things which a tenant has fixed to the freehold for the purposes of trade or manufacture may be taken away by him during his term, whenever the removal is not contrary to any express or implied stipulation in his lease or agreement (*z*), or the custom of the country (*a*), and the articles were of a perfect chattel nature before they were put up, or have in substance that character independently of their union with the soil, and may be removed without material injury to the freehold, and without losing their essential character or value (*b*). Thus if a lessee for years set up a furnace for his advantage, or a dyer make his vats and vessels to occupy his occupation ("*pour occuper son occupation*") during the term, he may remove them: and so of a baker (*c*). So a soap boiler, who for the convenience of his trade puts up vats, coppers, tables and partitions, may remove them during his term: or they may be taken under an execution against him (*d*). So a fire-engine or steam-engine set up by a tenant for the purpose of working a colliery may be removed by him during the term (*e*). Salt-pans erected by a tenant for the purpose of working salt-works let to him may be removed during the term (although it would be otherwise as between the heir and executor of a tenant in fee (*f*)), unless there be an express covenant to leave the salt-works in good repair at the end of the

Decisions as
 to Trade Fix-
 tures.

(*u*) Per cur. in *Penton v. Robart*, 2 East, 88; *Lawton v. Lawton*, 3 Atk. 14; *Dean v. Atalley*, 3 Esp. 11; *Amos & F.* 37.

(*z*) *Amos & F.* 32; *Lawton v. Lawton*, 3 Atk. 14, 16.

(*y*) *Amos & F.* 49.

(*z*) Post, 608.

(*a*) *Culling v. Tuffnall*, Bull. N. P. 34; *Wetherell v. Howells*, 1 Camp. 227; *Davis v. Jones*, 2 B. & A. 165; *Amos & F.* 44.

(*b*) *Amos & F.* 33, 48, 341, 342; *Fisher v. Dixon*, 12 Cl. & Fin. 312.

(*c*) Year Book, 20 Hen. 7, pl. 13; *Amos & F.* 23.

(*d*) *Poole's case*, 1 Salk. 368; *Amos & F.* 27, 339.

(*e*) *Lawton v. Lawton*, 3 Atk. 13; *Ld. Dudley v. Ld. Warde*, Ambler, 114; Bull. N. P. 34; *Amos & F.* 29, 34, 339.

(*f*) *Lawton v. Salmon*, 1 H. Blac. 259, n.; 3 Atk. 16, S. C.; *Amos & F.* 30, 339.

term (*g*). “Coppers and all sorts of brewing vessels cannot possibly be used without being as much fixed as fire-engines; and in brew-houses especially, *pipes* must be laid through the walls and supported by the walls; and yet, notwithstanding this, as they are laid for the convenience of trade, landlords will not be allowed to retain them” (*h*); or rather, it should be said, the tenants may remove them during their tenancy. Though a building may be raised on a brick foundation, and have a brick chimney, yet if the erection of such foundation is of wood, and the building used for the purpose of trade or manufacture, the tenant may remove it before or at the end of his term (*i*). A steam engine, to which a chimney necessarily belonged, has been held to be removable (*k*). Where trustees, seised under a devise in fee of a farm, leased to defendant (one of themselves) for a term, and afterwards, in the character of trustees only, conveyed the land to the plaintiff in fee, *with all fixtures*; it was held that defendant, being a party to the conveyance, could not, after the conveyance, under the general law or custom of the country, remove at the expiration of his term farm machinery annexed to the land, and that he was therefore liable to plaintiff, who had demised to M., in case for injury to the reversion, for removing staddles built into the land for the purpose of supporting ricks, and a threshing machine attached by bolts and screws to pillars fixed in the land, assuming that he might have removed them if they had been placed there by himself, and he had not joined in the conveyance; that a granary resting by its mere weight on staddles built into the land was a chattel, and would not be a fixture in the ordinary sense of the word, though it might pass by that word if, from the rest of the conveyance, an intention appeared of comprehending farm machinery in general: but that, even then, plaintiff could not recover against defendant for carrying it away, either as for an injury to the reversion in the land, the chattel not being part of such reversion, or in trover, M. being entitled to the exclusive possession of the chattel (*l*). The principle in favour of buildings erected for the purposes of trade has been extended to many buildings which come by no means strictly under the term (*m*); thus in the famous case of the cider-mill, although the mill was put up in part for the enjoyment of the real estate, yet as the making of cider was a species of trade, the mill was considered to fall within the general exception in favour of trade fixtures (*n*); but that case has been disapproved of by the House of Lords, and is not to be relied

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*Fixtures (for
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Trade).*

(*g*) *Earl of Mansfield v. Blackburn*, 6 Bing. N. C. 426.

(*h*) Per *Ld. Hardwicke, C.*, in *Lawton v. Lawton*, 3 Atk. 15.

(*i*) *Penton v. Robart*, 2 East, 88; 4 Esp. 33.

(*k*) *Ld. Dudley v. Ld. Warde, Ambler*, 114; Bull. N. P. 31.

(*l*) *Wiltshire v. Cottrell*, 1 E. & B. 674.

(*m*) *Amos & F.* 64—70.

(*n*) *Lawton v. Lawton*, 3 Atk. 14.

CH. XVI. s. 8. on (o). In the case of fire-engines and steam-engines in collieries, it was held that the getting and vending the coals so far partook of the nature of a trade, that the engines employed in the collieries might be deemed trading erections (p). But it has not yet been decided that a tenant may remove substantial and extensive additions to the premises, although he has built them exclusively for the convenience of trade—such as lime, pottery or brick kilns, wind or water mills, workshops, storehouses, furnaces and flues of smelting and glass-houses, stoves and floors of smelting-houses, and other erections of the like descriptions (q). The distinction is between *buildings* of a permanent nature and *machinery and fixtures* erected for the purposes of trade, the latter being removable, but the former not (r). It seems that the 14 & 15 Vict. c. 25, s. 3 (s), does not extend to buildings erected *only for the purposes of trade*. A reversionary interest in trade fixtures will pass to a purchaser under a parol agreement (t).

(c) *Fixtures for Ornament and Convenience.*

What Erec-
tions for
Ornament or
Convenience
may be re-
moved.

Articles put up for ornament and convenience during the term have been long allowed to be taken away by the tenant at the expiration of his lease. They are considered rather as articles of fixed furniture, or of utility and domestic convenience, than as parts of the house or freehold (u); unless, indeed, the tenant leaves them annexed to the premises after the expiration of his term (r). Instances are to be found as far back as the Year Books (y); but the relaxation of the general rule in these instances is an indulgence, which is an exception only, and, though to be fairly considered, is not to be extended (z). It is a privilege of a more limited nature than that in respect of trade fixtures (a), although such distinction does not appear to have been taken in many of the early cases (b). The principle upon which this exception to the general rule is founded appears to be that, as annexations of this nature must be generally designed for temporary purposes only, it would greatly incommode tenants in the enjoyment of their estates, if by every slight attachment to the freehold the property should be immediately changed, and pass over to the reversioner (c). Fixtures for ornament or convenience cannot be removed where the

(o) *Fisher v. Dixon*, 12 Cl. & Fin. 312; *Walmley v. Milne*, 7 C. B., N. S. 116; 29 L. J., C. P. 97.

(p) *Lawton v. Lawton*, 3 Atk. 14; *Ld. Dudley v. Ld. Warde*, Amb. 114; Bull. N. P. 34; *Minshall v. Lloyd*, 2 M. & W. 450.

(q) *Amos & F.* 340.

(r) *Whitehead v. Bennett*, 27 L. J., Ch. 474; *Foley v. Addenbrooke*, 13 M. & W. 174.

(s) Post, 605.

(t) *Petrie v. Dawson*, 2 C. & K. 138.

(u) *Amos & F.* 71—93, 340—342; *Birch v. Dawson*, 2 A. & E. 37.

(x) *Lyde v. Russell*, 1 B. & Ad. 394.

(y) 8 Hen. 7, 12; 21 Hen. 7, 26; *Day v. Austin*, Owen, 70; Cro. Eliz. 374.

(z) Per Dallas, C. J., in *Buckland v. Butterfield*, 2 Brod. & B. 54; *Amos & F.* 93.

(a) *Buckland v. Butterfield*, supra; *Leach v. Thomas*, 7 C. & P. 327.

(b) *Beck v. Rebow*, 1 P. Wms. 94; *Squier v. Mayer*, 2 Freem. 249.

(c) *Amos & F.* 83.

erection may be deemed a permanent improvement, and cannot be conveniently detached and removed without material injury or damage to the house or freehold: thus a conservatory erected on a brick foundation, affixed to, and communicating with rooms in, a dwelling-house, by windows and doors, may not be removed by a tenant for years, who has erected it during his tenancy; although he has a reversion in fee after the death of his lessor (*d*). So a *veranda*, the latter part of which is attached to posts fixed in the ground, may not be removed (*e*). And upon the same principle it has been held that ranges, ovens and set pots, affixed to a house built by the person against whom an execution has issued, cannot be taken by the sheriff under a writ of *fi. fa.* (*f*). Window-sashes, which are neither hung nor beaded into the frames, but merely fastened by laths, nailed across the frames to prevent their falling out, are not fixed to the freehold (*g*): so a pump erected by a tenant during his term, and very slightly affixed to the freehold, is removable as a tenant's fixture (*h*). A. bequeathed his leasehold messuage, with the grates, stoves, coppers, locks, bolts, keys, bells, and other fixtures and fixed furniture, to V. for life; and the household goods, furniture, plate, linen, china, books, wines and liquors, and other properties in the messuage, not being comprehended under the preceding terms fixtures and fixed furniture, to V. absolutely; there were in the messuage looking-glasses standing on chimney-pieces and nailed to the wall; and a book-case standing on (but not fastened to) brackets and screwed to the wall; it was held that V. took only a life interest in these (*i*). Erections of the description above mentioned also cannot be removed, if the removal would be of such a nature as to constitute waste, or if the premises could not be left in the same state as before the removal; at least the contrary of this was assigned by Lord Mansfield as a ground for removal, although the principle has not been adverted to in more modern decisions (*k*).

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Fixtures (for Ornament and Convenience).

The articles for ornament and convenience, which have been held to be removable, are:—hangings, tapestry and pier glasses, whether nailed to the walls or panels, or put up in lieu of panels (*l*); cornices (*m*); marble or other *ornamental* chimney-pieces (*n*); marble

Summary of what may be removed.

(*d*) *Buckland v. Butterfield*, *supra*; *West v. Blakeway*, 2 M. & G. 729; 9 Dowl. 846.

(*e*) *Penry v. Brown*, 2 Stark. 403.

(*f*) *Wynne v. Ingleby*, 5 B. & A. 625.

(*g*) *Rex v. Hedges*, 1 Leach C. C. 201; 2 East P. C. 590, n.

(*h*) *Grymes v. Boweren*, 6 Bing. 437.

(*i*) *Birch v. Dawson*, 2 A. & E. 37; 6 C. & P. 658.

(*k*) *Lawton v. Salmon*, 1 H. Blac. 259, n.; 3 Atk. 16, n.; *Amos & F.* 88.

(*l*) *Squier v. Mayer*, 2 Freem. 249; 2 Eq. Cas. Abr. 430; *Beck v. Rebou*, 1 P. Wms. 94; *Buckland v. Butterfield*, 2 Brod. & B. 54; *Amos & F.* 82.

(*m*) *Avery v. Cheslyn*, 3 A. & E. 75.

(*n*) *Lawton v. Lawton*, 3 Atk. 15; *Lawton v. Salmon*, 1 H. Blac. 260, n.; *Allen v. Allen*, *Moseley*, 113; *Leach v. Thomas*, 7 C. & P. 327; *Bishop v. Elliott* (in error), 11 Exch. 115, 120—122; *Amos & F.* 86, 341.

CH. XVI. s. 8.
*Fixtures (for
 Ornament and
 Convenience).*

Summary of
 what may be
 removed—
continued.

slabs (*o*); window blinds (*p*); wainscot fixed to the walls by screws (*q*). grates, ranges and stoves, although fixed in brickwork (*r*); iron backs to chimneys (*s*); beds fastened to the walls or ceiling (*t*); fixed tables (*u*); furnaces and coppers (*r*); pumps (*y*); mash-tubs and fixed water-tubs (*z*); coffee and malt-mills (*a*); cupboards fixed with hold-fasts (*b*); book-cases standing on brackets and screwed to the walls (*c*); clock cases (*d*); iron ovens and the like (*e*). It must, however, be remarked, that things can be removed only when the separation will occasion but little or no damage to the freehold or to the articles removed (*f*). The question whether a fixture can be removed by a tenant without substantial injury to the premises is a question for the jury, upon an issue whether the fixture is removable or not by law. A plea to an action by a landlord against his tenant for removing a cornice, stated that it was the property of the defendant; that it was fixed up by him with screws only, for the purpose of ornament; that he carefully removed it during the term, doing no unnecessary damage; and that he repaired all the damage done. The replication stated that it was affixed to the freehold of the house, and was not removable by law. Issue on that question:—held that it was not a misdirection to leave it to the jury to say whether they were of opinion that the cornice was ornamental, and was so affixed to the freehold that it could be removed without substantial injury; and that if they thought so, and that it had been so removed, the tenant had a right to remove it. The question whether removable by law or not is a mixed question of law and fact (*g*). If the damages caused by the removal would be insignificant, they would not prevent the removal. *De minimis non curat lex* (*h*). It appears, however, to have been generally understood in practice that where ornamental or other fixtures are taken down, the tenant is liable to repair the injury the premises may suffer by the act of removal; and, in like manner, that where a fixture has been put up in substitution for an article which

(*o*) *Allen v. Allen*, Moseley, 112; *Amos & F.* 249, 341.

(*p*) *Amos & F.* 341.

(*q*) *Lawton v. Lawton*, 3 Atk. 15; *Ex parte Quincey*, 1 Atk. 477; *Id. Dudley v. Id. Warde*, Ambler, 113; *Lee v. Risdon*, 7 Taunt. 191; *Amos & F.* 341; but see *Id.* 85, note (*b*).

(*r*) *Lee v. Risdon*, 7 Taunt. 191; *Re v. St. Dunstan*, 4 B. & C. 686; *Amos & F.* 76.

(*s*) *Harvey v. Harvey*, 2 Stra. 1141; *Amos & F.* 74.

(*t*) *Ex parte Quincey*, 1 Atk. 477.

(*u*) *Amos & F.* 187, 342.

(*x*) *Squier v. Mayer*, 2 Freem. 249; *Amos & F.* 72.

(*y*) *Grymes v. Bowren*, 6 Bing. 437; 4 M. & P. 143; *Amos & F.* 80.

(*z*) *Amos & F.* 342.

(*a*) *R. v. Londonthorpe*, 6 T. R. 379; *Amos & F.* 76, note (*a*); *Id.* 342.

(*b*) *Re v. St. Dunstan*, 4 B. & C. 686; *Amos & F.* 76, note (*a*); *Id.* 342.

(*c*) *Birch v. Dawson*, 2 A. & E. 37; 6 C. & P. 658.

(*d*) *Amos & F.* 187, 342.

(*e*) *Winn v. Ingleby*, 5 B. & A. 625; *Amos & F.* 185, 342.

(*f*) *Avery v. Cheslyn*, 3 A. & E. 75; *Leach v. Thomas*, 7 C. & P. 327; *Amos & F.* 88, 92, 341, 342.

(*g*) *Avery v. Cheslyn*, 3 A. & E. 75.

(*h*) *Governors of Harrow School v. Alderton*, 2 B. & P. 86.

was attached to the premises at the time of the demise, the tenant, in taking down his own fixture, is bound to restore the former article, or to replace it by another erection of a similar description (*i*).

CH. XVI. s. 8.
Fixtures (for Ornament and Convenience.

(d) *Fixtures for Agricultural Purposes.*

At common law there never was any right on the part of the tenant to remove fixtures erected by him for merely agricultural purposes. So it was laid down in 1803 in the leading case of *Elwes v. Mawe* (*k*), in which it was held that a tenant, who had erected at his own expense, and for the more convenient occupation of his farm, a beast-house, carpenter's-shop, fuel-house, cart-house, and fold-yard, all built of brick, tiled, and let into the ground, was liable to an action for waste for (during his term) removing the same, even although he left the premises in the same state as when he entered. The court was of opinion that the extension to agriculture of the established privilege in favour of trade would be an innovation, and contrary to the current of legal authorities on the subject.

No Right of Removal at Common Law.
Elwes v. Mawe.

This unjust rule was first sought to be remedied in 1851, by 14 & 15 Vict. c. 25, s. 3. By this section, "If any tenant of a farm or land shall, after the passing of this act, *with the consent in writing of the landlord* (*l*) for the time being, at his own cost and expense, erect any farm-buildings, either detached or otherwise, or put up any other building, engine, or machinery, *either for agricultural purposes or for the purposes of trade and agriculture* (which shall not have been erected or put up in pursuance of some obligation in that behalf), then all such buildings, engines, and machinery shall be the property of the tenant, and shall be removable by him notwithstanding the same may consist of separate buildings, or that the same or any part thereof may be built in or permanently fixed to the soil, so as the tenant making any such removal do not in anywise injure the land or buildings belonging to the landlord, or otherwise do put the same in like plight and condition, or as good plight and condition, as the same were in before the erection of anything so removed: provided, nevertheless, that no tenant shall, under the provision last aforesaid, be entitled to remove any such matter or thing as aforesaid without first giving to the landlord or his agent *one month's previous notice in writing* of his intention so to do (*m*); and thereupon it shall be lawful for the landlord, or his agent on his authority, to elect to purchase (*n*) the matters and things so proposed to be removed, *or any of them*, and the right to remove the

Right to remove under 14 & 15 Vict. c. 25.

Consent of Landlord to Erection.

Notice to Landlord of Removal.

(i) *Amos & F.* 89, 90; *Martyr v. Bradley*, 9 Bing. 24; *Sunderland v. Newton*, 3 Sim. 460.

(k) 3 East, 38; 2 Smith L. C. 162.

(l) See Form of Consent, post, Appen-

dix C., No. 20.

(m) See Form of Notice, post, Appendix C., No. 21.

(n) See Form of Notice of Election, post, Appendix C., No. 22.

CE. XVI. s. 8. same shall thereby cease, and the same shall belong to the landlord ;
Fixtures
(Agricultural). and the value thereof shall be ascertained and determined by two
 referees, one to be chosen by each party, or by an umpire to be named
 by such referees, and shall be paid or allowed in account by the land-
 lord who shall have so elected to purchase the same." It is to be
 observed that this enactment is confined to buildings, engines, and
 machinery erected or put up by the tenant at his own cost and
 expense, either for agricultural purposes, or for the purposes of trade
 and agriculture, *with the previous consent in writing* of the landlord,
 and with respect to which the tenant has given to the landlord or his
 agent *one calendar month's previous notice in writing* of his intention to
 remove them during the tenancy. It is the tenant's own folly, negli-
 gence or ignorance (for which he must generally suffer the conse-
 quences), or a deliberate act on his part, if he erect any such building,
 engine, or machinery without first obtaining the landlord's written
 consent : so if he omit to give one calendar month's notice in writing
 before the expiration of his tenancy to the landlord or his agent of his
 intention to remove any building, engine, or machinery erected with
 such consent as aforesaid. But the enactment does not apply to build-
 ings, engines, or machinery erected *solely for the purposes of trade* ; nor
 to articles affixed for mere ornament and convenience during the term.

Tenant's
 Right to Fix-
 tures under
 Agricultural
 Holdings
 Act, 1875. With respect to tenancies to which the Agricultural Holdings Act,
 1875 (38 & 39 Vict. c. 92), applies (o), the above enactment is im-
 pliedly repealed, except as regards steam-engines. Sect. 53 of the
 Act of 1875 gives the tenant an absolute property in all fixtures
 "affixed" by him "to his holding," except steam-engines, in the
 following terms :—"Where after the commencement of this act [i. e.
 February 14th, 1876] a tenant affixes to his holding any engine,
 machinery, or other fixture, for which he is not under this act or
 otherwise entitled to compensation, and which is not so affixed in
 pursuance of some obligation in that behalf, or instead of some fixture
 belonging to the landlord, then such fixture shall be the property of
 and be removable by the tenant :

Provisoos.

"Provided as follows :

Payment of
 Rent.

"1. Before the removal of any fixture the tenant shall pay all
 rent owing by him, and shall perform or satisfy all other his
 obligations to the landlord in respect of the holding :

(o) The Agricultural Holdings Act, 1875, applies, by sect. 56, to "every contract of tenancy [i. e. by sect. 4, to "every letting of land for a term of years or for lives, or for lives and years, or from year to year, or at will"] beginning after the commencement of the act [i. e. by sect. 2, the 14th February, 1876], unless the landlord and tenant agree in writing in the contract of tenancy, or otherwise," that the act, or any part of it, "shall not

apply to the contract." As to tenancies current at the commencement of the act, if they be tenancies from year to year or at will, the act (by sect. 57) applies to them unless either party has excluded its operation by notice in writing, while if they be tenancies for any other term, the act does not apply to them at all. See further as to the operation of the act, Chap. XXI., post ; and see the act at length, Appendix A., Sect. 8, post.

- "2. In the removal of any fixture, the tenant shall not do any avoidable damage to any building or other part of the holding: CH. XVI. s. 8.
Fixtures (Agricultural).
- "3. Immediately after the removal of any fixture, the tenant shall make good all damage occasioned to any building or other part of the holding by the removal: Careful Removal.
- "4. The tenant shall not remove any fixture without giving one month's previous notice in writing to the landlord of the intention of the tenant to remove it: Compensation for Damage.
 Notice of Removal to Landlord.
- "5. At any time before the expiration of the notice of removal, the landlord, by notice in writing given by him to the tenant, may elect to purchase any fixture comprised in the notice of removal; and any fixture thus elected to be purchased shall be left by the tenant, and shall become the property of the landlord, who shall pay the tenant the fair value thereof to any incoming tenant of the holding: and any difference as to the value shall be settled by a reference under this act (*p*), as in case of compensation (but without appeal): Option in Landlord to purchase.

"But nothing in this section shall apply to a steam-engine erected by the tenant if, before erecting it, the tenant has not given to the landlord notice in writing of his intention to do so, or if the landlord, by notice in writing given to the tenant, has objected to the erection thereof." Saving for Steam-engine.

Independently of the above acts, the agricultural tenant is left to the operation of the rule in *Elwes v. Mawr* above referred to, so as to have no power of removal of agricultural fixtures (*q*).

Although an agricultural tenant cannot remove articles which are strictly of an agricultural nature, yet, if the object and purpose of the erections relate partly to trade of any description, the tenant may remove them (*r*); thus cider mills (*s*), machinery for working mines and collieries (*t*), and salt pans (*u*), have been considered removable: nurserymen have been allowed to remove trees and shrubs which they have planted for the purposes of sale (*x*), but not to plough up strawberry beds out of the ordinary course of management of the nursery-ground (*y*): and it would seem that the tenant cannot remove hot-houses, greenhouses, forcing-pits and erections of that description (*z*), otherwise than as allowed by the 14 & 15 Vict. c. 25, s. 3 (*a*), or the

(*p*) See Sects. 22—38 of the act, post, Appendix A., Sect. 8.

(*q*) *Elwes v. Mawr*, 3 East, 38; and ante, 605; Amos & F. 50—63, 343; *Williams v. Williams*, 12 East, 209.

(*r*) Amos & F. 64—70, 343.

(*s*) 3 Atk. 14; disapproved of by the House of Lords in *Fisher v. Dixon*, 12 Cl. & Fin. 312; *Walmesley v. Milne*, 7 C. B., N. S. 115; 29 L. J., C. P. 97.

(*t*) *Lawton v. Lawton*, 3 Atk. 13; *Ld.*

Dudley v. Ld. Ward, Ambler, 113; Bull. N. P. 34; Amos & F. 64, 343.

(*u*) *Lawton v. Salmon*, 1 H. Blac. 260, noto; Amos & F. 36, 343.

(*x*) *Wardell v. Usher*, 3 Scott, N. R. 508; Amos & F. 68, 343.

(*y*) *Wetherell v. Howells*, 1 Camp. 227; Amos & F. 69, 343.

(*z*) Amos & F. 70, 343; but see *Syme v. Harvey*, 24 So. Sess. Cas. 202.

(*a*) Ante, 605.

Summary of what may be removed, at Common Law.

CH. XVI. s. 8. Agricultural Holdings Act. In no case can private persons sell or remove fruit-trees, although planted by themselves (b); nor hedges, nor flowers, nor even a border or edging of box (c).

Fixtures
(*Agricultural*).

(c) *Contracts respecting Fixtures.*

Construction
of express
Contracts re-
specting Fix-
tures, as to
Removal,

It is a principle of law applicable to fixtures, as well as other things, that individuals, on entering into a contract, may agree to vary the strict position in which they would otherwise legally stand towards each other, where no absurdity or general inconvenience would result from the transaction (d). *Modus et conventio vincunt legem* (e). Therefore buildings erected for the purposes of trade, under leases containing covenants to yield up in repair, at the expiration of the term, all buildings which should be erected upon the demised premises, cannot be removed by the lessees, when the words of the covenant are general, and contain no exception of any particular sort of buildings (f). Where a lease contained a general covenant to repair and leave in repair, and lime-kilns were erected by the lessee during the term, it was held, that he could not remove them at the end of his term without committing a breach of covenant (g). So salt pans erected by a tenant during his term cannot be removed where the lease contains a covenant to leave the salt works in good repair at the end of the term (h). Where there was a covenant to keep in repair the premises, and all erections, buildings, and improvements erected on the same during the term, and to yield up the same at the end of the term, it was held to be broken by the removal of a veranda erected during the term, the lower part of which was affixed to the ground by means of posts (i). Where there is a covenant to yield up at the expiration of the term all erections and improvements made during the term, a greenhouse, the framework of which is laid on walls imbedded in mortar, cannot be removed, although no damage is done to the walls by removing it (k). A lease contained covenants by the lessee to keep and leave in repair the demised

(b) *Wyndham v. Way*, 4 Taunt. 316, Heath, J.; Com. Dig. tit. *Waste* (D. 3); *Amos & F.* 69, 344.

(c) *Empson v. Soden*, 4 B. & Ad. 655; *Amos & F.* 70.

(d) *Amos & F.* 108, 345; *Dumergue v. Rumsey*, 2 H. & C. 777; 33 L. J., Ex. 88; *Stansfield v. Mayor, &c. of Portsmouth*, 4 C. B., N. S. 120; 27 L. J., C. P. 124; *Bishop v. Elliott* (in error), 11 Exch. 113, 122; 24 L. J., Ex. 229; *Earl of Mansfield v. Blackburne*, 6 Bing. N. C. 426.

(e) 2 Co. R. 73; *Broom's Max.* 661 (4th ed.); *Haslett v. Burt*, 18 C. B. 162, 893. This principle is recognized by sect. 54 of the Agricultural Holdings Act, 1875, which enacts that nothing in that act

"shall prevent a landlord and tenant, or intending landlord and tenant, from entering into and carrying into effect any such agreement as they think fit, or shall interfere with the operation thereof."

(f) *Naylor v. Collinge*, 1 Taunt. 19; *Thresher v. East London W. W. Co.*, 2 B. & C. 608; but see *Dean v. Atalley*, 3 Esp. 11.

(g) *Thresher v. East London W. W. Co.*, supra.

(h) *Earl of Mansfield v. Blackburne*, 6 Bing. N. C. 426.

(i) *Pemry v. Brown*, 2 Stark. R. 403.

(k) *West v. Blakeway*, 2 M. & G. 729; 9 Dowl. 840.

premises, "together with all wainscots, windows, shutters, fastenings, &c., and other things which then were, or at any time thereafter should be, thereunto *affixed or belonging* (looking-glasses and furniture excepted), and together also with all sheds and other erections and *improvements* which should be erected, built or made upon the demised premises." An assignee of the lease, during the term, removed an old shop-window, and put up in its place a plate-glass front, but without in any manner fastening it to the premises, except by means of wedges: held, that this plate-glass front was either a "window" or an "improvement within the true meaning of the covenant, and therefore irremovable by the tenant at the end of the term, *although erected for the purposes of trade*" (l). A lease contained a covenant to yield up certain scheduled articles, together with all doors, wainscots, shelves, presses, dressers, drawers, locks, keys, bolts, bars, staples, hinges, hearths, chimney-pieces, mantel-pieces, chimney-jambs, foot-pans, slabs, covings, window-shutters, partitions, sinks, water-closets, cisterns, pumps and rails, water-tanks *and other additions, improvements, fixtures and things* which were and should be anyways fixed or fastened upon the premises: held, that the general words could not be restricted (there being no assignable genus to which the enumerated articles belonged), and that the lessee could not make a marketable title even to articles in the nature of tenant's fixtures (m). So the lessee of an oil refinery who has covenanted to deliver up the premises at the end of the term, together with all doors, &c. (specifying numerous articles), and *all other things* which now are or at any time during the said term shall be fixed or fastened to the freehold, has no right to remove trade fixtures, and may be restrained from so doing (n). Where by the terms of his lease or agreement the tenant renounces his ordinary right to remove any of his fixtures during the term, the sheriff cannot take them under an execution against him (o). Where a colliery, with machinery and implements for working it, was leased for years, with a proviso for re-entry on non-payment of rent, and a covenant by the lessee, at the determination of the demise, to deliver up the machinery and implements, conformably to an inventory annexed to the lease, of which ~~an~~ valuation was to be made three months before the expiration of the demise; and the landlord recovered judgment in ejectment in Trinity term for a forfeiture for non-payment of the rent, but did not execute the writ of possession until the 8th November, and the tenant committed an act of bankruptcy the next day; it was held, that the landlord was entitled to take possession of all the machinery and implements (some of which had

CH. XVI. s. 8.

Fixtures
(Contracts respecting).

 General
Words.

Wilson v.
Whateley.

(l) *Haslett v. Burt*, 18 C. B. 162, 893; 25 L. J., O. P. 201, 295.

(m) *Wilson v. Whateley*, 1 J. & H. 436; 7 Jur., N: S. 908.

(n) *Biadder v. Trinidad Petroleum Co.*, 17 W. R. 153.

(o) *Dumergue v. Rumsey*, 2 H. & C. 777; 33 L. J., Ex. 88.

CH. XVI. s. 8.

Fixtures
(Contracts re-
specting).

been brought on the premises by the tenant during the term), although no previous valuation had been made (*p*). A lease of mines contained a covenant for the lessee to erect furnaces, iron-works, &c., and to repair and yield up the furnaces, fire-engines, iron-works, dwelling-houses and all other erections, &c. to be erected, built or set up, except the iron-work castings, railways, whimseys, gins, machines, and the movable implements and materials used in or about the said furnaces, fire-engines, iron-works, stone-pits and premises; and there was a power given to the lessor to purchase the excepted articles; it was held, that the lessee had a right to remove whatever was in the nature of a machine, or part of a machine, though fixed in brick-work, but not what was in the nature of a building or support of a building, although made of iron (*q*). A covenant to leave a water-mill with all fixtures, fastenings and improvements, was held to include a pair of new mill-stones, set up by the lessee during the term, although by custom they might have been removed (*r*). A covenant by a lessee that at the end of the term he would deliver up to the lessor the demised premises, "together with all locks, keys, bars, bolts, *marble and other chimney-pieces, foot-pans, slabs, and other fixtures and articles in the nature of fixtures*, which shall at any time during the said term be fixed or fastened to the said demised premises, or be thereto belonging," is confined to "landlord's fixtures," and does not prevent the lessee from removing or selling *trade and other tenant's fixtures* erected by himself during the term (*s*). In *Duck v. Braddyll* a lease was made of a cotton factory and machinery in consideration of 1,250*l.* paid on execution of the lease, and yielding for the first year 1,600*l.*, on the next day, and 350*l.* yearly afterwards. There were provisoes that the lessor might distrain the machinery for rent, and that when the rents reserved to be payable for the first year should have been paid, and all other covenants, &c. therein contained on the lessee's part had been fulfilled, the lessee should become absolutely entitled to the machinery. There was also a covenant to use the machinery on the premises and not elsewhere. It was held, that the property in the machinery passed to the lessee on the payment of the 1,600*l.*, and that it did not continue in the lessor until the end of the term (*t*). In conclusion upon this part of the subject,—before a tenant removes an article which he considers as a removable fixture,

(*p*) *Storer v. Hunter*, 3 B. & C. 368; and see *Clark v. Crownshaw*, 3 B. & Ad. 804; *Horn v. Baker*, 9 East, 215; *Fairburn v. Eastwood*, 6 M. & W. 679.

(*q*) *Foley v. Addenbrooke*, 13 M. & W. 174; *Amos & F.* 90. And see *Rea v. Topping*, M'Clel. & Younge, 544; *Dunergue v. Rumsey*, 2 H. & C. 777.

(*r*) *Martyr v. Bradley*, 9 Bing. 24.

(*s*) *Bishop v. Elliott* (in error), 11 Exch. 113; 24 L. J., Ex. 229. The court below decided that the lessee had the right to sell only the trade fixtures; *Elliott v. Bishop*, 10 Exch. 496, 522; 24 L. J., Ex. 33; but the judges were much divided in opinion.

(*t*) *Duck v. Braddyll*, M'Clel. 217; 13 Price, 455.

he should examine his right not only with reference to the general law of fixtures, but also as it may be affected by any express or implied contract by which he may be bound. Where a tenant renews or extends his term, he must be careful to preserve his right to fixtures, for, without some express stipulation on the subject, he may lose his right at the expiration of his first term (*u*).

CH. XVI. s. 8.
Fixtures
(*Contracts re-*
specting).

Accepting the demise of a house containing fixtures, does not raise an implied contract to pay for the fixtures (*x*). By the grant of a house with the appurtenances all the fixtures pass, unless some intention to the contrary be expressed (*y*). But it is otherwise where, by an enumeration of particular fixtures in the conveyance, an intention is shown to exclude others: *expressio unius est exclusio alterius* (*z*). Upon the sale of a mill or factory, looms used in the mill are not within the words "steam-engines, boilers, shafting, piping, mill-gearing, gasometer, gas-pipes, drums, wheels, and all and singular other the machinery, fixtures and effects fixed up, in, attached or belonging to the mill or factory or premises" (*a*). So looms standing upon a loom-foot, from which they may be removed at pleasure, will not pass by the general term of machinery, though they are worked by steam-power which is attached to the mill and mortgaged with it (*a*). A mortgage of a silk-mill was expressed to include "all those the steam-engines, boilers, steam-pipes, main shafting, mill-gearing, millwrought work and other machinery and fixtures whatsoever, then erected or set up or standing, &c. in or upon the mill or any part thereof:"—held, that all the machinery and fixtures used in the manufacturing of silk within the mill were included (*b*).

Contracts re-
specting Fix-
tures on other
Points.

Wherever, therefore, it is intended in contracts which concern the realty as well as the fixtures, that the latter should be paid for separately, a stipulation to that effect ought to be introduced. Contracts for the sale of fixtures are not within the Statute of Frauds, as they are not goods and chattels within the meaning of the statute, nor do they, although annexed to the freehold, constitute an interest in land (*c*). But a memorandum of the actual sale of fixtures requires a conveyance stamp, and it makes no difference that it is in the past tense (*d*). A reversionary interest in trade fixtures will pass by an agreement in writing, though not under seal (*e*). Where a lessee,

Contracts for
sale of Fix-
tures not
within Sta-
tute of
Frauds.

Hallen v.
Runder.

(*u*) Post, Sect. 9; *Fitzherbert v. Shaw*, 1 H. Blac. 258; *Thresher v. East London Waterworks Co.*, 2 B. & C. 608, 614; *Amos & F.* 345, 351.

(*x*) *Goff v. Harris*, 5 M. & G. 573.

(*y*) *Colegrave v. Dias Santos*, 2 B. & C. 76; *Steward v. Lombe*, 1 Brod. & B. 506; *Boydell v. M'Michael*, 1 C., M. & R. 177; *Longstaff v. Meagoe*, 2 A. & E. 167.

(*z*) *Hare v. Horton*, 5 B. & Ad. 715.

(*a*) *Hutchinson v. Kay*, 23 Beav. 413; 26 L. J., Ch. 457.

(*b*) *Haley v. Hammersley*, 3 De Gex, F. & J. 587; 30 L. J., Ch. 771; and see *Colegrave v. Dias Santos*, 2 B. & C. 76.

(*c*) *Hallen v. Runder*, 1 C., M. & R. 276; *Lee v. Risdon*, 7 Taunt. 191; *Pinner v. Arnold*, 1 Tyr. & Gr. 4.

(*d*) *Horsfall v. Hey*, 2 Exch. 778.

(*e*) *Petrie v. Dawson*, 2 C. & K. 138.

CH. XVI. s. 8. who had power to remove a greenhouse fixed to the freehold, agreed to sell the lease, together with the greenhouse and furniture, plants and crops, for a certain sum, but was afterwards unable to obtain the lessor's consent to the assignment of the lease, which was necessary; it was held, that the contract was an entire one, and that the lessee could not sue for the price of the greenhouse (g).

Fixtures
(Contracts re-
specting).

Mortgage of
Fixtures.

Meux v.
Jacobs.

It was held by the House of Lords, in *Meux v. Jacobs* (i), that the mortgage of a lease was a mortgage by implication of tenant's fixtures, whether affixed by the tenant before or after the mortgage; and it was pointed out that it did not require registration under the Bill of Sale Act, 1854, as against the holder of a bill of sale. As against such a person, the fixtures, although removable by the tenant as trade fixtures during the term, were held to continue chattels real, although as against trustees for creditors and execution creditors the Bill of Sale Act made them chattels personal.

Separate
Mortgage of
Fixtures.

And even as against trustees for creditors and execution creditors, a mortgage of fixtures did not require registration under the Bill of Sale Act, 1854, unless it gave power to the mortgagee to sell or take possession of the fixtures separately (h). If such power were given, the mortgage required registration, although there were no assignment of the fixtures in so many words (l).

Bills of Sale
Act, 1878.

Under the Bills of Sale Act, 1878 (41 & 42 Vict. c. 31), every bill of sale of "personal chattels" requires registration as therein mentioned, otherwise it is void as against trustees in bankruptcy, trustees for the benefit of creditors, and execution creditors. But by s. 4 of that act the term "personal chattels" (which included fixtures generally in the repealed Bill of Sale Act, 1854) means (inter alia) fixtures "when separately assigned or charged," "but shall not include fixtures (except 'trade machinery') when assigned together with a freehold or leasehold interest in any land or building to which they are affixed." The 5th section contains an elaborate definition of "trade machinery" for the purposes of the act.

Rights of
Trustees in
Bankruptcy.

It has been held that a steam-engine, erected for the purpose of working a colliery, to be used by the lessee of such colliery during his term, but to be held as the property of the landlord, subject to such use, did not pass to the assignees of the tenant on his bankruptcy (m): that fixtures which were by law removable as between landlord and tenant, part of which were erected before a mortgage, and part afterwards, passed to the mortgagee, and not to the assignees of the bankrupt

^a (g) *Sleddon v. Cruikshank*, 16 M. & W. 71.

(i) L. R., 7 H. L. 481; 44 L. J., Ch. 481; 32 L. T. 171; 23 W. R. 526.

(k) *Ex parte Barclay, Re Joyce*, L. R., 9 Ch. 577; 43 L. J., Bank. 137; 30 L. T. 479; 22 W. R. 608, distinguishing *Ex*

parte Daglish, L. R., 8 Ch. 1072.

(l) *Ex parte Daglish*, ubi supra. See also *Longbottom v. Berry*, L. R., 5 Q. B. 123; *Mather v. Frazer*, 2 K. & J. 536.

(m) *Coombs v. Beaumont*, 5 B. & Ad. 72. And see further Chap. VIII., s. 8, 267, 269, ante.

mortgagor (*n*): and that where copper roller manufacturers, being seised in fee of a mill and land, erected thereon steam-engines, machinery, &c. for the purposes of their trade, and then mortgaged in fee the mill and land, with all fixtures, &c., and afterwards became bankrupt, the mortgagees were entitled to all the machinery, &c. fixed to the freehold, and that the deed did not require to be registered as a bill of sale under the Bill of Sale Act, 1854 (*o*). But a mortgage of trade fixtures without the mill or land to which they are annexed, was held to be a mortgage of personal chattels within the meaning of that act, as explained by sect. 7, which includes "fixtures and other articles capable of complete transfer by delivery" (*p*). And such fixtures will be deemed to be in the order and disposition of the mortgagor in the event of his bankruptcy whilst he remains in possession thereof (*q*). The registration of the mortgage under the Bill of Sale Act, 1854, was held to make no difference in this respect (*r*).

CH. XVI. s. 8.
Fixtures
(Contracts re-
specting).

It may be added, that even before the decision of the House of Lords in *Meux v. Jacobs*, above referred to, it had been held that by a mortgage of a mill, the stones, tackling and implements pass to the mortgagee (*s*); that an equitable mortgage of a leasehold public-house with the fixtures therein, consisting of ordinary house fixtures and trade fixtures, was sufficient to prevent any of them being in the order and disposition of the lessee on his becoming bankrupt (*t*); and that under an equitable mortgage, by the simple deposit of a lease unaccompanied by any memorandum, the tenant's fixtures will be included (*u*). And it was distinctly laid down in *Meux v. Jacobs*, that the distinction, at one time (*x*) supposed to subsist between mortgages of freeholds and leaseholds, as regards registration, is not maintainable (*y*).

What passes
by Mortgage.

(f) Removal of Fixtures.

The right of a tenant to remove tenant's fixtures is a power coupled with an interest (*z*), which may be assigned by deed (*a*), and continues only during his original term (*b*), and "during such further period

When the
Tenant may
remove Fix-
tures.

(*n*) *Ex parte Reynel*, 2 Mont., D. & De G. 443; *Fletcher v. Manning*, 1 C. & K. 350; *Ex parte Corvell*, 17 L. J., Bank. 16.

(*o*) *Mather v. Fraser*, 2 Kay & J. 536; 25 L. J., Ch. 361; *Boyd v. Shorrocks*, L. R., 5 Eq. 72, 80; 37 L. J., Ch. 154.

(*p*) *Waterfall v. Penistone*, 6 E. & B. 876; 26 L. J., Q. B. 100.

(*q*) *Whitmore v. Empson*, 23 Beav. 313; 26 L. J., Ch. 364.

(*r*) *Badger v. Shaw*, 2 E. & E. 472; 29 L. J., Q. B. 73.

(*s*) *Place v. Fagg*, 4 Man. & R. 277; *Ex parte Bentley*, *Re West*, 2 Mont., D. & De G. 501.

(*t*) *Ex parte Barclay*, 5 Do G., M. & G. 403; 25 L. J., Bank. 1.

(*u*) *Williams v. Evans*, 23 Beav. 239.

(*x*) See *Hawtrev v. Butlin*, L. R., 8 Q. B. 290, per Lush, J.

(*y*) And see *Ex parte Treedy*, *Re Trethouan*, 46 L. J., Bank. 43.

(*z*) *Poole's case*, 1 Salk. 368; *Minshall v. Lloyd*, 2 M. & W. 460.

(*a*) *Hallen v. Runder*, 1 C., M. & R. 266; *London and Westminster Loan and Discount Co. v. Drake*, 6 C. B., N. S. 798, 811; 28 L. J., C. P. 297.

(*b*) *Ex parte Quincery*, 1 Atk. 477; *Lee v. Risdon*, 7 Taunt. 191; *Colegrave v. Dias*

CH. XVI. s. 8. of possession by him as he holds the premises under a right still to consider himself as tenant" (c). The meaning of this modification of the rule that tenant's fixtures vest in the landlord immediately on the determination of the term (d) is not very plain (e); but it seems clear that if the tenant quit the premises, and the landlord re-enter, the tenant's right to remove the fixtures is gone. Where steam-engines were removable by the lessee, and had not been removed previously to the lessor entering for a forfeiture, it was held, that trover could not be maintained for them (f). The right of the tenant is gone, too, where the landlord re-enters for a forfeiture by reason of the tenant having become a bankrupt (g), or where the landlord recovers possession under an ejectment for a forfeiture (h). In *Penton v. Robart* (i), however, a sub-tenant, who remained in possession after recovery in ejectment both against the mesne landlord and himself, was held entitled to remove fixtures, the superior landlord recovering nominal damages only for breaking and entering, and the verdict being entered for the sub-tenant in respect of the trespass de bonis asportatis. This case is, no doubt, a strong one in favour of the tenant (j); but it is strenuously argued by Mr. Amos (k) that the decision itself "forms no exception to the general rule in favour of the landlord."

On the whole it seems that, unless the landlord does some act to create what has been called an "excrecence of the term," the right to unsevered fixtures vests in the landlord on the determination of a term certain.

If the term be an uncertain one, as if the lessor be a tenant for life, or if the tenancy be at will, it seems clear, although it has not been expressly decided (l), that the tenant will be allowed a reasonable time, after the expiration of his estate, to remove "tenant's fixtures." For no laches can be imputed to such a tenant in not having availed himself of the privilege of severance during the term; neither can a gift to the landlord be implied (m).

A reasonable time for removal after the expiration of the term will

Special
Agreement.

Santos, 2 B. & C. 76; *Minshall v. Lloyd*, 2 M. & W. 450, 460.

(c) *Wecton v. Woodcock*, 7 M. & W. 14.

(d) See *Lyde v. Russell*, 1 B. & Ad. 394, in which case the tenant had quitted possession, and failed to recover severed fixtures from the landlord in trover.

(e) *Leader v. Homewood*, 5 C. B., N. S. 646; 27 L. J., C. P. 316; and see the question discussed by Kindersley, V.-C., in *Gibson v. Hammermith R. Co.* (32 L. J., Ch. 337), in which the defendants were held bound, under the Lands Clauses Act, to give compensation for trade fixtures.

(f) *Minshall v. Lloyd*, 2 M. & W. 450; *Mackintosh v. Trotter*, 3 M. & W. 184.

(g) *Fugh v. Arton*, L. R., 8 Eq. 626; 38 L. J., Ch. 619.

(h) *Minshall v. Lloyd*, 2 M. & W. 450; *Mackintosh v. Trotter*, 3 M. & W. 184; but see *Sumner v. Bromilow*, *infra*, (n).

(i) 2 East, 88.

(j) See *Heap v. Barton*, 12 C. B. 278; per Jervis, C. J.

(k) Amos & F. 102.

(l) See, however, *Martin v. Rowe*, 7 E. & B. 237.

(m) Amos & F. 107.

also be allowed in the case of a stipulation in the lease that the tenant may remove the fixtures "at the expiration of the term" (n).

CH. XVI. s. 8.
Fixtures
(Removal of).
Surrender.

The surrender of a lease, it may be added, will not prejudice the rights of a purchaser of fixtures before the surrender (o). Where the purchaser of lands brought an ejectment against a tenant from year to year, and the parties entered into an agreement that judgment should be signed for the plaintiff, with a stay of execution till a given period; it was held, that the tenant could not in the interval remove buildings, &c. from the premises which he had himself erected during his term, and before the action was brought (p). Where the landlord during the term, by letter, declined to buy the tenant's fixtures, but added, "I have no objection to your leaving them on the premises and making the best terms you can with the incoming tenant," it was held that such letter did not operate as a valid licence (it not being under seal); and that if the new tenant refused to pay for the fixtures so left, or to permit them to be removed, no action of *trover* would lie for them, whilst they remained unsevered from the freehold (q). Where the tenant has a legal right to remove fixtures after the end of his term, and is prevented from doing so by the landlord or incoming tenant, the action should be for preventing the plaintiff from exercising his right to sever and remove the fixtures (r). But the value of fixtures severed during the tenancy, and of other goods left behind, may (after a sufficient demand and refusal) be recovered in *trover* (s). But it is otherwise with respect to fixtures which were left unsevered on the expiration of the tenancy (t).

It appears to be generally understood in practice, that where trading as well as ornamental fixtures may be removed, and are accordingly taken down, the tenant is liable to repair any injury the premises may sustain by the act of removal; and in like manner, it would seem, that where a fixture has been put up in substitution for an article which was attached to the premises at the time of the demise, the tenant, on taking down his own fixture, is bound to restore the former article, or to replace it by another erection of a similar description (u). It has been held, that in removing engines, &c. partly fixed in brickwork, which a tenant has by the terms of his lease a right to remove, he may disturb such brickwork as is necessary, and is not bound to restore

How the Removal must be effected.

(n) *Stansfield v. Mayor of Portsmouth*, 4 C. B., N. S. 120; 27 L. J., C. P. 124; and see *Sumner v. Bromilow*, 34 L. J., Q. B. 130; 11 Jur., N. S. 481; *Fugh v. Arton*, *supra*.

(o) *Saint v. Pilley*, L. R., 10 Ex. 137 *London and Westminster Discount Co. v. Drake*, 6 C. B., N. S. 798; 28 L. J., C. P. 97.

(p) *Fitcherbert v. Shaw*, 1 H. Blac. 258;

Heap v. Barton, 12 C. B. 274.

(q) *Roffey v. Henderson*, 17 Q. B. 574; *Leader v. Homewood*, 5 C. B., N. S. 546.

(r) *London and Westminster Loan and Discount Co. v. Drake*, 6 C. B., N. S. 800, 811.

(s) *Leader v. Homewood*, 5 C. B., N. S. 546, 548.

(t) *Wilce v. Watore*,

(u) *Amos & F.* 89.

CH. XVI. s. 8 it to a perfect state, but that he is liable for unnecessary disturbance of brickwork (*x*).

Fixtures
(*Remedies re-*
specting).

(*g*) *Remedies respecting Fixtures.*

Landlord's
Remedies for
the wrongful
Removal of
Fixtures.

When fixtures which have become part of the realty, and irremovable according to law, have been removed, the landlord may maintain an action on the case in the nature of waste; for such removal amounts to an injury to the reversion, which the law considers waste (*y*). Where such waste amounts to a breach of covenant, the landlord may sue either in case, or on the covenant, at his election (*z*). He may also, before the removal, apply to the High Court for an injunction to prevent the removal (*a*). Although a landlord cannot maintain an action of trespass for entering the premises during the occupation of the tenant, because occupation is necessary to maintain that form of action; yet immediately upon the severance of the fixtures from the realty, they become mere chattels, and he may maintain an action of trespass for taking them away, for the property is vested in him from the time of severance (*b*); again, where the fixtures have been unlawfully severed from the freehold and carried away, or otherwise converted or disposed of, the landlord may maintain an action of trover for their value (*c*).

Remedies to
recover the
Value of Fix-
tures.

Fixtures being often the subject of contracts, actions may be brought for any breach of such contracts by either of the parties (*d*). These actions generally arise either from the breach of contracts respecting the care and disposition of fixtures during the existence of a tenancy, or upon contracts for the sale of fixtures. A lessee cannot even during his term maintain trover for fixtures attached to the freehold (*e*). If a landlord, during the term, severs fixtures from the freehold and distrains them, the tenant may maintain trover for them (*f*). But where a tenant leaves fixtures at the end of his term and the landlord afterwards severs them, the tenant cannot maintain trover for them (*g*). Where a tenant assigned his lease by way of mortgage, but continued in possession and became bankrupt, whereupon the assignees removed fixtures which by the lease were to be yielded up at the end of the term to the lessor; it was held, that the mortgagee might maintain trover against the assignees (*h*). If a lessee, who is possessed of

(*x*) *Foley v. Addenbrooke*, 13 M. & W. 174.

(*y*) *Hitchman v. Walton*, 4 M. & W. 409; *Smith v. Render*, 27 L. J., Ex. 83.

(*z*) *Kinlyside v. Thornton*, 2 W. Blac. 1111; *Kerne v. Benbow*, 4 Taunt. 764; *Martyr v. Bradley*, 9 Bing. 24.

(*a*) *Amos & F.* 281—287.

(*b*) *Farrant v. Thompson*, 5 B. & A. 826; *Amos & F.* 352.

(*c*) *Hitchman v. Walton*, 4 M. & W. 409.

(*d*) *Martyr v. Bradley*, 9 Bing. 24; *Watson v. Lane*, 11 Exch. 769; 25 L. J., Ex. 101.

(*e*) *Mackintosh v. Trotter*, 3 M. & W. 184; *Roffey v. Henderson*, 17 Q. B. 574.

(*f*) *Dalton v. Whittem*, 3 Q. B. 961; *Clarke v. Holford*, 2 C. & K. 540.

(*g*) *Lyde v. Russell*, 1 B. & Ad. 394.

(*h*) *Hitchman v. Walton*, 4 M. & W. 409.

tenant's fixtures, mortgage his term with the fixtures and afterwards becomes bankrupt the mortgagee may recover in trover the value of the fixtures from the assignees, who have removed and converted them (*i*). Where the assignees of a bankrupt mortgagor who had vested in his mortgagee an immediate interest in fixtures severed and sold them; it was held, that the mortgagee was entitled to recover from the assignees the value of the fixtures estimated as between outgoing and incoming tenant (*k*). A lessee of a house containing fixtures, executed an assignment of the premises by way of mortgage, not mentioning the fixtures: he afterwards assigned the premises and all his estate and effects, to trustees; the trustees being in treaty for a sale of the fixtures, the mortgagee, whose principal and interest were due, took forcible possession of the house, and refused, on demand, to deliver up the fixtures; the trustees brought trover; and it was held, that they could not recover for them (*l*).

CH. XVI. s. 8.
Fixtures
(Remedies re-
specting).

If an incoming tenant purchase as fixtures from the outgoing tenant property which in fact belongs to the landlord, he may recover back the money he paid for it, in an action against the outgoing tenant for money had and received; and in such action it will be no defence that the outgoing tenant was not aware that the articles belonged to the landlord, having bought them himself from a preceding tenant; he, however, has his remedy against such preceding tenant (*m*). But there is no implied warranty of title in the contract of sale of a *personal chattel*, the maxim being *caveat emptor*; and therefore, in the absence of fraud, a vendor is not liable for a defect of title, unless there be an express warranty, or an equivalent to it, by declaration or conduct (*n*). Where the owner of the goodwill and fixtures of a public-house allowed another person to represent himself as such to the landlord, whereupon they let the house to him and he sold the house and fixtures to a bona fide purchaser; it was held, that the real owner of the fixtures had estopped himself from recovering the fixtures of the purchaser (*o*).

Remedies to
recover
Damages for
an improper
Sale of Fix-
tures.

SECT. 9.—Survey and Valuation of Dilapidations and Fixtures.

A landlord has no legal right during the term to enter upon the demised premises to view the state and condition thereof, or the dilapidations, wants of repair, mode of cultivation, &c., except in pursuance

Right of
Landlord to
enter the
Premises to
Survey, &c.

(*i*) *Boydell v. M'Michael*, 1 C. M. & R. 177; *Thompson v. Pettit*, 10 Q. B. 101; *Horsfall v. Hey*, 2 Exch. 778.

(*k*) *Thompson v. Pettit*, *supra*.

(*l*) *Longstaff v. Meagoe*, 2 A. & E. 167.

(*m*) *Robinson v. Anderton*, Peake, 94.

(*n*) *Morley v. Attenborough*, 3 Exch. 500;

Ormrod v. Hulth, 14 M. & W. 651, 664; *Burnby v. Bollett*, 16 M. & W. 644; *Sims v. Marryat*, 17 Q. B. 281.

(*o*) *Gregg v. Wells*, 10 A. & E. 90; and see *Freeman v. Cooke*, 2 Exch. 654; 6 D. & L. 187; *Clarke v. Hart*, 6 H. L. Cas. 633, 644, 655.

CH. XVI. s. 9. of some power or authority in that behalf contained in the lease or agreement, or the written or oral leave of the tenant (*p*). For any such unauthorized entry he would be liable to an action of trespass at the suit of the tenant. When, as frequently is the case, there is a covenant or proviso in the lease or agreement that the landlord may enter so many times during the year to survey the premises, and to require the necessary repairs to be done, he may select any days in the year that he thinks fit, whether they be the worst or best time for doing repairs (*q*). But a covenant for a landlord to be allowed to come into a house to see the state of its repair “at convenient times” is not broken by his not being allowed to go into some of the rooms, if the tenant has had no previous notice of his coming (*r*).

Estimate of
Dilapidations

Towards the end of the term, some respectable and competent surveyor or architect (to be mutually agreed on) should be employed on behalf of both landlord and tenant to ascertain what defects and wants of repairs exist *contrary to the covenants or stipulations in the lease or agreement*, and the sum it will take to do what is necessary. He should, of course, be furnished with the lease or agreement, or a copy; and he should be acquainted with the law as to the construction of covenants to repair and leave in repair, &c. (*s*). He should decide fairly and impartially between the parties, in like manner as an arbitrator. He should make a schedule of the repairs, &c. necessary to be done (stating them in detail), with an estimate of the sum it will take to do such repairs, &c. Such schedule and estimate should be written upon an appraisement stamp (*t*). When the appraisement is not made on behalf of both parties, but merely for the private information of the party procuring it to be made, it does not require any stamp (*u*). The charges of and incident to such survey and appraisement should be expressly provided for by agreement between the parties and the person employed. In some cases the decision of the valuer may be reviewed by the court, in the same manner as ordinary arbitrations (*x*).

Amount of
Damages.

It is usual and desirable that the tenant should, instead of executing the required repairs himself, pay the estimated cost of them to the landlord. What this cost is to be must depend almost entirely on the judgment of the surveyor. For the modern practice of surveyors, the reader is referred to the useful “Handbook of House Property,” by

(*p*) Ante, 572.

(*q*) *Hill v. Barclay*, 16 Ves. 403.

(*r*) *Doe d. Wetherell v. Bird*, 6 C. & P. 195.

(*s*) Ante, 562 *et seq.*

(*t*) Stamp Act, 1870 (33 & 34 Vict. c. 97), and Sched. tit. *Appraisement*, post, Appendix A., Sect. 7.

See a very full form of specification illustrating “a few matters arising”

under the ordinary covenant to leave in repair, in Tarbuck’s Handbook of House Property, 2nd ed. p. 74.

(*u*) *Atkinson v. Fell*, 5 M. & S. 240; *Jackson v. Stopherd*, 2 Cr. & M. 381, 387; *Amos & F.* 357; Stamp Act, 1870 (33 & 34 Vict. c. 97), and Sched. tit. *Appraisement*, Exemption 1.

(*x*) See *Re Hopper*, L. R., 2 Q. B. 367; 38 L. J., Q. B. 97.

Mr. E. L. Tarbuck, architect and surveyor, of which a second edition has recently (1880) appeared.

CH. XVI. s. 9.
*Survey and
 Valuation of
 Dilapidations,
 &c.*
 Valuation of
 Fixtures.

The valuation of any fixtures to be paid for by the landlord at the end of the term may be made in like manner. But, as a general rule, a landlord is not obliged to pay for any fixtures whatever, except such as he has expressly contracted to take and pay for at the end of the term, or for which he is liable according to the custom of the country. Where a valuation of fixtures takes place, as above suggested, nothing should be included in it except those fixtures which the tenant has a legal right to be paid for pursuant to the covenant or custom, or to remove during the term (*y*), either by virtue of some express stipulation in his lease or agreement (*z*), or by the custom of the country (*a*), or under the general law of fixtures. Under the last are comprised articles of ornament and convenience (*b*), machinery, engines and other things erected for the purpose of trade (*c*), and not merely for agricultural purposes (*d*); unless, indeed, they were erected or put up with the written consent of the landlord, and one calendar month's written notice of the tenant's intention to remove them has been given, and the landlord has elected to purchase them pursuant to 14 & 15 Vict. c. 25, s. 3 (*e*), or the contract of tenancy be subject to the operation of the Agricultural Holdings Act, 1875 (*f*).

If, after such valuations have been made and paid for, the incoming tenant discover that he has paid for too much, or for things not included in the valuation, he cannot recover the over-payments in an action for money had and received, especially where he had not given any notice of the errors, and demanded back the money before action (*g*).

Valuations between outgoing and incoming tenants of fixtures, &c. should be made in like manner as between landlord and tenant; but the incoming tenant should take especial care to ascertain that he will have a good title *as against the landlord*, to any fixtures he purchases from the outgoing tenant (*h*); for it is to be remembered that an outgoing tenant has *only a right to remove his own fixtures during his term* (*i*); and he cannot, by agreement or otherwise, convey to the incoming tenant (without the landlord's concurrence) a greater right or title than he himself possesses. Consequently, if the tenant's fixtures are permitted to remain affixed to the demised premises when the old tenancy ends and the new one commences, they will belong to the landlord as parcel of the freehold, notwithstanding the incoming

Valuations
 between Out-
 going and
 Incoming
 Tenants.

(*y*) See ante, 599.

(*z*) Ante, 608.

(*a*) Post, Chap. XX.

(*b*) Ante, 602.

(*c*) Ante, 602.

(*d*) Ante, 599.

(*e*) Ante, 605.

(*f*) Ante, 606.

(*g*) *Freeman v. Jeffries*, L. R., 4 Ex. 189.

(*h*) *Elliott v. Bishop*, 10 Exch. 496; 11 Exch. 113; 24 L. J., Ex. 33; *Burt v. Haslett*, 18 C. B. 162, 893.

(*i*) Ante, 598.

CH. XVI. s. 9. tenant has paid for them to the outgoing tenant their full value as fixtures (*k*). To prevent this, the fixtures so purchased should be specified in a schedule to the new lease, and an express provision inserted therein that the tenant shall be at liberty at any time during the term to remove and dispose of them (inter alia) as tenant's fixtures. An outgoing tenant, who has quitted possession, has no right to re-enter on the incoming tenant to remove any fixtures whatever (*l*).

Surveyor's
Remunera-
tion.

The surveyor is to be paid according to his labour, and not according to the amount of bills he looks over, or the amount of money expended, or to be expended (*m*); although a commission of 5 per cent. on the sum laid out, when such was proved to be the usage, has been allowed (*n*). If a surveyor make an estimate, which turns out to be incorrect to a considerable amount, and consequently entirely useless, through his omitting to take reasonable precaution in forming his judgment, he is not entitled to recover anything for his plans, specifications or estimates made for the work (*o*); but this is a dangerous ground of defence, it being a question for the jury whether the work done was of any use or value to the defendant (*p*). It is frequently better to pay the sum demanded (as agreed) and afterwards bring a cross-action for the negligence and want of due care and skill. Where in making the valuation the surveyor acts as an appraiser within the meaning of 46 Geo. 3, c. 43, and 8 & 9 Vict. c. 76, by which latter an annual duty of two pounds is imposed, he cannot recover his charges unless duly licensed as an appraiser or as an auctioneer (*q*) or house agent (*r*).

Customary
Fee.

"The customary fee for estimating dilapidations is five per cent. upon the estimate, but not less than two guineas, exclusive of travelling expenses, time in going to distant parts, and ultimate trouble. An umpire sometimes charges five guineas a day" (*s*).

(*k*) Ante, 598.

(*l*) *Leader v. Homewood*, 5 C. B., N. S. 546; 27 L. J., C. P. 316.

(*m*) *Upsdell v. Stewart*, Peake, 193.

(*n*) *Chapman v. De Tastet*, 2 Stark. 291; *Maltby v. Christie*, 1 Esp. 340.

(*o*) *Money Penny v. Hartland*, 1 C. & P. 352; 2 Id. 378; *Whitty v. Id. Dillon*,

2 F. & F. 67.

(*p*) *Farnsworth v. Garrard*, 1 Camp. 38; *Bracey v. Carter*, 12 A. & E. 373.

(*q*) *Palk v. Force*, 12 Q. B. 660.

(*r*) 24 & 25 Vict. c. 21.

(*s*) *Tarbut's Handbook of House Property*, 2nd ed. p. 85 (A.D. 1880).

CHAPTER XVII.

ORDINARY PARTICULAR COVENANTS.

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SECT. 1.—*Insurance against Fire.*(a) *Liability in Case of Fire.*

AT common law tenants were not answerable to their landlords for accidental or negligent burning: then came the Statute of Gloucester (6 Edw. 1, c. 5), which, by making tenants for life and years liable to waste, without any exception, rendered them answerable for destruction by fire (a); but by 14 Geo. 3, c. 78, s. 86 (b), “no action, suit or process whatsoever shall be had, maintained or prosecuted against any person in whose house, chamber, stable, barn or other building, or on whose estate any fire shall *accidentally begin*, nor shall any recompense be made by such person for any damage suffered thereby;” provided “that no contract or agreement made between landlord and tenant shall be hereby defeated or made void.” This enactment is not of a local and personal nature, but extends to the whole kingdom (c). It does not apply where the fire is lighted intentionally, and mischief results to a neighbour; nor where the fire is produced by negligence (d), nor will it affect any express covenant or agreement to repair, &c., because of the proviso above mentioned.

(a) *Ante*, 582.

(b) Which is still in force, 18 & 19 Vict. c. 122, s. 109.

(c) *Ex parte Goreley, In re Barker*, 34 L. J., Bkt. 1; 10 Jur., N. S. 1085. Seealso *Filliter v. Phippard*, 11 Q. B. 355.(d) *Filliter v. Phippard*, 11 Q. B. 355; *Vaughan v. Taff Vale R. Co.* (in error), 5 H. & N. 679.

CH. XVII. s. 1.

*Covenant to Insure.*Usual form of
Covenant to
Insure, &c.(b) *Covenant to Insure.*

Leases of premises, which comprise houses or other buildings, frequently contain a covenant on the part of the lessee, his executors, administrators and assigns, to insure all or some of the demised buildings to the full value, or some proportion thereof, or to not less than a fixed amount, in some respectable insurance office (the name of which is sometimes mentioned), either in the joint names of the lessor and lessee (*e*), or in the name of the lessor (*f*) or of the lessee; and to keep the same so insured during the term; and to produce the policy and show the receipt for the premium for the current year to the lessor or his agent on request (*g*); and to lay out and expend all insurance monies received in rebuilding or repairing the demised premises as may be necessary. Sometimes it is further stipulated that if the tenant omit so to insure, the landlord may do it, and recover the amount paid, by distress or otherwise, as for rent in arrear.

14 Geo. 3,
c. 78, s. 83.Laying out of
Insurance
Money in Re-
building.

By 14 Geo. 3, c. 78, s. 83, insurance offices are “authorized and required *upon the request of any person or persons interested in or entitled unto* any house or houses or other building which may be burnt down, demolished or damaged by fire, or (without such request) upon any grounds of suspicion that the owner or owners, occupier or occupiers, or any person or persons who shall have insured such house or houses or other buildings, shall have been guilty of fraud, or of wilfully setting their house or houses or other buildings on fire, to cause the insurance money to be laid out and expended, as far as the same will go, towards rebuilding, reinstating or repairing such house or houses or other buildings so burnt down, demolished or damaged by fire; unless the party or parties claiming such insurance money shall within sixty days next after his, her or their claim is adjusted, give a sufficient security to the governors or directors of such insurance office, that the same insurance money shall be laid out and expended as aforesaid; or unless the said insurance money shall be, in that time, settled and disposed of, to and amongst all the contending parties, to the satisfaction and approbation of such governors or directors of such insurance office respectively.”

This enactment is still in force (*h*). It is not limited to the metropolitan district, but is applicable to the whole kingdom (*i*). To entitle a landlord or other owner to the benefit of it, he must make a distinct request to the insurance office to apply the policy money in

(*e*) 8 & 9 Vict. c. 124, Sched. Form 6 (Appendix A., sect. 1, post); *Doe d. Muston v. Gladwin*, 6 Q. B. 953; *Wilson v. Wilson*, 14 C. B. 616; *Green v. Low*, 22 Beav. 625.

(*f*) *Fenniall v. Harborne*, 11 Q. B. 368.

(*g*) *Doe d. Bridger v. Whitehead*, 8 A. & E. 671; *Doe d. Ives v. Scott*, Arn. & Hod. 76; 8 & 9 Vict. c. 124, Sched. Form 6, post, Appendix A., sect. 1.

(*h*) 18 & 19 Vict. c. 122, s. 109.

(*i*) *Ex parte Goreley, In re Barker*, 34 L. J., Bkt. 1; 10 Jur., N. S. 1085.

rebuilding, before they have settled with the tenant insuring; and in no case is the landlord or owner entitled to rebuild himself and claim the policy money (*k*). His remedy appears to be by a mandamus, after a sufficient request and refusal (*k*). A tenant seems to be clearly included in the words "person interested" (*l*). A tenant from year to year insuring is not limited in his claim on the insurance company to the extent of his interest in the property insured (*k*). Trade fixtures put up by a tenant and removable by him are not within the words "houses or other buildings," as used in this section (*m*). A purchaser of property insured for does not, by the mere fact of purchase, acquire a right to the insurance monies (*n*). And where a fire policy has been assigned, the insurers, in the absence of express contract to do so, are not bound upon the application of the assignee to pay him upon the policy (*o*).

By 22 & 23 Vict. c. 35, s. 7, "the person entitled to the benefit of a covenant on the part of a lessee or mortgagor to insure against loss or damage by fire shall, on loss or damage by fire happening, have the same advantage from any then subsisting insurance relating to the building covenanted to be insured, effected by the lessee or mortgagor in respect of his interest under the lease or in the property, or by any person claiming under him, but not effected in conformity with the covenant, as he would have from an insurance effected in conformity with the covenant."

By s. 8, "where, on the bonâ fide purchase after the passing of this act of a leasehold interest under a lease containing a covenant on the part of the lessee to insure against loss or damage by fire, the purchaser is furnished with the written receipt of the person entitled to receive the rent, or his agent, for the last payment of rent accrued due before the completion of the purchase, and there is subsisting at the time of the completion of the purchase an insurance in conformity with the covenant, the purchaser or any person claiming under him shall not be subject to any liability, by way of forfeiture or damages or otherwise, in respect of any breach of the covenant committed at any time before the completion of the purchase, of which the purchaser had not notice before the completion of the purchase; but this provision is not to take away any remedy which the lessor or his legal representatives may have against the lessee or his legal representatives for breach of covenant."

The covenant to insure seems to be a covenant that runs with the

CH. XVII. s. 1.
Covenant to
Insure.

22 & 23 Vict.
c. 35, s. 7.
Lessor to
have benefit
of an in-
formal In-
surance.

Sect. 8.
Purchaser of
Leasehold
protected in
case of sub-
sisting Insur-
ance at Time
of Completion
of Purchase.

Covenant to
Insure runs
with Land.

(*k*) *Simpson v. Scottish Union Insurance Co.*, 1 H. & M. 618; 32 L. J., Ch. 329.

(*l*) See ante, 380, where the effect of the enactment upon the rule of *Leeds v. Cheetham*, 1 Sim. 146, is noticed.

(*m*) *Ex parte Goreley, In re Barker*, supra.

(*n*) *Poole v. Adams*, 33 L. J., Ch. 639; 12 W. R. 683.

(*o*) *London Investment Co. v. Montefiore*, 9 L. T. 688.

CH. XVII. s. 1.
Covenant to
Insure.

land (*p*). Under a covenant to insure in such office as the lessor or his assigns should direct, an assignee of the reversion cannot take advantage of a direction given by the lessor before assignment, which had not been obeyed, so as to work a forfeiture after the assignment, the lessee not having had notice of the assignment nor any direction from the assignee (*q*).

Breach of
Covenant to
Insure is
committed by
failure to In-
sure for ever
so short a
Time.

Where a lessee has covenanted to insure and keep insured the buildings demised, or any part thereof, it will be a breach of the covenant if he permit them to remain uninsured, although it be only for a short period of time, and no fire or damage happen. Thus, where a lessee covenanted to keep premises insured, and omitted to pay the premium till after the expiration of fifteen days beyond the year, but at the end of the month he paid the premium, which was accepted by the company, as reviving the insurance from the former year; it was held, that the covenant was broken, the premises having in fact remained uninsured from the expiration of the fifteen days to the time the premium was paid (*r*). But where a lessee, having covenanted to keep 800*l.* insured on the premises, effected an insurance containing a memorandum, that in case of the death of the insured the policy might be continued to his personal representative, provided an indorsement to that effect was made upon it within three months after his death, and died, and an indorsement continuing the policy to his personal representative was made after the expiration of the three months, it was held to be no breach of the covenant to insure (*s*). Where a lessee covenants to insure and keep insured the buildings demised, and to deposit the policy with the lessor, the covenant does not mean that he is to effect one policy and keep that policy on foot, but that the premises shall always be kept insured by one policy or another; and it is a breach if they are uninsured at any one time, and a continuing breach for any portion of the time they are uninsured (*t*). A purchaser of a leasehold may object to the vendor's title on the ground that he has incurred a forfeiture by omitting for the space of a month to pay the annual premium of insurance pursuant to his covenant, although it does not appear that the lessor has taken advantage of the forfeiture (*u*). But a defect of this sort may sometimes be provided against by a special condition of sale (*x*).

(*p*) See *Vernon v. Smith*, 5 B. & A. at p. 9, per Best, J. And see ante, 160.

(*q*) *Crane v. Batten*, 2 Com. L. R. 1696; 23 L. J., Q. B. 220.

(*r*) *Doe d. Pitt v. Shewin*, 3 Camp. 134; *Wilson v. Wilson*, 14 C. B. 616; 23 L. J., C. P. 137; *Doe d. Darlington v. Ulph*, 13 Q. B. 204; 18 Id. 106.

(*s*) *Doe d. Pitt v. Laming*, 4 Camp. 73.

(*t*) *Doe d. Flower v. Peck*, 1 B. & A. 428; *Hyde v. Watts*, 12 M. & W. 264; 1 D. & L. 479; *Doe d. Baker v. Jones*, 5 Exch. 498; *Cole Ejec.* 429.

(*u*) *Wilson v. Wilson*, 14 C. B. 616; *Palmer v. Gosen*, 25 L. J., Ch. 841.

(*x*) *Howell v. Kightley*, 8 De Gex, M. & G. 325; 25 L. J., Ch. 864.

The breach of a covenant to insure is a continuing breach. Where there was a covenant to insure and continue insured the premises in the joint names of the lessor and the lessee, but the lessee effected an insurance in his own name alone, and showed the policy to the lessor, who approved of it, and afterwards accepted rent; it was held, that there was a continuing breach of the covenant, and that the acceptance of rent waived the previous breaches only (*y*). A breach of covenant is committed if the lessee covenants to insure the buildings from time to time and at all times, and leaves a part uninsured for two months after the execution of the lease, or even less (*z*); although the greater part of the premises were already insured at the requisite amount by a policy expiring at the end of two months, and on its expiration a new policy was effected covering all the premises, which were then insured at the stipulated amount (*a*). So, where there was a covenant by the tenant to insure in the names of three lessors, and the insurance was made in their names jointly with the tenant, it was held a breach of the covenant (*a*). Where the lessee was to insure, with a proviso that if he did not the lessor might, it was held, that the lessor could not recover in ejectment for a forfeiture, if by his conduct he had led the lessee to believe the premises were insured by himself (*b*).

CH. XVII. s. 1.
Covenant to
Insure.
Continuing
Breach.
Doe v.
Gladwin.

Where the performance of a covenant to insure in a sublease did not necessarily include a performance of the corresponding covenant in the original lease, and the premises were uninsured, and the original lessor entered for breach of the covenant to insure, and there was no general covenant in the sublease to indemnify against the covenants in the original lease, the lessee failed to recover against the sublessee damages for the term which he had lost by the non-insurance (*c*).

Action
against Sub-
lessee.

Originally no relief could have been obtained even in a court of equity against an ejectment for a forfeiture by not insuring (*d*), unless there had been fraud or misleading on the part of the lessor (*e*). Relief was first given in equity under 22 & 23 Vict. c. 35, and afterwards at law by the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126), s. 2, but subject to four important conditions: (1) that no loss has happened; (2) that there has been no fraud; (3) that there has been an insurance on foot; and (4) that the relief is not to be repeated (*f*).

Relief against
Forfeiture
where neither
Loss nor
Fraud.

(*y*) *Doe d. Muston v. Gladwin*, 6 Q. B. 953; *Cole Ejec.* 429.

706; *Cole Ejec.* 430.

(*z*) *Penniall v. Harborne*, 11 Q. B. 368; *Doe d. Darlington v. Ulph*, 13 Q. B. 204; 18 L. J., Q. B. 106.

(*c*) *Logan v. Hall*, 4 C. B. 598.

(*d*) *White v. Warner*, 2 Meriv. 459; *Gregory v. Wilson*, 9 Harc. 683.

(*e*) *Meek v. Carter*, 4 Jur., N. S. 992.

(*f*) See further as to this ante, 302.

(*a*) *Penniall v. Harborne*, *supra*.

(*b*) *Doe d. Pittman v. Sutton*, 9 C. & P.

CH. XVII. s. 2.

Covenant
not to Assign
or Sublet.Such Cove-
nants not
common and
usual.*Church v.
Brown.*SECT. 2.—*Not to Assign or Sublet without Licence.*(a) *Covenants and Conditions against.*

It seems to be settled, although there are some early decisions to the contrary (*g*), that under an agreement for a lease "with common and usual covenants" the lessor is not entitled to have a covenant inserted not to assign or sublet without his licence (*h*). Even an agreement for a lease to contain a covenant not to sublet and to hold on other covenants of a ground lease which contained a proviso for re-entry on breach of covenants generally, but did not contain a covenant not to sublet, has been held not to entitle the lessor to a proviso for re-entry on breach of the covenant not to sublet (*i*).

Whether
Licence must
be in writing.

A covenant or proviso that the lessee shall not set, let, or assign over the whole or part of the premises without leave in writing, will not be affected by an oral licence to let part (*j*). But the licence need not be in writing, unless that be expressly required by the terms of the lease; and if, when a written licence is necessary, the lessor gives a parol licence on purpose to ensnare the lessee (and that can be proved), a court of equity will relieve on the ground of fraud (*k*), this being an exception to the general rule (*l*). Where lessees, holding with a covenant not to assign without written consent, sold their interest to a person who entered with the consent of the lessor, but never took a formal assignment, it was held that no breach of the covenant had been committed (*m*).

Vendor must
procure
Licence.

If the vendor of a lease, in which there is a covenant not to assign without licence, contract to assign his interest, it is incumbent on him, and not on the purchaser, to procure the lessor's licence for the assignment (*n*); although he seems not to be bound to take legal proceedings to obtain it (*o*). Where A. assigned to B. a lease of a farm from C., which contained a covenant not to assign without C.'s consent in writing, and B. agreed to assign the lease to D.'s nominee, D. to pay the expenses of the assignment and 180*l.* on a day certain for the improvements and manure; to take the crops at a valuation, and to have immediate possession; it was held, that to support an action on

(*g*) *Morgan v. Slaughter*, 1 Edp. 8; *Folkington v. Croft*, 3 Anst. 700, and see *Haberdashers' Co. v. Isaac*, 3 Jur., N. S. 611, Wood, V.-C.

(*h*) *Hampshire v. Wickens*, L. R., 7 Ch. D. 555, and 113, ante; *Church v. Brown*, 15 Ves. 259, 271.

(*i*) *Crawley v. Price*, L. R., 10 Q. B. 302; 33 L. T. 203; 23 W. R. 874.

(*j*) *Roe d. Gregson v. Harrison*, 2 T. R. 425.

(*k*) *Richardson v. Evans*, 3 Mad. 218.

(*l*) See *Hill v. Barclay*, 18 Ves. 56.

(*m*) *West v. Dobb*, L. R., 5 Q. B. 450; 39 L. J., Q. B. 190; 23 L. T. 76; 18 W. R. 1167 (Ex. Ch.).

(*n*) *Lloyd v. Crispe*, 5 Taunt. 249; *Mason v. Corder*, 7 Taunt. 9; *Barker v. Banks*, 2 F. & F. 213; *Davis v. Nisbett*, 10 C. B., N. S. 752; 31 L. J., C. P. 6. As to payment of rent upon an agreement for sublease see *Brook v. Fletcher*, 37 L. T. 100.

(*o*) *Lehmann v. M'Arthur*, L. R., 3 Ch. 496.

this agreement, B. must show that he had obtained C.'s consent-in writing to the assignment, though D. had taken possession of the premises, had cut down the crops, and had paid part of the 180l. to B. (p).

CH. XVII. s. 2.
Covenant
not to Assign
or Sublet.

Where in an agreement for a sublease it was provided that the sublease should contain the like conditions and stipulations as were contained in the original lease, and the original lease contained a covenant not to assign without the lessor's consent, it was held that the sublessor's consent was the consent to be required (q).

Agreement
for Sublease.

The covenant not to assign or sublet without licence seems to run with the land, so as to be binding on the assigns of the lessee (r).

"Running
with Land."
*Williams v.
Earle.*

(b) Licence to Assign or Sublet.

The unreasonable doctrine of *Dumpor's case*, that a licence to assign or sublet operated as a total waiver of the condition against assigning or subletting, such condition being considered as an entire thing, not capable of being waived or released as to part only (s), was never overruled. It was, however, abrogated by statute 22 & 23 Vict. c. 35, which, it will be observed, applies to all kinds of licence. By sect. 1 of this act it is enacted, that "where any licence to do any act which without such licence would create a forfeiture, or give a right to re-enter, under a condition or power reserved in any lease heretofore granted or to be hereafter granted, shall at any time after the passing of this act be given to any lessee or his assigns, every such licence shall, unless otherwise expressed, extend only to the permission actually given, or to any specific breach of any proviso or covenant made or to be made, or to the actual assignment, underlease or other matter thereby specifically authorized to be done, but not so as to prevent any proceeding for any subsequent breach (unless otherwise specified in such licence), and all rights under covenants and powers of forfeiture and re-entry in the lease contained shall remain in full force and virtue, and shall be available as against any subsequent breach of covenant or condition, assignment, underlease or other matter not specifically authorized or made punishable by such licence, in the same manner as if no such licence had been given; and the condition or right of re-entry shall be and remain in all respects as if such licence had not been given, except in respect of the particular matter authorized to be done."

Dumpor's case.

22 & 23 Vict.
c. 35, s. 1.
Licence to
Assign or
Sublet ex-
tends only to
Permission
actually
given.

(p) *Mason v. Corder*, 7 Taunt. 9.

(q) *Williamson v. Williamson*, L. R., 9 Ch. 729; 43 L. J., Ch. 738; 31 L. T. 291.

(r) *Williams v. Earle*, L. R., 3 Q. B. 739; 37 L. J., Q. B. 231. But see *West*

v. Dobb, L. R., 4 Q. B. 634, and 150, ante, as to whether assigns are bound if not named.

(s) *Dumpor's case*, 4 Co. R. 119 b; 1 Smith L. C. 41 (7th ed.).

CH. XVII. s. 2.

Covenant
not to Assign
or Sublet.Licence to
one of
several, is not
Licence to
Co-lessees.22 & 23 Vict.
c. 35—*contd.*

By sect. 2, "where in any lease heretofore granted or to be hereafter granted there is or shall be a power or condition of re-entry on assigning or under-letting or doing any other specified act without licence, and a licence at any time after the passing of this act shall be given to one of several lessees or co-owners to assign or underlet part only of the property, or to do any other such act as aforesaid in respect of part only of such property, such licence shall not operate to destroy or extinguish the right of re-entry in case of any breach of the covenant or condition by the co-lessee or co-lessees, or owner or owners, of the other shares or interests in the property, or by the lessee or owner of the rest of the property (as the case may be), over or in respect of such shares or interests or remaining property, but such right of re-entry shall remain in full force over or in respect of the shares or interests or property not the subject of such licence."

[The third section of this act provides for the apportionment of conditions of re-entry in case of severance of reversion. See this section set out *ante*, Chapter VII., Sect. 3, page 237. As to Waiver, see *post*, page 632.]

"Arbitrary"
refusal of
Consent.
Treloar v.
Bigge.

Where the covenant was not to assign without consent, "such consent not being arbitrarily withheld," it was held, that the effect of these words was not to give the lessee a right of action for an arbitrary refusal of consent, but merely to allow him, in case of an arbitrary refusal, to assign without consent. And in the same case the majority of the court intimated that a refusal grounded on an expectation that the property would be required by a public body under the Lands Clauses Consolidation Act was not arbitrary (*t*).

Pecuniary
Consideration
for Licence.

The very serious question whether a pecuniary consideration can be required for the licence does not appear to have been considered by the courts, nor does the risk of such a consideration being required appear to have been expressly guarded against in the precedents of conveyancers. It is believed that a consideration is very seldom required in practice, but the question whether it is to be requirable is not one which ought to be left in uncertainty when the lease is being settled. Upon the covenant as framed in the unqualified form, it is conceived that the requirement of a pecuniary consideration for the licence is perfectly legal, although it might perhaps be argued that only a reasonable, and not a prohibitory, consideration can be required (*u*).

(*t*) *Treloar v. Bigge*, L. R., 9 Ex. 151; 43 L. J., Ex. 95; 22 W. R. 843. But see *Shepherd v. Hong Kong, & Co. Corporation*, 20 W. R. 459, per Malins, V.-C.

(*u*) See *Hilton v. Tipper*, 18 L. T. 626;

16 W. R. 888, and *ante*, 230. The words "such consent not being arbitrarily withheld," or like words, are now frequently inserted, and it is conceived that they exclude a pecuniary consideration.

(c) *Breach of Covenant not to Assign, &c.*

CH. XVII. s. 2.

Covenant
not to Assign
or Sublet.

A covenant not to *assign* without licence is broken upon the execution by the lessee (without licence) of any deed whereby he parts with the demised premises *for the whole of the residue of his term*; although such deed purports to be merely a lease or sublease for an equal or longer term, at a different rent, payable to himself, and contains other and different covenants and stipulations than those in the original lease (v). In order that an assignment shall create a forfeiture, the instrument must be valid and effectual in point of law and not void as an act of bankruptcy (x). An advertisement to sublet or assign is not a breach of contract, if no actual sublease or assignment be made (y).

Breach by a
Lease
amounting to
an Assign-
ment.Advertis-
ment.

A covenant not to assign or otherwise part with the premises, or any part thereof, for the whole *or any part of the term*, is broken by a sublease (z); but a covenant “not to assign, transfer, set over, or otherwise do or put away the lease or premises,” is not (a). A covenant against subletting will restrain an assignment (b).

Breach by a
Sublease.

Letting lodgings has been held not to be a breach of a covenant not “to grant any under-lease for any term whatsoever, or let, assign, transfer, set over, or otherwise part with” without the licence of the lessor; for “the covenant,” said Lord Ellenborough, “can only extend to such under-letting—as a licence might be expected to be applied for; and who ever heard of a licence from a landlord to take in a lodger?” (c). But the same learned judge ruled otherwise where the covenant was not to let the premises, or any part thereof (d), and the ruling itself has been questioned in a later case (e), where land was suffered to be occupied by more persons than one. On principle it would seem that if the covenant be not to sublet the premises or any *part*, the letting lodgings would be a breach, otherwise not.

Letting
Lodgings.

A covenant “not to alien, sell, assign, transfer, set over or otherwise part with the lease or premises” was ruled, before the Judicature Act, not to be broken by a deposit of the lease as a security for a loan (f);

Equitable
Mortgage by
Deposit of
Lease.

(v) Ante, 239.

(x) *Doe d. Lloyd v. Powell*, 5 B. & C. 308; 2 Y. & J. 372.(y) *Gourley v. Duke of Somerset*, 1 V. & B. 68.(z) *Doe d. Holland v. Worsley*, 1 Camp. 20; Cole Ejec. 435.(a) *Crusoe d. Blencowe v. Bugby*, 2 W. Blac. 766; 3 Wils. 234; *Kinnerley v. Orpe*, 1 Doug. 55; *Church v. Brown*, 15 Ves. 258.(b) *Greenaway v. Adams*, 12 Ves. 395.(c) *Doe d. Pitt v. Laming*, 4 Camp. 77.

As to whether letting lodgings is a “trade,” see 634, post.

(d) *Roe v. Sales*, 1 M. & S. 297.(e) *Greenslade v. Tapscott*, 1 Cr., M. & R. 69, per Parke, B. Both in *Pitt v. Laming* and *Roe v. Sales* exclusive possession was granted.(f) *Doe d. Pitt v. Hogg*, 4 D. & R. 226; 1 C. & P. 160, per Abbott, C. J., whose ruling was upheld by the court. As to effect of equitable mortgage of lease, see *Moore v. Choat*, 8 Sim. 508, and ante, 244.

CH. XVII. s. 2. but the effect of section 24 of that act would seem to be to alter the law in this respect.

*Covenant
not to Assign
or Sublet.*

Assignment
by operation
of Law—no
breach.

An assignment by operation of law, and not by the voluntary and immediate act of the party, as where leasehold premises are assigned to a railway company under the compulsory powers of their act (*g*), is no breach of a covenant against alienation. A lease taken in execution on a warrant of attorney to confess a judgment given by the lessee, is not a forfeiture of the lease under a covenant by such lessee "not to let, set, assign, transfer, make over, barter, exchange or otherwise part with the indenture, &c., for there is a distinction between those acts which a party does voluntarily, and those which pass in invitum (*h*); but where it was found by verdict, that the tenant gave such a warrant of attorney to a creditor for the express purpose of enabling such creditor to take the lease in execution under the judgment, it was held to be in fraud of the covenant; and the landlord, under the clause of re-entry, recovered the premises in ejectment from a purchaser under the sheriff's sale (*i*). Where a lease contained a clause of re-entry, in case the term should be extended or taken in execution, and the sheriff entered the premises during the term, under a writ of extent against the lessee at the suit of the crown, held an inquisition, and seized the lessee's interest into the King's hands; it was held, that this was a taking in execution within the latter clause of the proviso, and therefore that the term was forfeited (*k*).

Bankruptcy
of Lessee.

Where the lessee becomes a bankrupt the operation of the Bankrupt Acts, by which the property becomes vested in the trustees in bankruptcy, does not create a breach of the contract against alienation without licence (*l*); and what is more, the trustees in bankruptcy have a right to assign the lease over (*m*). The assignment being done by the authority of a statute, supersedes any private agreement between the parties, and is, therefore, no breach of the condition (*n*). But a lease may be made subject to a proviso for re-entry by the lessor, in the event of the lessee becoming bankrupt; and such proviso will be valid as against his assignees (*o*).

Marriage of
Lessee.

Where the lessee of a term for years is a single woman, and there

(*g*) *Slipper v. Tottenham and Hampstead Junction R. Co.*, L. R., 4 Eq. 112, 114; 36 L. J., Ch. 841. And see *Baily v. De Crespigny*, L. R., 4 Q. B. 180.

(*h*) *Doe d. Mitchinson v. Carter*, 8 T. R. 67; *Croft v. Lumley*, 6 H. L. Cas. 672; 27 L. J., Q. B. 321.

(*i*) *Doe d. Mitchinson v. Carter*, 8 T. R. 300.

(*k*) *Rex v. Topping*, M'Clel. & Y. 544.

(*l*) *Wadham v. Marlow*, 1 H. Blac. 438, n.; 8 East, 314, n.; 4 Doug. 54.

(*m*) *Doe d. Goodbehare v. Bevan*, 3 M. & S. 353, 360, 361. But see ante, 253.

(*n*) *Wetherell v. Geering*, 12 Ves. 512; *Doe d. Lockwood v. Clarke*, 8 East, 185.

(*o*) *Roe d. Hunter v. Galliers*, 2 T. R. 133.

is a condition against alienation, her taking a husband is no breach of the condition (*p*). CH. XVII. s. 2.

*Covenant
not to Assign
or Sublet.*

Whether a bequest of the term (to any other person than the lessee's executor) is a breach of the covenant not to assign without licence is a point not precisely determined by authority. Where the lessee, having covenanted "not to assign over the term without the lessor's consent first had in writing," bequeathed the term without any such consent obtained; it was held not to be such an assignment as was a breach of the covenant (*q*). And in a later case, Bayley, J., treated it as settled that "a devise of the term by the lessee is not a breach of the covenant not to assign" (*r*). But the contrary has no doubt been held (*s*). On principle it would seem that the opinion of Bayley, J., is correct: that assignment and such like words apply only to transfer *inter vivos*; and that if the lessor desire to exclude a specific devise of the term, he must do so by express words (*t*). In any event the whole estate of the lessee is liable for breaches of covenant, &c.

Bequest of
the Term.

If two partners be assignees of a lease containing a covenant not to assign without licence, it is a breach of this covenant for one of them to assign all his interest to the other, and such an assignment is not authorized by the original licence to the lessee to assign to the two (*u*); but where there was a lease to two partners as joint tenants with a covenant not to assign or part with possession without consent of the lessor, and upon dissolution one of the partners remained in sole possession, intending to take an assignment which was not in fact executed, it was held that there was no breach of the covenant (*v*).

Assignment
by one Part-
ner to
another.
*Varley v.
Coppard.*

Where the covenant was, not to assign the whole or any part of the lands demised without the lessor's consent, and the lessor entered into part himself, and then the lessee assigned; it was held to be a breach of the covenant, notwithstanding the lessor's entry (*r*). Suffering, without consent, persons to use portions of the land for the purpose of raising a potato crop, is a breach of the stipulation not to suffer any part of the land to be occupied by any other person, without the consent of the landlord, although it be proved to be the

Evidence of
Assignment.

(*p*) *Anon.*, Moor, 21.

(*q*) *Fox v. Swann*, Style, 483.

(*r*) *Doe d. Goodbehere v. Bevan*, 3 M. & S. 353. In *Doe d. Evans v. Evans*, 9 A. & E. 719, the point was argued on one side only (that the bequest was a breach), and the court abstained from saying anything about it.

(*s*) See Bao. Abr. tit. *Leases*, p. 886; *Berry v. Taunton*, Cro. Eliz. 331; *Dumpey v. Syme*, id. 815, and other cases cited, Cole Ejec. 437.

(*t*) In *Lloyd v. Cripe*, 5 Taunt. 549, express words allowed a specific devise.

(*u*) *Varley v. Coppard*, L. R., 7 C. P. 505; 26 L. T. 882; 20 W. R. 972.

(*v*) *Corporation of Bristol v. Wratcott*, 12 Ch. D. 451; 41 L. T. 117; 27 W. R. 841, C. A., affirming decision of Bacon, V.-C. The consent of the lessor had been stipulated for between the partners on dissolution, but had not in fact been applied for.

(*x*) *Collins v. Sillye*, Style, 265.

CH. XVII. s. 2. custom of the country for farmers to pursue that course (y). It was at one time held, that where there is a right of re-entry upon assignment or subletting, if a person be found on the premises appearing as tenant, it is *prima facie* evidence of a subletting, and that the defendant must show, whether the person was a tenant or merely a servant (z): but it has since been decided that it is not sufficient to prove the defendant, a stranger, in possession of the demised premises, and his declaration that they were demised to him by another stranger, even if the tenant had covenanted not to part with the possession (a).

*Covenant
not to Assign
or Sublet.*

(d) *Waiver of Forfeiture.*

By Accept-
ance of subse-
quent Rent.

Where a forfeiture has been incurred by breach of a covenant against alienation, the receipt of rent which becomes due at a later period will amount to a waiver of the forfeiture, if the lessor then knows of the breach (b). In an ejectment for breach of a condition not to sublet, it was proved that the plaintiff asked the defendant what he would take for his land, and on the defendant naming a price, said, "Then let it, and I shall know what it will produce next year." It was held, that this was a waiver of the forfeiture, for breach of such condition (c).

Restriction on
effect of
Waiver of
Forfeiture.

By 23 & 24 Vict. c. 38, s. 6, "where any actual waiver of the benefit of any covenant or condition in any lease, on the part of the lessor, or his heirs, executors, administrators or assigns, shall be proved to have taken place after the passing of this act in any one particular instance, such actual waiver shall not be assumed or deemed to extend to any instance or any breach of covenant or condition other than that to which such waiver shall specially relate, nor to be a general waiver of the benefit of any such covenant or condition, unless an intention to that effect shall appear." Before this enactment a lessor who had a right of re-entry on the breach of a covenant not to sublet, did not, by waiving his right on one subletting, lose his right to re-enter on a subsequent subletting (d).

SECT. 3.—*For Residence on the Premises.*

Effect of
Covenant to
reside.

A covenant by the lessee to reside constantly upon the demised premises, is sometimes inserted in leases; and such a covenant has

* (y) *Greenslade v. Tapscott*, 1 C., M. & R. 55.

(z) *Doe d. Hindley v. Rickarby*, 5 Esp. 4.

(a) *Doe v. Payne*, 1 Stark. R. 86. As to the effect of Declarations by Occupiers, see *Cole Ejec.* 232.

(b) *Roe d. Gregson v. Harrison*, 2 T. R. 425; *Harvie v. Ouel*, Cro. Eliz. 572; *Goodright d. Waller v. Davids*, Cowp. 803.

(c) *Doe d. Henniker v. Watts*, 8 B. & C. 308.

(d) *Doe d. Boscauren v. Bliss*, 4 Taunt. 735.

been recognized as a fair and proper covenant (*e*); but it certainly is not a common or usual covenant. It runs with the land into whose-soever hands it comes; and is therefore binding upon assigns, although they be not mentioned (*f*).

CH. XVII. s. 3.
*Covenant for
Residence on
the Premises.*

SECT. 4.—*For or against Particular Trades.*

In leases of houses in towns a covenant is frequently inserted, to restrain the lessee from carrying on or permitting or suffering the premises to be used for carrying on obnoxious trades. The real object in all these cases is to prevent the lowering of the tenement in the scale of houses, by the exercise, whether wholly or partially, of those trades which, in the judgment of the lessor, are likely to [be a nuisance to the neighbourhood, or to] prevent tenants from afterwards taking the premises, and which by so doing may depreciate their value at a future period (*g*).

Effect of
Covenant
against par-
ticular
Trades.

Such covenants affect the occupier of the demised premises, and run with the land, so as to bind "assigns" not therein mentioned (*h*), or at all events so as to bind in equity assigns who have actual or constructive notice of them (*i*). But a covenant by the lessor not to build a public-house within half a mile of the demised premises does not run with the land, and cannot be sued on by assignees of the lease (*k*). Any such covenant must be fortified by a proviso for re-entry, otherwise the breach of it will not support an ejectment, but only an action for damages (*l*), or claim for a writ of injunction (*m*).

Covenants
against Trade
run with
the Land.

Covenants in restraint of trade in a trading locality are not generally considered usual covenants (*n*); but whether they are so or not is a question of fact, and where the defendant agreed to purchase the lease of a public-house described as held "under common and usual covenants," and the lease was found to contain a proviso for re-entry upon any business but that of a publican being carried on, the plaintiff succeeded in enforcing the agreement upon evidence that the proviso for re-entry was inserted in at least six out of ten leases of public-houses (*o*). A person agreed to take land for ninety years at a certain rent, and to build glass-houses, and *not to use* the premises

How far
"usual cove-
nants."

(*e*) *Ponsonby v. Adams*, 2 Bro. P. C. 431.

(*f*) *Tatem v. Chaplin*, 2 H. Blac. 133; *Sevell*, app., *Taylor*, resp., 7 C. B., N. S. 160. See ante, 149.

(*g*) *Gaskell v. Spry*, 1 B. & A. 619.

(*h*) *Wilkinson v. Rogers*, 2 De Gex, J. & S. 62; 12 W. R. 119, 284.

(*i*) *Jay v. Richardson*, 30 Beav. 563; *Wilson v. Hart*, L. R., 1 Ch. App. 463; 13 W. R. 988; *Catt v. Tourle*, L. R., 4 Ch. App. 654; 38 L. J., Ch. 665. See ante,

149 (*o*).

(*k*) *Thomas v. Hayward*, L. R., 4 Ex. 311; 38 L. J., Ex. 175; 20 L. T. 814.

(*l*) *Cole Ejec.* 432.

(*m*) See *Wilson v. Hart* and *Catt v. Tourle*, supra.

(*n*) *Wilbraham v. Livesey*, 18 Boav. 206; *Probert v. Parker*, 3 Myl. & K. 280, and see 112, ante.

(*o*) *Bennett v. Womack*, 3 C. & P. 96; 7 B. & C. 627.

CH. XVII. s. 4. *Covenant for or against Trades.* for any other purpose than a glass manufactory; it was held, that this agreement did not warrant the insertion of a covenant in the lease, compelling the tenant to carry on the business of a glass manufacturer during the whole term (*p*). A promise cannot be implied, from the mere fact of a lessee having entered into an agreement for a sub-tenancy, that he had power to let "without restriction as to the purposes for which the premises should be used" (*q*).

Illegal Trades.

A lease made for the express purpose of using the premises to boil oil and tar, contrary to the provisions of the Building Act (25 Geo. 3, c. 77) is void, though the intended use of the premises is not mentioned in the lease (*r*). So where a house is knowingly let or assigned for the purposes of a brothel, although it contains an express covenant not to use it as a brothel (*s*). Where A. procured B. to grant him a lease of premises, by means of a false representation that he intended to carry on a certain lawful trade therein, and having obtained possession, converted the premises into a common brothel, whereupon B. forcibly expelled him; it was held, that A. might maintain ejectment; the fraudulent misrepresentation and the subsequent illegal use of the premises not being sufficient at law to avoid the lease (*t*).

Covenant for private House.

The putting up of a blind in a window with the words "A. B. Coal Office," is a breach of a covenant to use the house as a private dwelling-house only (*u*), and putting up a similar blind or brass plate would be a breach of a covenant not "to affix any outward mark or show of business" (*x*).

Lodging-house.

We have seen (*y*) to what extent the letting of lodgings is a breach of a covenant not to sub-let; it does not seem to be settled by any case how far such a letting is a breach of a covenant not to exercise a business, &c., but it is submitted that although much may often depend on the wording of a covenant and the particular facts, the majority of covenants against business, &c. would be so construed to bar the letting of lodgings as ordinarily carried on.

Auction.

A covenant to use a house as a private house only is not broken by a sale by auction of the furniture of the house (*z*).

Lessee bound by restrictive Covenants of Lessor.

The lessee is bound by the restrictive covenants of his lessor, although he has no knowledge of them. Thus, where a house was granted to B. in fee, and A. covenanted with the grantor that he

Fielden v. Slater.

(*p*) *Doc d. Marquis of Dute v. Guest*, 15 M. & W. 160.

(*q*) *Jackson v. Cobbin*, 8 M. & W. 790; 1 Dowl., N. S. 96.

(*r*) *Gaslight Co. v. Turner*, 5 Bing. N. C. 666; 6 Id. 324.

(*s*) *Smith v. White*, L. R., 1 Eq. 626; 35 L. J., Ch. 454.

(*t*) *Feret v. Hill*, 15 C. B. 207; and see E., B. & E. 814, 815.

(*u*) *Wilkinson v. Rogers*, 2 De Gex, J. & S. 62; 10 Jur., N. S. 5, 162; 12 W. R. 119, 284.

(*x*) *Evans v. Davis*, L. R., 10 Ch. D. 747.

(*y*) *Ante*, 629.

(*z*) *Reeves v. Cattell*, 24 W. R. 485.

would not use it "as an inn, public-house, or tap-room, or for the sale of spirituous liquors or beer," and afterwards demised the house to B., who sold wine and spirits in bottle as a grocer, it was held, that though B. had no knowledge of A.'s covenant with the grantor he was put upon inquiry, was fixed with constructive notice of the covenant, and could be restrained by injunction from selling spirits (a).

CH. XVII. s. 4.
Covenant
for or against
Trades.

A covenant in a lease, that the lessee shall not exercise the trade of a butcher upon the premises, is broken by selling there raw meat by retail, although no beasts are slaughtered (b). So a covenant not to carry on the business of a pork-butcher on the demised premises, nor to use them for the sale of pork, is broken by the exposure there of carcasses of pigs for sale, although such carcasses are cut up and contracts for the sale thereof completed elsewhere in the neighbourhood (c).

Covenant
against Trade
of Butcher.

Where a lessee of a house and garden covenanted with the School. lessor not to use or exercise, or permit or suffer to be used or exercised, upon the demised premises, or any part thereof, any trade or business whatsoever, &c. without the licence of the lessor &c., and afterwards, without the licence of the lessor, assigned the lease to a schoolmaster, who carried on his business in the house and premises; it was held, that such assignment was a breach of the covenant (d). But a school has been held not to be a nuisance within the meaning of a general covenant against nuisances (e). A covenant not to carry on "any public business" in a house, but that it should "be used solely as a private dwelling-house," is broken by using it as a day-school and dancing academy, notwithstanding that the next-door neighbours make no complaints (f), and in *German v. Chapman* (g) it was held by the Court of Appeal that a covenant—of even date with a conveyance of sale—that no building to be erected on the four-acre plot of land sold "should be used or occupied otherwise than as a private residence only, and not for any purpose of trade" was broken by the erection of a boarding-school large enough to accommodate 100 girls, but supported by voluntary contributions, being an "Institution for the Education of the Daughters of Missionaries."

German v.
Chapman.

A hospital, the patients of which make small payments according Hospital.

(a) *Fielden v. Slater*, L. R., 7 Eq. 523; 38 L. J., Ch. 379; 20 L. T. 112; 17 W. R. 485.

(b) *Doe d. Gaskell v. Spry*, 1 B. & A. 617.

(c) *Doe d. Davis v. Elsom*, Moo. & M. 189.

(d) *Doe d. Bish v. Keeling*, 1 M. & S. 95; *Kemp v. Sober*, 1 Sim., N. S. 517.

(e) *Harrison v. Good*, L. R., 11 Eq. 338;

40 L. J., Ch. 294; 24 L. T. 263; 19 W. R. 346.

(f) *Wickenden v. Webster*, 6 E. & B. 387; *Johnstone v. Hall*, 2 K. & J. 414; 25 L. J., Ch. 462.

(g) L. R., 7 Ch. D. 271; 47 L. J., Ch. 250; 37 L. T. 685; 26 W. R. 149, C. A., reversing decision of Bacon, V.-C., 37 L. T. 265.

CH. XVII. s. 4. *Covenant for or against Trades.* to their means, is a "business" within a covenant by lessee "not to carry on any trade business or dealing whatsoever, or anything of the nature thereof" upon the demised premises (*h*). This was held in a case where the hospital was a "throat and chest" hospital, and the covenant also contained the words, "or suffer any act or thing which may be or grow to the annoyance, damage, injury, prejudice, or inconvenience of the neighbouring premises." Upon these words also there was held to have been a breach of the covenant, so that the case may be supported on another ground. The injunction granted was "not to be enforced for two months."

Shop A covenant not to convert a dwelling-house into a shop means a structural conversion, and not merely exposing goods for sale (*i*).

"Offensive Trade." A lease containing a covenant not to carry on certain specified trades or businesses or "any offensive trade," is not forfeited by using the premises as a private lunatic asylum (*k*), or for the business of a licensed victualler (*l*), or for the deposit of lucifer matches (*m*).

Sale of Beer, &c. Carrying on the business of a "retail brewer" has been held to be no breach of a covenant not to carry on the business of a common brewer or retailer of beer (*n*). More recently, a covenant made in 1854 not to use the trade or calling of a seller by retail of "wine, beer, spirits or spirituous liquors," was held not to be broken by the sale of wine and spirits in bottle by a grocer, under an act passed in 1861 (24 & 25 Vict. c. 21), on the ground that, at the time the covenant was made, this would not have been a selling by retail (*o*). It is expressly provided by statute that any covenant in a lease "between any landlord and tenant" against the trade of a victualler or publican being carried on "in any house mentioned or comprised" in the lease, or against the house being used as a "public-house or ale-house," shall apply to every person licensed to sell beer or cider under the Beer Act, 1830 (*p*), and likewise to every person licensed to sell wine *to be consumed on the premises* under the Wine Act, 1860 (*q*).

Application of Beer Acts, &c. to Licences prior thereto.

'Vintner.' The expression "vintner" in such a covenant has been held to apply to a person selling wine not to be drunk on the premises (*r*), and a covenant not to use a house as a *beer-shop* or public-house has been held to be broken by the sale of beer *not to be drunk on the premises* (*s*), to which kind of sale, however, a covenant not to use a house as a

(*h*) *Bramwell v. Lacy*, L. R., 10 Ch. D. 691; 48 L. J., Ch. 339; 40 L. T. 361; 27 W. R. 463, per Jessel, M. R.

(*i*) *Wilkinson v. Rogers*, 2 Do Gex, J. & S. 62; 12 W. R. 119, 284.

(*k*) *Doe d. Wetherell v. Bird*, 6 C. & P. 195; 2 A. & E. 161.

(*l*) *Jones v. Thorne*, 1 B. & C. 715.

(*m*) *Hickman v. Isaacs*, 4 L. T. 285. Here the words were "noisome or offensive."

(*n*) *Simons v. Farren*, 1 Bing. N. C. 126, 272.

(*o*) *Jones v. Bone*, L. R., 9 Eq. 674; 39 L. J., Ch. 405; 23 L. T. 304; 18 W. R. 489; distinguishing *Fielden v. Slater*, *supra* (*a*). See also *Pease v. Coats*, L. R., 2 Eq. 688.

(*p*) 1 Will. 4, c. 64, s. 31.

(*q*) 23 Vict. c. 27, s. 44.

(*r*) *Wells v. Attenborough*, 24 L. T. 312.

(*s*) *St. Albans (Bishop of) v. Battersby*, 3 Q. B. D. 359; 47 L. J., Q. B. 571; 38 L. T. 685; 26 W. R. 678.

beer-house had previously been held not to extend (*t*). In construing a covenant not to carry on any offensive trade or business on premises demised, much will depend on the situation of the premises: and it is particularly worthy of consideration, whether such trade as that complained of was carried on there at the time of the demise; for if it were, it could scarcely be thought to come within the covenant (*u*).

Cn.XVII.s.4.
Covenant
for or against
Trades.

In *Croft v. Lumley*, a lease of the Opera House contained a covenant on the part of the lessee not to use the house for any but purposes of a theatrical kind, and "to use his best endeavours to improve" the house for that purpose. The house was closed at the end of the season of 1852, and was not opened at all during the following year. It was held by the House of Lords that this was not a breach of the covenant (*x*). And a covenant to use the demised premises "as a post-office and not for any other purpose," was held not to be broken by the issue of Inland Revenue licences under the authority of 32 & 33 Vict. c. 14, s. 18 (*y*).

Theatrical
Covenant.
Croft v.
Lumley.

Post office.

If a lessee exercise a trade upon the demised premises, by which his lease is forfeited, the landlord does not, by merely lying by and witnessing the act for six years, waive the forfeiture, some positive act of waiver being necessary; but if he permit the tenant to expend money in improvements to adapt them to that trade, it would be evidence for the jury of his consent to their being so used (*z*). If rent be received for twenty years, with full knowledge of the breach of covenant, and without any objection, a licence *under seal* may be presumed and found by the jury (*a*). Where there is a covenant against carrying on a particular trade without a written licence, the mere fact of the lessor's suffering the tenant to carry on one trade on the premises will not afterwards authorize his carrying on another without a written licence (*b*).

Waiver of
Forfeiture.

A covenant not to carry on or suffer upon the demised premises during the term any specified trades or businesses, or any trade or business whatever, is a covenant of a *continuing nature*, and broken from day to day so long as any prohibited trade or business is carried on (*c*); but where a plumber was found to be in occupation of the

Continuing
breach.

(*t*) *London and North Western R. Co. v. Garnett*, L. R., 9 Eq. 26; 39 L. J., Ch. 25; 21 L. T. 352; 18 W. R. 246.

(*u*) *Gutteridge v. Munyard*, 7 C. & P. 129, per Tindal, C. J.

(*x*) *Croft v. Lumley*, 6 H. L. Cas. 672; 27 L. J., Q. B. 321.

(*y*) *Wadham v. Postmaster-General*, 24 L. T. 545. And see *Doe v. Churchwardens of Rugeley*, 6 Q. B. 107, where a covenant to use a house as a poor-house only, was held not to be broken by ceasing so to use it after the passing of the Poor Law

Amendment Act, which compelled the non-user.

(*z*) *Doe d. Sheppard v. Allen*, 3 Taunt. 78; *Doe d. Boscawen v. Bliss*, 4 Taunt. 735; *Doe d. Bryan v. Banks*, 4 B. & A. 401.

(*a*) *Gibson v. Doeg*, 2 H. & N. 616; 27 L. J., Ex. 37; *Bridges v. Longman*, 24 Beav. 27.

(*b*) *Macher v. Foundling Hospital*, 1 V. & B. 188; 23 & 24 Vict. c. 38, s. 6.

(*c*) *Doe d. Ambler v. Woodbridge*, 9 B. & C. 376; Cole Ejec. 433.

CH. XVII. s. 4. demised premises, and the landlord had received two quarters' rent with knowledge of the occupation, it was said that the waiver by receipt of rent must be taken to extend to some *term*, and that the plumber must be supposed to have had at least a tenancy from year to year, so that an ejectionment could not be sustained (*d*).

Covenants to work Mines. An agreement to work a mine as long as it is "fairly workable," does not oblige the tenant to work it at a dead loss (*e*). "Coal seams workable as coal seams," means workable at a profit, including the coal and fire clay, &c. to which the tenant is entitled (*f*). Where lessees of mines entered into an absolute unqualified covenant to get 2,000 tons of rock salt in each year during the continuance of the term, or pay for the deficiency: held, that they were liable, whether the salt could be got easily or with difficulty, and that whether it existed at all was immaterial (*g*). So, where lessees of a mine had covenanted with all reasonable diligence to sink the shafts down to the salt: held, that they were bound to do so, although it might be an unreasonable application of time and labour (*g*). So, where the lessees of a mine covenanted to work it during the continuance of the term in a proper and workmanlike manner, it was held, that they must be taken to have covenanted to work the mine *in some way*, in as prudent and proper a manner as they could under the circumstances, and therefore had no right to abandon the works altogether, notwithstanding that the mine was drowned by an influx of brine, which rendered it impossible to work the mine at a profit (*g*). A lessee of iron mines covenanted to work them, unless prevented by accident or want of materials, or unless the ironstone should be insufficient in quantity or quality, or would not by itself, or with a proper mixture or process, make good common pig-iron. It was held, that the mixture intended was not necessarily of ingredients procurable on the demised premises (*h*). In another case, there was a demise of all mines which had been, or during the demise should be, discovered or opened under certain lands, and there was a covenant by the lessee that he would work the said mines in a proper and workmanlike manner; and it was held, that no action lay on the covenant if the mines had never been worked either before or since the demise (*i*). On the construction of a proviso that the lease should be void if the tenant ceased working at any time for two years, it was held, that a fraudulent working for a short time would not prevent a forfeiture (*k*).

Public House Covenants.

Where a lessee covenanted to use his utmost endeavours to continue

(*d*) *Griffin v. Tomkins*, 42 L. T. 459; see *Watford v. Hawkins*, L. R., 10 C. P. 342, ante, 300, for the ratio decidendi of this case.

(*e*) *Jones v. Shears*, 7 C. & P. 346.

(*f*) *Curr v. Benson*, L. R., 3 Ch. App. 524.

(*g*) *Jervis v. Tomkinson*, 1 H. & N. 196.

(*h*) *Foley v. Addenbrooke*, 13 M. & W. 174.

(*i*) *Quarrington v. Arthur*, 10 M. & W. 335.

(*k*) *Doe d. Bryan v. Bancks*, 4 B. & A. 401; *Gow*, 220.

the house open as a public-house, and the licence was taken away by the magistrates on account of the disorderly conduct of a subtenant, and was not renewed for six years, when the lease expired; it was held, that the covenant was broken, because the lessee had done no act to endeavour to get the licence renewed (*l*). But there is no implied covenant by the lessee of a public-house that he will do no act whereby the licence shall become forfeited (*m*); and even an express covenant that the lessee would do no act which could or might "affect, lessen, or make void" the licence was held not to be broken by a conviction of the lessee which might have been but was not recorded on his licence under the Licensing Acts (*n*). Moreover, an agreement not to do anything to "imperil" the licence of a beer house has been held not to be broken by the mere absence of the licensee away at sea (*o*). A stipulation for similar covenants to those of an old lease will not, if a licence has become forfeited, entitle the intending landlord to a covenant to procure a licence, but only to a covenant for best endeavour to obtain and keep up one (*p*).

CH. XVII. s. 4.
*Covenant
for or against
Trades.*

Public House
Covenants—
contd.
Wooler v.
Knott.

It may be here stated that, by sect. 56 of the Licensing Act, 1872 (35 & 36 Vict. c. 94), "where any tenant of any licensed premises is convicted of an offence" against that act, and such offence is one, the repetition of which may render the premises liable to be disqualified from receiving a licence for any period," the clerk of the peace is bound to serve notice of the conviction upon the owner of the premises. By the same section, the owner may appeal to petty sessions against a disqualification of the licensed premises on the grounds only—(1) that the required notice has not been served; (2) "that the tenant by whom the offence was committed held under a contract made prior to the commencement of the act, and that the owner could not legally have evicted the tenant in the interval between the commission of the offence, in respect of which the disqualifying order was made, and the receipt by him of the notice of the immediately preceding offence which on repetition renders the premises liable to be disqualified from receiving a licence at any period;" or (3) "that the offence in respect of which the disqualifying order was made occurred so soon after the receipt of such last-mentioned notice that the owner, notwithstanding he had legal power to evict the tenant, could not with reasonable diligence have exercised that power in the interval which occurred between the said notice and the second offence." Moreover, by sect. 15 of the Licensing Act, 1874 (37 & 38 Vict. c. 49), a temporary authority may be obtained by or on behalf of the landlord of licensed premises to carry on the business in case

Protection of
Landlord under
Licensing
Acts.

Temporary
Authority for
Landlord to
sell.

(*l*) *Linder v. Prior*, 8 C. & P. 518.

(*m*) *Maw v. Hindmarsh*, 28 L. T. 644.

(*n*) *Wooler v. Knott*, L. R., 1 Ex. D. 265; 45 L. J., Ex. 313; 34 L. T. 362;

24 W. R. 1004 (C. A.).

(*o*) *Moore v. Robinson*, 48 L. J., Q. B. 156, per Lush, J.

(*p*) *Shepherd v. Walker*, 34 L. T. 230.

CH. XVII. s. 4. of the licence of the tenant being declared forfeited on conviction of felony or of certain offences against the licensing acts therein mentioned.

Covenant for or against Trades.

Covenant by Landlord not to let adjoining House for similar Trade.
Kemp v. Bird.

A covenant by a landlord of an eating-house not to let any house in the same street as the demised premises "for the purpose of carrying on the business of an eating-house" will not be construed to oblige the landlord to enforce a covenant by the lessee of an adjoining house not to carry on any business without the consent of the lessor, unless it be shown that the adjoining house was let with the intention of allowing the prohibited business to be carried on (g).

Permission of Sale by Auction.
Tuleman v. Portbury.

A lease of a house in a town not unfrequently contains a covenant that the lessee will not permit a sale by auction therein without the consent of the lessor. Such a covenant was held broken where the lessee gave a bill of sale on his goods, with power to the grantee to sell by auction in default of payment, although the lessee had mortgaged the house by a sublease, and executed a general assignment for the benefit of his creditors (r). A covenant to use a house as a private house only is not broken by a sale by auction of the furniture (s).

SECT. 5.—*Dealing with Particular Persons.*

Contracts to deal with Lessor only.

Covenants or undertakings entered into by the lessee to deal with the lessor alone in the way of trade, or indeed any other mode of binding a party to purchase articles of particular individuals, are not favoured by the courts. The question upon the validity of such covenants has generally arisen with respect to leases granted by brewers to publicans, to enforce which it must be proved that *good beer*—"good marketable beer" (t)—was supplied (u); and the quality cannot be shown to be good by evidence that the brewer served good beer to his other customers at the same period of time (u). It is, however, now clearly settled that such covenants, which are extremely common, are legal and binding in equity on an assignee, whether they run with the land or not, provided he have actual or constructive notice of them (x).

(g) *Kemp v. Bird*, L. R., 5 Ch. D. 974; 46 L. J., Ch. 828; 37 L. T. 53; 25 W. R. 838 (C. A.).

(r) *Tuleman v. Portbury*, L. R., 7 Q. B. 344; 41 L. J., Q. B. 98; 26 L. T., 292; 20 W. R. 441 (Ex. Ch.). A private house where a sale by auction takes place has been held a "place of public resort" within the Vagrant Act, 5 Geo. 4, c. 83, s. 4; *Sewell*, app. v. *Taylor*, resp., 7 C. B., N. S. 160.

(s) *Reeves v. Cattell*, 24 W. R. 485.

(t) *Luker v. Dennis*, L. R., 7 Ch. D. 227; 47 L. J., Ch. 174; 37 L. T. 827; 26 W. R. 167, per Fry, J.

(u) *Holcombe v. Hewson*, 2 Camp. 391; *Cooper v. Twibill*, 3 Camp. 286, n.; *Thorn-ton v. Sherratt*, 8 Taunt. 529.

(x) *Wilson v. Hart*, L. R., 1 Ch. Ap. 463; *Catt v. Tourle*, L. R., 4 Ch. Ap. 654; 659; *Luker v. Dennis*, ubi supra.

Where a licensed public house is taken under the Lands Clauses Consolidation Act, 1845, the brewers are entitled, by virtue of sect. 18 of that act, to compensation for the value of the premises as increased to them by such covenant (*y*). But for rating purposes, the brewery on the one hand and the licensed public house on the other, are to be valued and rated irrespective of any such covenant (*z*).

Where, in the conditions of sale of a public house, it was described as a free public house, and the lease contained a clause of this nature, it was held, that the purchaser was not bound to complete his purchase, and might recover back his deposit, notwithstanding the lease was read over by the auctioneer at the time of sale (*a*). Where the lessee of a public house covenanted, for himself and his assigns, with his lessors (brewers) to take all his beer of them, or their successors in their said trade, and the lessors sold their trade, and the public house, with other premises, to third persons, who removed their business to a short distance; it was held, that the trade of the lessors was determined, and that their assignee could not take advantage of the covenant, on the assignee of the lessee purchasing beer from another brewer (*b*).

Where there was a lease of limeworks, with a stipulation that the lessor should furnish, and the lessee take, coals from particular collieries; it was held, that the lessee could not, on failure by the lessor to raise the full quantity of coals, resort to other collieries for the whole of his supply, but only for the deficiency (*c*).

SECT. 6.—Trading within a certain Distance.

A covenant to restrain a person from exercising a trade is not illegal if it be not to the general prejudice of the public, and the consideration be reasonable (*d*): there is, therefore, no objection to a covenant, by which a party binds himself not to exercise a particular trade within a specified distance of premises which he has transferred to another, for the purpose of carrying on the same trade (*e*). And in such case he may be restrained by injunction from so doing, even as the foreman or workman of another person (*f*); nor will he be allowed

CH. XVII. s. 5.

Dealing with Particular Persons.

Compensation in respect of restrictive Covenant under Lands Clauses Acts. Sale of House held under restrictive Covenant.

Contracts in Restraint of Trade within a given Distance.

Mitchell v. Reynolds.

(*y*) *Bourne v. Mayor, &c. of Liverpool*, 33 L. J., Q. B. 15; 10 Jur., N. S. 125.

(*z*) *Overseers of Sunderland, app., Guardians of Sunderland Union, resp.*, 18 C. B., N. S. 531; 34 L. J., C. P. 121.

(*a*) *Jones v. Edney*, 3 Camp. 285.

(*b*) *Doe d. Calvert v. Reid*, 10 B. & C. 849.

(*c*) *Wight v. Dicksons*, 1 Dow, 141.

(*d*) *Chesman v. Nainby*, 2 Str. 739; *Morris v. Coleman*, 18 Ves. 438; *Homer v.*

Ashford, 3 Bing. 322; *Archer v. Marsh*, 6 A. & E. 959; *Mallon v. May*, 11 M. & W. 653, 655; *Mumford v. Gething*, 7 C. B., N. S. 305; 29 L. J., C. P. 105.

(*e*) *Mitchell v. Reynolds*, 1 P. Wins. 181; 1 Smith L. C. (8th ed.); *Pemberton v. Faughan*, 10 Q. B. 87; *Elves v. Crofts*, 10 C. B. 241; *Bryson v. Whitehead*, 1 Sim. & Stu. 74.

(*f*) *Newlin v. Dobell*, 19 L. T., N. S. 403.

CH. XVII. s. 6. *Trading within a certain Distance.* to break his contract even upon payment of the stipulated penalty (if any), with costs (*g*). But a covenant by the lessor of a brewery, that he will not, during the continuance of the demise, carry on the business of a brewer, or agent for the sale of ale, &c. in S. or elsewhere, or in any other manner howsoever be concerned in the business, is void (*h*). So a bond not to follow or be employed in the business of a coal merchant for nine months (without any limit as to space or distance), is void (*i*). The court will not inquire into the *adequacy* of the consideration for the restriction when it appears to possess some bonâ fide legal value; but if it be merely colourable, the restraint will be void (*k*). A mere technical or nominal consideration is insufficient (*l*). The contract being under seal will not dispense with the necessity for a sufficient legal consideration to support a stipulation in restraint of trade (*m*).

Distance—
measured on
Map.
Mouflet v.
Cole.

The distance is not to be measured by the nearest available mode of access, but by a straight line drawn from one place to the other on a map (*n*). If the parties wish the distance to be measured otherwise, they must use express words (*o*).

SECT. 7.—*Re-delivery of Fixtures, Goods, Land, &c.*

Covenants to
re-deliver
Fixtures, &c.

Where fixtures, furniture, or other goods and chattels, are leased together with houses, it is usual to attach a schedule of them to the lease, and to insert a covenant by the lessee to re-deliver them in the same condition at the end of the term (*p*). The object in doing this is to give the lessor a remedy on the covenant (with clearer evidence) for any damage sustained by their being removed or injured during the term (*q*). Where a lessee of a coal mine had covenanted at the end of the term to yield up the works and mines and all ways and roads in good repair, order and condition, so that the works might be continued and carried on by the lessor: held, that such covenant did not include wooden sleepers, or iron tram-plates fastened to such wooden sleepers, used for the purpose of a railway or tramway from and to the mines (*r*).

(*g*) *Howard v. Woodward*, 34 L. J., Ch. 47; *Coles v. Sims*, 5 De Gex, M. & G. 1; 23 L. J., Ch. 258; *Long v. Bowring*, 33 Beav. 585; *French v. Macale*, 2 Dru. & War. 269, 273.

(*h*) *Hinde v. Gray*, 1 M. & G. 195; and see *Horner v. Graves*, 7 Bing. 735; which appears to have been overruled in *Error*, 6 A. & E. 966.

(*i*) *Ward v. Byrne*, 5 M. & W. 548, 561; *Hunlocke v. Blacklowe*, 2 Wms. Saund. 156.

(*k*) *Hitchcock v. Coker*, 6 A. & E. 438,

447; *Archer v. Marsh*, 6 A. & E. 959; *Pilkington v. Scott*, 15 M. & W. 657.

(*l*) *Young v. Timmins*, 1 C. & J. 331.

(*m*) *Prugnall v. Gosse*, Aleyn, 67; *Tailors of Exeter v. Clarke*, 2 Show. 350; *Hutton v. Parker*, 7 Dowl. 739.

(*n*) *Mouflet v. Cole*, L. R., 8 Ex. 32; 42 L. J., Ex. 8; 27 L. T. 678 (Ex. Ch.).

(*o*) See *Atkyns v. Kinnear*, 4 Exch. 76.

(*p*) *Ante*, 608.

(*q*) *Ante*, 608.

(*r*) *Duke of Beaufort v. Bates*, 31 L. J., Ch. 481; 10 W. R. 200.

Sometimes the lessor reserves the powers of taking such portions of the land demised as he may want for building or other purposes, upon giving a specified notice to the lessee, and making a proportionable abatement out of the rent (*s*). Such provisoes may be perfectly reasonable and just, and have often been recognized by the courts both of law and equity. Such a power has been extended to the whole of the land demised (*t*); where the proviso was, that the lessor might from time to time have any part of the land leased, it was held, he might require possession of the whole (*u*). In the same case it was held, as the proviso gave the lessor power to take possession, it did not operate by way of covenant merely (*u*). But in another case, where there was no such power, it was held to operate only as a covenant (*x*).

CH. XVII. s. 7.
*Re-delivery of
Furniture, &c.*

Covenants to
give up Part
of Land.

SECT. 8.—Covenants for Quiet Enjoyment.

(a) Implied.

All covenants between a lessor and his lessee are either express covenants, or covenants in law, that is to say, implied covenants. By a covenant in law for quiet enjoyment the lessee is to enjoy his lease against the lawful entry, eviction or interruption of any man, but not against tortious entries, evictions or interruptions; and the reason of the law is solid and clear, because against tortious acts the lessee has proper remedy against the wrongdoers (*y*).

Covenants in
Law for Quiet
Enjoyment.

A contract for quiet enjoyment is implied by law from a parol demise (*z*).

Contract by
Parol Demise.

If a man by deed demise lands for years, without any express covenant for title or for quiet enjoyment, an action of covenant lies upon the word "demise," which imports or makes a covenant in law for quiet enjoyment during the continuance of the term, without any lawful interruption or disturbance by any person or persons having any legal title or right of entry, &c. (*a*).

From the
Word "De-
mise."

By 8 & 9 Vict. c. 106, s. 4, the word "give" or "grant" in a deed executed after the 1st October, 1845, "shall not imply any covenant in law in respect of any tenements or hereditaments, except so far as the word 'give' or the word 'grant' may, by force of any act of parliament, imply a covenant" (*as in railway acts, &c.*).

8 & 9 Vict.
c. 106, s. 4.
No Covenant
implied from
"Give" or
"Grant."

(e) See Forms, post, Appendix A., Sects. 23, 24.

(i) *Doe d. Wilson v. Abel*, 2 M. & S. 541.

(u) *Doe d. Gardner v. Kennard*, 12 Q. B. 244.

(x) *Doe d. Wilson v. Phillips*, 2 Bing. 13.

(y) *Hayes v. Bickerstaff, Vaugh.* 118; *Lucy v. Levinson*, Freem. 103; 3 Keb. 163;

Tisdale v. Sir W. Essex, Hob. 34; Platt on Covenants, 313.

(z) *Bandy v. Cartwright*, 8 Ex. 913; *Hall v. City of London Brewery Co.*, 31 L. J., Q. B. 257.

(a) *Williams v. Durrell*, 1 C. B. 429; *Smith L. & T.* 280 (2nd ed.). See ante, 158.

CH. XVII. s. 8.

*For Quiet
Enjoyment
(Implied).*

No implied
Covenant or
Promise when
an express
one.

Any express covenant or promise in a lease, either for title or quiet enjoyment, however qualified or restricted, will prevent any more general covenant or promise on the same subject being implied by law, from the word “demise” or any equivalent word—the maxim being *expressum facit cessare tacitum* (b). Where a person held under an agreement which amounted to an actual demise, subject to the same conditions as were mentioned in the memorandum under which the lessor held the premises, and it did not appear what those conditions were, it was held, that a contract for quiet enjoyment could not be implied (c). By writing not under seal signed by plaintiff and defendant, plaintiff agreed to take of defendant a farm at a yearly rent, “the tenancy to commence from the 29th of September next, for a term of eight years, subject to a lease,” to be drawn up by defendant: held, that there was no contract by the defendant *to give the plaintiff possession* of the farm on the day named; for that possession was to be given only on the commencement of a tenancy *under a lease for eight years*, and not under that agreement, which was void as a lease under 8 & 9 Vict. c. 106, s. 3, nor under an implied tenancy at will, or from year to year, to be created by entry, or entry and payment of rent under that agreement (d). But where there is an *actual demise* for one year or more, the lessor impliedly contracts to give the lessee possession at the commencement of the term, and if he fails to do so, by reason of a previous tenant wrongfully holding over, the lessee may recover damages, and is not driven to bring ejectment against the previous tenant (e). By agreeing to grant a lease, the intended lessor does not impliedly engage for a general warranty, nor undertake to deliver an abstract of his title (f); nor that he has a good title to the fee simple, and will deliver a written abstract (g); but he does impliedly promise that he has title to grant such a lease (h).

Cesser of im-
plied Cove-
nant.

A covenant in law, i. e. an implied covenant, ceases with the estate of the lessor, and does not necessarily continue during the whole term expressed to be granted. Therefore, if a tenant for life demise by indenture for fifteen years, without any express covenant for quiet enjoyment, upon his death during the term the covenant in law implied from the word “demise” will cease (i), although an express covenant would continue in force to the end of the term expressed to be granted (k). Where tenant for life, with remainder over,

(b) See post, 645.

(c) *Messent v. Reynolds*, 3 O. & B. 194.

(d) *Drury v. Macnamara*, 5 E. & B. 612;
Brashier v. Jackson, 6 M. & W. 549; 8
Dowl. 784.

(e) *Coe v. Clay*, 5 Bing. 440; *Jinks v. Edwards*, 11 Exch. 775; *Ludwell v. Newman*, 6 T. R. 458.

(f) *Gwillim v. Stone*, 3 Taunt. 433.

(g) *Temple v. Brown*, 6 Taunt. 60.

(h) *Stranks v. St. John*, L. R., 2 C. P. 376; 36 L. J., C. P. 118; *Anthony v. Brecon Market Co.*, L. R., 2 Ex. 167.

(i) See ante, 643.

(k) *Evans v. Vaughan*, 4 B. & C. 261
(2nd point).

demised by indenture for years, without any express covenant for quiet enjoyment, and the lessee was evicted by the remainderman after the death of the tenant for life, but before the expiration of the term: it was held, that he could not maintain an action of covenant against the executor of the tenant for life (*l*). If the incumbent of a living let lands belonging to the benefice for a term of years, his resignation of the living during the term is a breach of the contract (*m*). Where an agreement for letting part of a house at a rent of 30*l.*, contained a clause that the tenant should be liable only to the said rent; such clause was held to be a clause of indemnity, and that an action would lie upon it where the tenant's goods were seized under a distress for rent by the original landlord, though the party giving the indemnity was not the immediate tenant of such original landlord; it was also held, that if no notice be given to the party indemnifying, and he pay the rent, and protect his tenant's goods, such tenant cannot recover specially on a count framed on the indemnity, though he may recover the money on the common counts (*n*). In these cases of implied contract of indemnity against the consequences of distress, an action of tort is the proper form of remedy (*o*).

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*For Quiet
Enjoyment
(Implied).*

(b) *Express Covenant for Quiet Enjoyment.*

It is material to observe that the express covenant for quiet enjoyment is usually a qualified one only, and is a less protection to the lessee than the implied one, inasmuch as it does not protect the lessee in case of an eviction by title paramount to that of the lessor, as we have seen that the implied covenant does. The usual *qualified* covenant for quiet enjoyment is to the following effect, viz.: "And the said [lessor] doth hereby for himself, his, heirs, executors and administrators, covenant with the said [lessee], his executors, administrators and assigns, that he and they paying the rent hereby reserved, and performing the covenants hereinbefore on his and their part contained, shall and may peaceably possess and enjoy the said demised premises for the term hereby granted, without any interruption or disturbance from or by the said [lessor], his [heirs or executors, administrators] or assigns, or any other person or persons claiming by, from or under him, them or any of them" (*p*). Such a covenant may be safely entered into by any lessor who never had any title whatever to the demised premises, or any part thereof; because any subsequent entry, eviction, ejectment, or other interruption or disturbance by the real owner, or by the party entitled to possession,

Express Cove-
nant for Quiet
Enjoyment is
usually less
than implied
one.

*Merrill v.
Frame.*

(*l*) *Adams v. Gibney*, 6 Bing. 656;
Woodhouse v. Jenkins, 9 Bing. 431.

(*m*) *Price v. Williams*, 1 M. & W. 6.

(*n*) *Evans v. Curtis*, 2 C. & P. 296.

(*o*) *Hancock v. Caffyn*, 8 Bing. 358.

(*p*) 8 & 9 Vict. c. 124, Sched. Form 12,
post, Appendix A., Sect. 1; see also
Forms, post, Appendix B., Sects. 12 and
14.

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*For Quiet
Enjoyment
(Express).*

or by any other person who does not claim "by, from or under" the lessor, would be no breach of such qualified covenant (*q*). The wrongful acts of a tenant of the lessor, under a previous lease, who does things not authorized by such lease, do not amount to a breach of the usual qualified covenant for quiet enjoyment (*r*). So, in conveyances containing the usual qualified covenants for title, &c. (*s*).

*Distress for
Land Tax.*

Even a distress for previous arrears of land tax due from the lessor would be no breach of the usual qualified covenant, because the collector does not claim by, from or under, but *against* the lessor (*t*).

*Distress or
Re-entry for
non-payment
of Ground
Rent.*

It has not been expressly decided whether a re-entry by the ground landlord for non-payment of ground rent, whether to distrain for it, or to forfeit the lease, is a breach; but it is conceived that in either case no breach would be committed on the part of the mesne landlord;—this is a case which is usually provided for by a covenant of the mesne landlord *with the sub-tenant* to pay the ground rent.

*Lessee is put
upon Inquiry
as to Title
and restrictive
Covenants of
Lessor.*

*Parker v.
Whyte.*

A lessee is a purchaser *pro tanto*, to whom the maxim *caveat emptor* applies (*u*) if he does not take advantage of his fair opportunities (*x*). Therefore, he must, at his peril, ascertain that the intended lessor has sufficient title to demise for the proposed term (*y*), and that his conveyance does not restrict him from permitting the premises to be used for any trade or business intended (*z*): or the lessee should (if possible) obtain from the lessor an *unqualified* covenant for quiet enjoyment during the term, without any interruption or disturbance by the lessor, "*or by any other person or persons whomsoever*;" i. e. against all persons having lawful title: or he must take his chance and run all risk as to the lessor's title. Where the lessee is to build upon or otherwise improve the demised premises, or pays a premium for the lease, he should take care either to investigate the lessor's title (or at all events to see the conveyance to him); or he should obtain an *unqualified* covenant for quiet enjoyment during the term (*a*). The lessor ought not to refuse to enter into such a covenant where no investigation of his title takes place. It is much more reasonable that he, rather than the tenant, should run any risk as to his own title, when he does not allow it to be investigated by or on behalf of the tenant. But it too often happens that an intended

(*q*) *Merrill v. Frame*, 4 Taunt. 329; *Smith L. & T.* 290 (2nd ed.); 2 Platt on Leases, 285.

(*r*) *Jeffryes v. Evans*, 19 C. B., N. S. 246; 34 L. J., Q. B. 261.

(*s*) *Thackeray v. Wood*, 5 B. & S. 325; 34 L. J., Q. B. 226.

(*t*) *Stanley v. Hayes*, 3 Q. B. 105.

(*u*) *Bealey v. Bealey*, L. R., 9 Ch. D. 103; 38 L. T. 844; 27 W. R. 184.

(*v*) *Id.*; *Hyde v. Warden*, 3 Ex. D. 72; 47 L. J., Ex. D. 191—C. A.

(*y*) *Spencer v. Marriott*, 1 B. & C. 457.

(*z*) See *Parker v. Whyte*, 1 H. & M. 167; 32 L. J., Ch. 520; *Jay v. Richardson*, 30 Beav. 563; *Clements v. Welles*, L. R., 1 Eq. 200; 35 Beav. 513; *Mitchell v. Steward*, L. R., 1 Eq. 541; *Wilson v. Hart*, L. R., 1 Ch. Ap. 463; *Dennett v. Atherton*, L. R., 7 Q. B. 316, and 650, post.

(*a*) See *Onions v. Cohen*, 2 H. & M. 354; 34 L. J., Ch. 338, for an instance in which an unqualified covenant was stipulated for and decreed.

lessee fears to lose the proposed lease by asking either for an investigation of the lessor's title or for an unqualified covenant for quiet enjoyment; indeed, he generally knows that nothing of the sort would be agreed to (*b*). And yet a sublessee, who neglects to inquire into the provisions of the original lease, does so at his own risk, and may, at the instance of the original lessor, be restrained by injunction from breaking the covenants in such lease, although they are not repeated in the sublease (*c*): or he may be ejected for a forfeiture, and perhaps have no remedy over against his immediate lessor (*d*). A tenant from year to year, equally with a tenant having a larger interest, is bound to make proper inquiries into his landlord's title, and he is affected with the consequences of not doing so (*e*).

The following cases have been determined upon the construction of express covenants for quiet enjoyment. A covenant for quiet enjoyment by the lessee, his executors, administrators and assigns, during the term, *he or they paying the rent thereby reserved and performing the covenants* on his and their part therein contained, is not a covenant subject to a condition precedent (*f*). The words "during the said term" mean during the whole term expressed to be granted, and not merely during the actual continuance of the term (*g*), although it is otherwise where the covenant is implied by law (*h*). A tenant for life, with a power of leasing, made a lease for years, in which was a clause that "he, for himself, his heirs and assigns, the said demised premises unto the said lessee, his executors, administrators and assigns, under the rent, covenants, conditions, exceptions and agreements before expressed, against all persons whatsoever lawfully claiming the same, shall and will during the said term warrant and defend:" held, that this amounted to an express covenant for quiet enjoyment during the whole term expressed to be granted (*i*).

A general covenant for quiet enjoyment without any interruption or disturbance by the lessor, his heirs or assigns, "or by any other person or persons whomsoever," does not extend to the *unlawful acts of third persons having no title* (*j*). The law will never adjudge that a lessor covenants against the *wrongful* acts of strangers, except his

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*For Quiet
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(Express).*

Decisions on
express Cove-
nants for
Quiet Enjoy-
ment.

Covenant for
Quiet Enjoy-
ment does not
extend to Acts
of Third Per-
sons having
no Title.

(*b*) And see the Vendor and Purchaser Act, 1874, ante, 228.

(*c*) *Herbert v. Maclean*, 12 Ir. Ch. R. 84; *Robson v. Flight*, 34 L. J., Ch. 101; 11 Jur., N. S. 147; *Mitchell v. Steward*, L. R., 1 Eq. 541.

(*d*) *Spencer v. Marriott*, 1 B. & C. 457; *Hayward v. Parke*, 16 C. B. 295, 357.

(*e*) *Wilson v. Hart*, L. R., 1 Ch. 463; 12 Jur., N. S. 460; 14 L. T. 499.

(*f*) *Dawson v. Dyer, Bart.*, 5 B. & Adol. 584; *Briant v. Pileher*, 16 C. B. 354; *Hayes v. Bickerstaff*, 2 Mod. 34;

Allen v. Babbington, Sid. 280; *Ludwell v. Newman*, 6 T. R. 458.

(*g*) *Evans v. Vaughan*, 4 B. & C. 261; *Williams v. Burrell*, 1 C. B. 402.

(*h*) Ante, 158.

(*i*) *Williams v. Burrell*, 1 C. B. 402; *Wotton v. Hele*, 2 Wms. Saund. 177.

(*j*) Year Bk. 22 Hen. 6, 52 b; 32 Hen. 6, 32 b; *Tisdale v. Sir W. Essex*, Hob. 34, 35; *Dudley v. Folliott*, 3 T. R. 585; *Foster v. Pierson*, 4 T. R. 617; *Young v. Raincock*, 7 C. B. 310.

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covenant is express to that purpose; for the law itself does defend every man against wrong; and therefore, though one warrants land to another expressly, [or covenants for quiet enjoyment *generally*,] yet he does not defend against tortious entries (*k*). “Where a man covenants to indemnify against all persons, this is but a covenant to indemnify against lawful title. And the reason is, because, as it regards such acts as may arise from rightful claims, a man may well be supposed to covenant against all the world; but it would be an extravagant extension of such a covenant, if it were good against all the acts which the folly or malice of strangers might suggest; and therefore the law has properly restrained it within its reasonable import; that is, to rightful title. It is, however, different where an individual is named, for there the covenantor is presumed to know the person against whose acts he is content to covenant, and may therefore be reasonably expected to stipulate against any disturbance from him, whether by lawful title or otherwise” (*l*). Therefore a covenant for quiet enjoyment, or for indemnity against all actions, suits, claims and demands whatsoever, both in law and equity, of certain *named persons*, extend to their unlawful acts, claims and demands, without any lawful right or title (*m*), as well as to their lawful acts (*n*).

Covenant for
 Quiet Enjoy-
 ment extends
 to all Acts of
 Lessor him-
 self.

The covenant applies to all interruptions and disturbances by the lessor himself (he being a party named) (*o*). Therefore if a lessor covenant that he will not interrupt the lessee in the enjoyment of a close demised, the erection by him of a gate on a necessary way leading to it, so as to intercept it, is a breach of the covenant, although the lessor had a legal right to erect the gate there, but for his covenant (*p*). So if the lessor of a mine excavates a stone quarry over it, in such a manner as thereby to interrupt the lessee in his occupation of the mine, that is a breach of the covenant for quiet enjoyment, whether the lessor has or has not a legal right to excavate the quarry (*q*). If the lessor covenant with the lessee that he has not done any act to prejudice the lease, but that the lessee shall enjoy it against all persons; in this case, the words “against all persons” refer to the first branch of the covenant, and are limited and restrained to acts done by him (*r*). Where the lessors covenanted that the lessee of a mill should enjoy the mill and stream without interruption by them, or by persons claiming under them, or by their acts or procurement, a diminution of the water occasioned by supplies under con-

(*k*) See note (*j*), ante, 647.

(*l*) *Nash v. Palmer*, 5 M. & S. 374, 379; *Foster v. Mapez*, Cro. Eliz. 213.

(*m*) *Fowle v. Welsh*, 1 B. & C. 28.

(*n*) *Foster v. Mapez*, supra; *Perry v. Edwards*, 1 Stra. 400.

(*o*) *Corus v. —*, Cro. Eliz. 544; *Lloyd v. Tomkies*, 1 T. R. 671.

(*p*) *Andrews v. Paradise*, 8 Mod. 318.

(*q*) *Shaw v. Stenton*, 2 H. & N. 858.

(*r*) *Shep. Touch.* 166.

tracts entered into by the lessors prior to making the lease, is not a breach of the covenant for quiet enjoyment (*s*). But where the covenants for title are general and absolute against all persons they will not be qualified by reference to other covenants, unless there are words either in the absolute covenants themselves, or in the preceding or subsequent ones, to connect them (*t*). Where A. B. covenanted with his lessee for quiet enjoyment as against any person "claiming by, from or under" him, it was held, that an eviction by a prior appointee of A. B. and C. D. was a breach of the covenant, and that the case was not altered by the grant to the lessee being "as far as in his power lay, or he lawfully might or could" (*u*). So an eviction by the lessor's widow, claiming under a settlement executed by him before the lease, constitutes a breach (*x*). So is an eviction by a tenant under a previous lease granted by the lessor (*y*). So is an injury to the foundations, committed under a previous mining lease granted by an ancestor of the lessor, expressly named in the lessor's covenant for quiet enjoyment (*z*). The usual qualified covenant for quiet enjoyment is broken by an eviction, molestation or disturbance of the lessee by persons claiming under a prior mortgage for a long term granted by the trustees of a settlement *with the concurrence of the defendant*, who joined therein and covenanted for payment of the mortgage money, and for title, &c. (*a*). In an action against executors in their own right, on a covenant for "good title and quiet enjoyment against any person or persons whatsoever," contained in an assignment of a lease of the testator by way of mortgage, it was held, that the cause of action must arise from some act of the covenantors (*b*). In a demise for 500 years the lessor covenanted that he had not done or permitted or suffered to be done any act whereby the property was encumbered: held, that his having assented to an act which he could not prevent was not a breach of the covenant (*c*). A covenant that the lessee shall quietly enjoy against all claiming, or *pretending to claim*, a right in the premises, extends to all interruptions, be the claim legal or not, provided it appear that the disturber do not claim under the lessee himself (*d*).

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For Quiet
Enjoyment
(Express).

A breach of the covenant for quiet enjoyment may occur either by a molestation arising from an action of any kind relating to the

(*s*) *Blatchford v. Mayor, &c. of Plymouth*, 3 Bing. N. C. 691; and see *Thackeray v. Wood*, 5 B. & S. 325; 33 L. J., Q. B. 275.

(*t*) *Smith v. Compton*, 3 B. & Adol. 189.

(*u*) *Calvert v. Sebright*, 15 Beav. 156; and see *Lock v. Furze*, 19 C. B., N. S. 96; 34 L. J., C. P. 201; 35 Id. 141; L. R., 1 C. P. 441.

(*x*) *Butler v. Swinnerton*, Cro. Jac. 656; Palm. 339; 2 Roll. 286.

(*y*) *Rolph v. Crouch*, L. R., 3 Ex. 44;

37 L. J., Ex. 8.

(*z*) *Taylor v. Shafto*, 16 L. T., N. S. 205.

(*a*) *Carpenter v. Parker*, 3 C. B., N. S. 206; 27 L. J., C. P. 78.

(*b*) *Noble v. Smith*, 1 H. Blac. 34.

(*c*) *Hobson v. Middleton*, 6 B. & C. 295; and see *Thackeray v. Wood*, 5 B. & S. 325; 34 L. J., Q. B. 226.

(*d*) *Chaplin v. Southgate*, 10 Mod. 384; 1 Comyn, 230; and see *Ibbet v. De la Salle*, 6 H. & N. 233; 30 L. J., Ex. 44.

CH. XVII. s. 8. title or possession, or by any act by which the lessee is disturbed in the possession of the premises. Of the first sort is an ejectment by a person having a lawful title; or any other suit by which the peaceable occupation of the premises is prevented: thus, a covenant in a lease, that the lessee should quietly enjoy the estate discharged from tithes, is broken by a suit for them, although commenced after the expiration of the term (e): but where in covenant for quiet enjoyment the breach assigned was, "that the defendant had exhibited a bill in Chancery against him for ploughing meadow, and obtained an injunction, which had been dissolved with 20s. costs;" it was held on demurrer to be no breach of covenant, for the covenant was for quiet enjoyment, and this was a suit for waste (f).

Restriction of particular Use of Land.

On the other hand, any description of annoyance, on the part of the lessor himself, to the occupation of the premises, which prevents the lessee from enjoying his property in so ample a manner as he is entitled to do by the terms of the lease, amounts to a breach of the covenant for quiet enjoyment of the second sort: thus, if a man covenants that he will not interrupt the covenantee in the enjoyment of a close, the erection of a gate which intercepts it is a breach of the covenant, although he had a right to erect it (g). So if, after a demise of mines containing the usual covenant for quiet enjoyment, the lessor digs a quarry over the mines and makes holes, through which water percolates and escapes into the mines, although he had a legal right to work the quarry, his doing so in such a manner amounts to a breach of the covenant for quiet enjoyment of the mines (h). An action on the covenant for quiet enjoyment may be maintained for the disturbance of a way of necessity (i); or of a way by grant from the covenantor (k). It must be remembered, however, that the act done must be in the assertion of title, and not a mere tortious act for which an action of trespass might be maintained (l). And the restriction of the particular use of the land must be the act of the lessor himself, otherwise the action cannot be supported. A decree restraining a particular use of the land by reason of a covenant with the lessor, but not otherwise interfering with the title, is not a breach of the covenant for quiet enjoyment. This was held by the Exchequer Chamber in *Dennett v. Atherton* (m). There the defendant covenanted with the grantor, upon a conveyance of the premises to him in fee, not to permit any part of the premises to be used for selling beer, and afterwards let part of the premises with a covenant for

Dennett v. Atherton.

(e) *Laming v. Laming*, Cro. Eliz. 316.

(f) *Morgan v. Hunt*, 2 Ventr. 216.

(g) *Andrews v. Paradise*, 8 Mod. 318.

(h) *Shaw v. Stenton*, 2 H. & N. 858.

(i) *Morris v. Edgington*, 3 Taunt. 24.

(k) *Pomfret v. Ricraft*, 1 Saund. 322.

(l) *Sedden v. Senate*, 13 East, 72.

(m) L. R., 7 Q. B. 316; 41 L. J., Q. B. 166; affirming *Spencer v. Marriott*, 1 B. & C. 467.

quiet enjoyment on his part, and a covenant not to carry on particular trades (of which beer-selling was not one) on the part of the lessee. The term was assigned to the plaintiff, who had no notice of the defendant's restrictive covenant, and having used the premises as a beer-shop was restrained by an injunction in Chancery from so doing. The court decided that there was no breach of covenant, express or implied.

CH. XVII. s. 8.
For Quiet Enjoyment (Express).

Failure by a landlord under compulsion of a statute is no breach. Where a landlord covenanted to keep the demised premises available for storing cartridges, and for quiet enjoyment, and the Explosives Act, 1875, passed after the demise, made such storage illegal, it was held that the landlord might lawfully remove the cartridges, and committed no breach of the covenant for quiet enjoyment by so doing (u).

Breach under
Compulsion of
Statute.

*Newby v.
Sharpe.*

A covenant for quiet enjoyment does not oblige the lessor to rebuild or repair, in case the buildings are destroyed or injured by fire, tempest or otherwise (o).

Is not to re-
build.

The covenant for quiet enjoyment runs with the land (p), and is therefore binding on the assignees of the reversion; and may be rendered available by the assignees of the term. Where A. let to B., who assigned to C., and C. assigned to D., and B. had covenanted for quiet enjoyment with C. and his assigns, it was held by the Exchequer Chamber, that D. might maintain an action against B., on being ejected by A., for a forfeiture by B. before the assignment to C. (q).

Runs with
Land.

*Campbell v.
Lewis.*

When the covenant is general, the alleged breach must show an interruption or disturbance by some person having lawful title and right of entry (r). When the covenant applies to the acts of any particular person or persons *therein named*, an interruption or disturbance by any such person (whether lawful or not) amounts to a breach (s). Where the covenant is qualified and confined to interruptions and disturbances by the lessor, his heirs and assigns, "or by any other person or persons claiming by, from or under him, them or any of them," the breach must show an interruption or disturbance by the lessor (t), his heirs or assigns, or by some other person lawfully claiming by, from or under him, them or some of them (u). One who

Particulars of
Breaches.

(n) *Newby v. Sharpe*, 8 Ch. D. 39; 47 L. J., Ch. 617; 38 L. T. 583; 26 W. R. 686.

(o) *Brown v. Quilter*, Ambler, 620; ante, Chapter XVI.

(p) *Campbell v. Lewis*, 3 B. & Ald. 392, affirming *Lewis v. Campbell*, 8 Taunt. 715. See ante, 149.

(q) *Id.*

(r) *Lucy v. Leviston*, Freeman, 103; 3 Keb. 163; *Dudley v. Folliott*, 3 T. R. 585; *Foster v. Pierson*, 4 T. R. 617; *Young v. Raincock*, 7 C. B. 310; *Hall v. City of*

London Brewery Co., 2 B. & S. 737; 31 L. J., Q. B. 257; *Jeffries v. Evans*, 19 C. B., N. S. 246.

(s) *Foster v. Mapes*, Cro. Eliz. 212; *Lucy v. Leviston*, Freeman, 103; 3 Keb. 163; *Fowle v. Welsh*, 1 B. & C. 29; *Nash v. Palmer*, 5 M. & S. 374.

(t) *Corus v. —*, Cro. Eliz. 544; *Andrews v. Paradise*, 8 Mod. 318; *Lloyd v. Tomkies*, 1 T. R. 671; *Shaw v. Stenton*, 2 H. & N. 858.

(u) Ante, 645.

CH. XVII. s. 8. claims under a deed of settlement made by A. is a person claiming under A. within the meaning of the usual qualified covenant for quiet enjoyment (*x*), as also is a person who claims under a lease previously granted by the lessor (*y*), although such lease has expired (*z*). The breach must have happened during the term, and not prior to its commencement (*a*).

(*x*) *Hurd v. Fletcher*, 1 Doug. 43; *Evans v. Vaughan*, 4 B. & C. 261; *Carpenter v. Purker*, 3 C. B., N. S. 206; 27 L. J., C. P. 78.

(*y*) *Rolph v. Crouch*, L. R., 3 Ex. 44; 37 L. J., Ex. 8.

(*z*) *Ludwell v. Newman*, 6 T. R. 468; *Coe v. Clay*, 5 Bing. 440; *Jinks v. Edwards*, 11 Exch. 775; but see *Jeffryes v. Evans*, 19 C. B., N. S. 246; 34 L. J., C. P. 261.

(*a*) *Ireland v. Birchem*, 2 Bing. N. C. 90.

CHAPTER XVIII.

OF RIGHTS OF COMMON, WAY, LIGHTS, WATER, AND SPORTING, AND
OF THE METROPOLITAN BUILDING ACTS.

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SECT. 1.—*Rights of Common (a).*(a) *Generally.*

COMMON is a right or liberty to take or use some part or portion of that which another person's lands, woods, waters, &c., naturally produce, without having any property in such lands, woods, waters, &c. (b). The most usual rights of common are—1. Common of pasture—that is, a right of liberty which one or more may have to feed their cattle on another man's land. 2. Common of turbary—that is, the liberty to cut turves in another's soil to be burnt in a house (c). 3. Common of estovers—that is, a right to take trees, loppings, shrubs or underwood in another's woods, coppices, &c. (d). 4. Common of piscary—that is, a right to fish in another's pond, pool or river.

Nature of
Rights of
Common.

A right of common is not a mere easement, but a *profit à prendre* in the soil of another. So is a right to hunt, shoot, fowl or fish in another's land or water, and to carry away whatever is so taken (e): so is a right to dig clay in another's land for the purpose of making bricks (f). But a right to deposit and mix dung, &c. upon adjoining land, and to make the same into manure, and carry away the same, is a mere easement and not a *profit à prendre* (g). So a right in the occupier of an ancient messuage to water his cattle at a pond, and to take the water thereof for domestic purposes, for the more convenient

Right of
Common not
mere Ease-
ment.

(a) And see Hall on Rights of Common and Profits à Prendre, A.D. 1871.

(b) Bac. Abr. tit. Common; Burton Comp. 353; Tudor's L. C. Real Prop. 108 (2nd ed.).

(c) Noy, 145; 3 Lev. 165; 7 East, 121.

(d) Cro. Jac. 25; Cro. Eliz. 820; 4 Co. R. 87 a; 5 Id. 25 a.

(e) *Wickham v. Hawker*, 7 M. & W. 63; *Bland v. Lipscombe*, 4 E. & B. 713, n.

(f) *Clayton v. Corby*, 2 Q. B. 813.

(g) *Pye v. Mumford*, 11 Q. B. 666, 668.

CH. XVIII.s.1 use of his messuage, is a mere easement and not a profit à prendre (*h*).
Rights of Common (Generally). A right of way is a mere easement and not an interest in the land itself (*i*). A right of common or other profit à prendre can exist only by grant under seal, or by prescription from time immemorial (which is always supposed to be founded on an ancient grant); or by user for thirty or sixty years pursuant to the Prescription Act (*k*), but not by custom (*l*). "The reason why a profit à prendre cannot be supported by a custom in an indefinite number of people is, that the subject of the profit à prendre would, in that case, be liable to be entirely destroyed" (*m*). A right to carry away the soil of another *without stint* cannot be claimed even by prescription; nor can the claim be sustained by evidence of a lost grant (*n*). The right of commoners in a common may be subservient to the right of the lord in the soil; so that the lord may dig clay pits there, or empower others to do so, without leaving sufficient herbage for the commoners, if such a right can be proved to have always been exercised by the lord (*o*). The owner of a common may, under the statute of 13 Edw. 1, st. 1 (Westm. 2), c. 46, erect thereon a house necessary for a beast-keeper or for a woodward (*p*).

Right of Common cannot exist by Custom.

Right of Lord to demise.

Prescriptive Rights at Common Law.

By the common law an enjoyment to confer a title to an easement or profit à prendre must have existed, (or be found by a jury to have existed,) from time immemorial [A.D. 1189], and is presumed to have originated by a grant made before that time (*q*). Any easement or profit à prendre, which is reasonable and might have been so granted, may be claimed by way of prescription at common law (*r*). Such rights made before the Prescription Act (2 & 3 Will. 4, c. 71) have been proved *prima facie* by evidence of the uninterrupted exercise or enjoyment thereof, as of right, for the full period of twenty years (*s*). But now proof of the exercise or enjoyment of the right or matter claimed must be carried back at the least for such period or number of years mentioned in that act, as may be applicable to the case and to the nature of the claim (*t*). Evidence showing when the alleged

(*h*) *Manning v. Wadale*, 5 A. & E. 758; *Race v. Ward*, 4 P. & B. 702; 7 E. & B. 384; *Carlyon v. Lovering*, 1 H. & N. 784; *Whitehead v. Parker*, 2 H. & N. 870; *Whaley v. Laing*, 2 H. & N. 476; 3 H. & N. 675, 901; 27 L. J., Ex. 422.

(*i*) *Godley v. Prith*, Yelv. 159.

(*k*) 2 & 3 Will. 4, c. 71, post, 655.

(*l*) *Gateward's case*, 6 Co. R. 60; Cro. Jac. 152; *Grimstead v. Marlow*, 4 T. R. 717; *Blewitt v. Tregoning*, 3 A. & E. 554; *Jones v. Robin*, 10 Q. B. 581, 620; *Lloyd v. Jones*, 6 C. B. 81, 89; 5 D. & L. 784; *Att.-Gen. v. Mathias*, 4 K. & J. 579; 27 L. J., Ch. 761.

(*m*) *Race v. Ward*, 4 E. & B. 705.

(*n*) *Att.-Gen. v. Mathias*, 4 K. & J. 579; 27 L. J., Ch. 761; *Bailey v. Stephens*,

12 C. B., N. S. 91.

(*o*) *Bateson v. Green*, 5 T. R. 411; *Place v. Jackson*, 4 D. & R. 318; *Clarkson v. Woodhouse*, 5 T. R. 412, n.; 3 Doug. 189; *Arlett v. Ellis*, 7 B. & C. 346; *Lascelles v. Lord Onslow*, 36 L. T. 459.

(*p*) *Patrick v. Stubbs*, 9 M. & W. 830.

(*q*) *Potter v. North*, 1 Ventr. 387; 2 Blac. Com. 265.

(*r*) *Rogers v. Taylor*, 1 H. & N. 706; 26 L. J., Ex. 203; *Carlyon v. Lovering*, 1 H. & N. 784; 26 L. J., Ex. 261.

(*s*) *Campbell v. Wilson*, 3 East, 294; *Cross v. Lewis*, 2 B. & C. 686; *Williams v. Morland*, Id. 914.

(*t*) Sect. 6, post, 656; *Darling v. Clue*, 4 F. & F. 320.

right first commenced, or when it did not exist within the time of legal memory, is sufficient to negative a prescriptive right pleaded as from time immemorial (*u*); but not a right pleaded according to the statute (*x*). On the other hand, a prescriptive right from time immemorial is not so easily destroyed or lost by abandonment, non-user, or otherwise (*y*), as a right by user under the statute (*z*). And therefore it is often expedient for a defendant to plead his right or claim in several ways (*u*); ex. gr.—1. By user for [20 or 30] years according to the statute and the nature of the right claimed. 2. The like, by user for [40 or 60] years. 3. By prescription from time immemorial, according to the common law (*b*). 4. Sometimes also a lost grant is pleaded (*d*).

*Rights
of Common
(Generally).*

By 2 & 3 Will. 4, c. 71, entitled "An Act for shortening the Time of Prescription in certain Cases," after reciting that "whereas the expression 'time immemorial, or time whereof the memory of man runneth not to the contrary,' is now by the law of England in many cases considered to include and denote the whole period of time from the reign of King Richard the First (*e*), whereby the title to matters that have been long enjoyed is sometimes defeated by showing the commencement of such enjoyment, which is in many cases productive of inconvenience and injustice;" for remedy thereof it is enacted (s. 1), "that no claim which may be lawfully made at the common law by custom (*f*), prescription or grant to any *right of common or other profit or benefit* to be taken and enjoyed from or upon any land of our sovereign lord the king, his heirs or successors, or any land being parcel of the Duchy of Lancaster, or of the Duchy of Cornwall, or of any ecclesiastical or lay person or body corporate (except such matters and

2 & 3 Will. 4,
c. 71: The
Prescription
Act.

Sect. 1.

Rights of
Common and
other Profits
à prendre,
after Thirty
Years' Enjoy-
ment.

(*u*) *Mayor, &c. of Hull v. Horner*, Cowp. 108; *Bury v. Pope*, Cro. Eliz. 118; Gale, 143 (4th ed.); 17 Q. B. 269.

(*x*) *Clay v. Thackrah*, 9 C. & P. 47; *Clay v. Shackeray*, 2 Moo. & R. 244; *Penwarden v. Ching*, Moo. & M. 400.

(*y*) Co. Lit. 114 b; *Ward v. Ward*, 7 Exch. 838; 21 L. J., Ex. 334; *Stokoe v. Singers*, 8 E. & B. 31; *Crossley v. Lightowler*, L. R., 3 Eq. 279; 2 Ch. App. 478; 36 L. J., Ch. 584; *Cook v. Mayor, &c. of Bath*, L. R., 6 Eq. 177; *Tupling v. Jones*, 11 H. L. Cas. 290; 34 L. J., C. P. 342; *Hale v. Oldroyd*, 14 M. & W. 789, 793; *Ward v. Robins*, 15 M. & W. 237, 244; *Darwin v. Upton*, 3 T. R. 159; *Cross v. Lewis*, 2 B. & C. 686; *Moore v. Rawson*, 3 B. & C. 332.

(*z*) *Lowe v. Carpenter*, 6 Exch. 825; *Battishill v. Reed*, 18 C. B. 696; *Rochdale Canal Co. v. Radcliffe*, 18 Q. B. 303, 304.

(*a*) *Tudor's L. C. Real Prop.* 154 (2nd ed.); *Moon v. Webb*, 1 C. B., N. S. 673.

(*b*) *Earl of Stamford and Warrington v. Dunbar*, 13 M. & W. 822, 827; 2 D. & L.

852; *Ward v. Ward*, 7 Exch. 838; *Sampson v. Hoddinott*, 1 C. B., N. S. 590; 3 Id. 596; *Rogers v. Taylor*, 1 H. & N. 706; 26 L. J., Ex. 203; *Papendick v. Bridgewater*, 5 E. & B. 166; *Bailey v. Stephens*, 12 C. B., N. S. 91.

(*d*) *Campbell v. Wilson*, 3 East, 294; *Lovett v. Wilson*, 3 Bing. 115; *Alwett v. Tregoning*, 3 A. & E. 554; *Parker v. Mitchell*, 11 A. & E. 788; *Onley v. Gardiner*, 4 M. & W. 496; *Welcome v. Upton*, 5 M. & W. 398; 6 Id. 536; 7 Dowl. 475; *Sampson v. Hoddinott*, 1 C. B., N. S. 590; 3 Id. 596. A plea of right of common from time immemorial is not supported by proof of a grant made in 1755; *Welcome v. Upton*, supra.

(*e*) A.D. 1189.

(*f*) *Mounsey v. Ismay*, 3 H. & C. 486; 34 L. J., Ex. 52. No claim to a profit à prendre can be made by custom, unless in the case of a copyhold tenant against his lord; *Arlett v. Ellis*, 9 B. & C. 671; *Beardsworth v. Torkington*, 1 Q. B. 782.

CH. XVIII s. 1
Rights
of Common
(Generally).

things as are herein specially provided for, and except tithes, rents and services), shall, where such right, profit or benefit shall have been actually taken and enjoyed by any person claiming right thereto without interruption for the full period of *thirty years*, be defeated or destroyed by showing *only (g)* that such right, profit or benefit was first taken or enjoyed at any time prior to such period of thirty years *(h)*; but, nevertheless, such claim may be defeated in any other way by which the same is now liable to be defeated *(i)*; and when such right, profit or benefit shall have been so taken and enjoyed as aforesaid for the full period of *sixty years*, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement expressly made or given for that purpose by deed or writing" *(k)*.

After Sixty
Years the
Right to be
absolute, un-
less, &c.

Sect. 4. Above
Periods to be
next before
some Suit or
Action
wherein, &c.
Meaning of
"Interrup-
tions."

By sect. 4, "each of the respective periods of years hereinbefore mentioned shall be deemed and taken to be the period *next before some suit or action (l)* wherein the claim or matter to which such period may relate shall have been or shall be brought into question; and no act or other matter shall be deemed to be an *interruption*, within the meaning of this statute, unless the same shall have been or shall be submitted to or acquiesced in *for one year* after the party interrupted shall have had or shall have notice thereof, and of the person making or authorizing the same to be made." It is possible for an interruption not to be submitted to or acquiesced in for one year, although no action for it be brought within that period *(m)*.

Sect. 6. No
Presumption
allowed on
Proof of User
for shorter
Period.

By sect. 6, "in the several cases mentioned in and provided for by this act, no presumption shall be allowed or made in favour or support of any claim, upon proof of the exercise or enjoyment of the right or matter claimed for any less period of time or number of years than for such period or number mentioned in this act, as may be applicable to the case and to the nature of the claim."

Sect. 7. Pro-
viso for Dis-
abilities.

Sect. 7 provides, "that the time during which any person, otherwise capable of resisting any claim to any of the matters before mentioned, shall have been or shall be an infant, idiot, non compos mentis,

(g) *Rochdale Canal Co. v. Radcliffe*, 18 Q. B. 287; *Mill v. New Forest Commrs.*, 18 C. B. 60; 25 L. J., C. P. 212; *Barker v. Richardson*, 4 B. & A. 579.

(h) *Mayor, &c. of Hull v. Horner*, Cowp. 108; *Eaton v. Swansea W. W. Co.*, 17 Q. B. 267, 269.

(i) There are six modes by which prescriptive rights may be extinguished, viz., 1. By unity of possession. 2. By release. 3. By severance. 4. By the dissolution of the corporation to which they belong. 5. By enfranchisement. 6. By inclosure. Tudor L. C. Real Prop. 122—126 (2nd ed.).

(k) Sect. 2, as to ways and water-courses, is stated post, 670; Sect. 3, as to lights, post, 676.

(l) *Wright v. Williams*, 1 M. & W. 77; *Ward v. Robins*, 15 M. & W. 241, 243; *Cooper v. Ilbbuck*, 12 C. B., N. S. 456; 31 L. J., C. P. 323; *Bennison v. Cartwright*, 5 B. & S. 1; 33 L. J., Q. B. 137; *Beytagh v. Cassidy*, 16 W. R. 403, 1r. Exch.; Gale, 160 (4th ed.). Not "next before the said time when, &c.," *Richards v. Fry*, 7 A. & E. 698; 3 N. & P. 67.

(m) *Bennison v. Cartwright*, 5 B. & S. 1; 33 L. J., Q. B. 137.

feme covert or tenant for life (*n*), or during which any action or suit shall have been pending, and which shall have been diligently prosecuted until abated by the death of any party or parties thereto, shall be excluded in the computation of the periods hereinbefore mentioned; except only in cases where the right or claim is hereby declared to be absolute and indefeasible.”

CH. XVIII. s. 1
Rights of Common (Generally).

Sect. 8 provides, “that when any land or water, upon, over or from which any such way or other convenient (*o*) watercourse or use of water shall have been or shall be enjoyed or derived hath been or shall be held under or by virtue of any term of lives, or any term of years exceeding three years from the granting thereof, the time of the enjoyment of any such way or other matter as herein last before mentioned, during the continuance of such term, shall be *excluded in the computation* of the said period of *forty years* (*p*), in case the claim shall within three years next after the end or sooner determination of such term be resisted by any person entitled to any reversion expectant on the determination thereof.”

Sect. 8. Terms for Life or exceeding Three Years to be excluded in Computation of Forty Years in certain Cases.

A title under this act is always inchoate until the action is commenced in which its validity is called in question, however long it may have been enjoyed (*q*). On the other hand, a right which is inchoate at the time of the interruption or disturbance may become complete and support an action for such interruption commenced immediately after the expiration of the prescribed period and before the interruption has been submitted to for a year (*r*). So a defendant's right may become complete between the time when, &c. and the commencement of the action (*s*). A title gained under this act by user for the prescribed period may exist concurrently with a common law title, and does not merge or extinguish it (*t*). A right claimed by user under this act can only be co-extensive with the user; and an issue on a plea justifying under such a right is an issue *not upon the right, but the user*, and differs therefore from an issue on a right claimed by prescription from time immemorial (*u*).

Title inchoate until Action commenced.

The words “enjoyed by any person *claiming right*” (sect. 2), and “enjoyment thereof *as of right*” (sect. 5), mean an enjoyment had, not

“Enjoyment as of Right” means an open Enjoyment.

(*n*) *Pye v. Mumford*, 11 Q. B. 667. Not a tenant for years; *Palk, Bart. v. Shinner*, 18 Q. B. 668; 22 L. J., Q. B. 27.

(*o*) The word “convenient” is written by mistake for “easement” in the Parliament Roll; *Wright v. Williams*, 1 M. & W. 77, Parke, B. But it must be taken that the word “convenient” was intended.

(*p*) But not in the computation for twenty years; *Palk, Bart. v. Shinner*, 18 Q. B. 668; 22 L. J., Q. B. 27.

(*q*) *Wright v. Williams*, 1 M. & W. 77; *Richards v. Fry*, 7 A. & E. 698; 3 N. &

P. 67; *Ward v. Robins*, 15 M. & W. 237, 242.

(*r*) *Flight v. Thomas*, 11 A. & E. 688; 3 P. & D. 412; 7 Dowl. 741; *S. C.* (in error), 8 Cl. & Fin. 231; 1 West, 671.

(*s*) *Ward v. Robins*, 15 M. & W. 237.

(*t*) *Onley v. Gardiner*, 4 M. & W. 496; *Lowe v. Carpenter*, 6 Exch. 825.

(*u*) *Davies v. Williams*, 16 Q. B. 546; *Lowe v. Carpenter*, 6 Exch. 825; *Battishill v. Reed*, 18 C. B. 696, 703; *Rochdale Canal Co. v. Radcliffe*, 18 Q. B. 303, 304; *Ward v. Ward*, 7 Exch. 838; 21 L. J., Ex. 334.

CH. XVIII.s.1

Rights
of Common
(Generally).The Prescrip-
tion Act—
continued.

secretly or by stealth, or by tacit sufferance, or by permission asked from time to time, on each occasion or on many; but an enjoyment had openly, notoriously, without particular leave at the time, by a person claiming to use without danger of being treated as a trespasser, as a matter of right, whether the right so claimed shall be strictly legal, as by prescription and adverse user, or by deed, or shall have been merely lawful so far as to excuse trespass (*x*). The user must not be precarious (*y*), but as of right against all persons, so as to be evidence of a perfect right (*z*). The enjoyment must be continuous and as of right for the prescribed period next before the commencement of the suit, of the easement *as an easement* (*a*), without interruption acquiesced in for a year (*b*); and such right is defeated by unity of possession during all or part of the period of enjoyment, though such unity of possession has its inception after the completion of the prescribed period (*c*). Therefore where the plaintiff had enjoyed a way as of right and without interruption from 1800 to 1855, when the action was brought, it was held, that his claim under the statute was defeated by unity of possession from 1843 to 1853 (*d*). The right or easement must be appurtenant to some dominant tenement, and not in gross; otherwise the act does not apply (*e*).

Remedies for
a Disturbance
of Common.

The remedies for disturbance of common may be considered as respects the lord, and as regards the commoner. The former having the right to the soil may, when wrongfully dispossessed thereof, maintain an action of ejectment (*f*); and if he be disturbed by a mere stranger, who puts in cattle, having no colour of right, or by a commoner who surcharges the common, he may maintain an action of trespass or case (*g*). In some cases, also, where the right of common is clearly stinted as to number, he may distrain the surplus number damage feasant (*h*). It has been held, that a commoner may maintain an action on the case for an injury done to the common, by taking away from thence the manure which was dropped on it by the cattle, though his proportion of the damage be found only to the amount of a farthing; at least the smallness of the damage found is no ground for a nonsuit (*i*). One commoner, who has surcharged, may maintain an action against another for surcharging the com-

(*x*) *Tickle v. Brown*, 4 A. & E. 369; *Gaved v. Martyn*, 19 C. B., N. S. 732; 34 L. J., C. P. 353.

(*y*) *Gaved v. Martyn*, *supra*.

(*z*) *Winship v. Hudspeth*, 10 Exch. 5; 23 L. J., Ex. 268.

(*a*) *Mounsey v. Iemay*, 3 H. & C. 486; 34 L. J., Ex. 52. A man cannot have an "easement" over his own land, but only upon or over the land of another person. See *Onley v. Gardiner*, 4 M. & W. 496.

(*b*) See *Bennison v. Cartwright*, 5 B. &

S. 1; 33 L. J., Q. B. 137.

(*c*) *Onley v. Gardiner*, 4 M. & W. 496; *Battishill v. Reed*, 18 C. B. 696; 25 L. J., C. P. 290.

(*d*) *Battishill v. Reed*, *supra*.

(*e*) *Shuttleworth v. Le Fleming*, 19 C. B., N. S. 687; 34 L. J., C. P. 309.

(*f*) *Cole Ejoc*. 611.

(*g*) *Arlett v. Ellis*, 9 B. & C. 671.

(*h*) 1 Roll. Abr. 665; *Dixon v. James*, 2 Lutw. 1241; 4 Burr. 2431.

(*i*) *Pindar v. Wadsworth*, 2 East, 154.

mon (*k*). One commoner cannot generally distrain the cattle of another; for the right of commonage, which every commoner has, runs through the whole land (*l*). Nor can one commoner distrain the cattle of another commoner *pur cause de vicinage*, inasmuch as the cattle come upon the common under some colour of right (*m*). But in case of an absolutely stinted common, in point of number, one commoner may distrain the supernumerary cattle of another (*n*); but not if an admeasurement be necessary, as where the stint has relation to the quantity of the commoner's land (*o*). A freeman or burgess, entitled as such to common of pasture, may distrain the cattle of a person wrongfully claiming to be so entitled (*p*); or he may sue for the disturbance (*q*).

CH. XVIII. s. 1
*Rights
of Common
(Generally).*

Where a house obstructs the exercise of a right of common the commoner may, after notice and request to the party to remove the house, pull it down, though such party is actually inhabiting and present in the house (*r*); but he may not do so without such previous notice and request (*s*). Where the injury complained of arises from an act of the lord, the commoner may often proceed himself to abate the nuisance (*t*); thus, if the lord so plant trees as to destroy the common, such an act would be considered as a nuisance, and the commoner might abate it; but he cannot justify cutting down trees planted by the lord on the waste, if it be not a total destruction of the common, though there be not a sufficiency of common left; his remedy being by action on the case (*u*). The distinction seems to be this: if the lord of the manor make a hedge round the common, or do any other act that *entirely excludes* the commoner from exercising his right, the latter may do whatever is necessary to let himself into the common; but if the commoner can get at the common, and enjoy it to a certain extent, and his right be *merely abridged* by the act of the lord, in that case his remedy is by an action on the case, and he cannot assert his right by any act of his own (*x*). The owner of a common may, under the stat. of 13 Edw. 1, stat. 1 (Westm. 2), c. 46, erect thereon a house necessary for a beast-keeper or for a woodward (*y*). It seldom, if ever, happens that a commoner can distrain the cattle of the lord as damage feasant, unless by special

Abatement of
Nuisances on
Commons.

(*k*) *Hobson v. Todd*, 4 T. R. 71.

(*l*) Bac. Abr. tit. *Common* (C. 2); *Hall v. Harding*, 4 Burr. 2426; 1 W. Blac. 673.

(*m*) *Cape v. Scott*, L. R., 9 Q. B. 269; 43 L. J., Q. B. 65; 30 L. T. 87; 22 W. R. 326.

(*n*) Year Book, 46 Edw. 3, 12 b; 2 Lutw. 1241; *Mary's case*, 9 Co. R. 112; Freem. 273.

(*o*) *Hall v. Harding*, 1 W. Blac. 673; 4 Burr. 2426.

(*p*) *Stubbs v. Escourt*, 2 H. & C. 47.

(*q*) *Bradsworth v. Torkington*, 1 Q. B.

782.

(*r*) *Davies v. Williams*, 16 Q. B. 546.¹

(*s*) *Perry v. Fitzhove*, 8 Q. B. 757; *Jones v. Jones*, 1 H. & C. 1; 31 L. J., Ex. 606.

(*t*) Bac. Abr. tit. *Common* (C.).

(*u*) *Kirby v. Sadgrove* (in error), 1 Bos. & P. 13; 3 Anst. 892; 6 T. R. 483.

(*x*) Bac. Abr. tit. *Common* (C.); *Cooper v. Marshall*, 2 Wils. 51; 1 Burr. 259; *Sadgrove v. Kirby*, 6 T. R. 483; *Kirby v. Sadgrove* (in error), 1 Bos. & P. 13.

(*y*) *Patrick v. Stubbs*, 9 M. & W. 830.

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Rights
of Common
(Generally).

Onus of Proof
on Party
claiming
Easement.

custom (z). But it seems that if cattle be *agisted* by the lord and improperly put on the common, the commoners may distrain them as the cattle of a stranger (a).

The onus of proof, of course, lies on the party alleging the right or easement (b); and he must show actual enjoyment thereof for the full period as pleaded. Proof of an enjoyment for twenty-eight years will not support a plea of user for thirty years (c). So pleas of twenty and forty years' user respectively are not supported by proof of user for forty years and upwards before the commencement of the action to within fourteen months of it (d). In one case it was held that a mere discontinuance of user of a right of common of pasture for *two intermediate years* of the prescribed period, only because the commoner during these two years had no commonable cattle, and not by reason of any adverse interruption, was not sufficient to prevent the right being acquired under the statute, and that the jury might find an enjoyment for the full period (e). It seems, however, that there must be proof of a user of the right or easement as claimed, in each year of the prescribed period, particularly within one year next before the commencement of the action (f). But a user of lights for nineteen years and a fraction of another year ending within one year next before action is sufficient to establish a right; which cannot be defeated by an interruption not submitted to for a year (g). To support a plea of a right of way by user for forty years, evidence may be given of user for more than forty years back (h). An enjoyment for thirty years may be partly before and partly after an intervening life estate during which the enjoyment continued (i). Proof of encroachments made on one part of 217 acres is not conclusive evidence of an interruption of the enjoyment of a right of pasturage pleaded under this statute to an action for a trespass for taking cattle damage feasant in another part (j).

Ascertain-
ment of
Rights of
Common.

An action will lie against the lord by one copyholder on behalf of himself and the other copyholders, being numerous, to have their rights of common ascertained; but one copyholder, not suing on behalf of all, cannot maintain such action (m).

(z) *Hodesdon v. Gresil*, Yelv. 104; *Kenrick v. Targiter*, Cro. Jac. 208; Yelv. 129; *Hoskins v. Robins*, 2 Saund. 324; Bullen, 228, 229.

(a) Year Book, 30 Edw. 3, 27; Bullen, 229.

(b) *Maxwell v. Martin*, 6 Bing. 522.

(c) *Bailey v. Appleyard*, 8 A. & E. 167; 2 P. & D. 1, n.

(d) *Lowe v. Carpenter*, 6 Exch. 825; *Battishill v. Reed*, 18 C. B. 696, 703; *Rochdale Canal Co. v. Radcliffe*, 18 Q. B. 303, 304.

(e) *Carr v. Foster*, 3 Q. B. 581.

(f) *Parker v. Mitchell*, 11 A. & E. 788; 3 P. & D. 655; *Lowe v. Carpenter*, 6 Exch. 825; *Battishill v. Reed*, 18 C. B. 698, 703; *Rochdale Canal Co. v. Radcliffe*, 18 Q. B. 303, 304; Gale, 155 (4th ed.).

(g) *Flight v. Thomas*, 11 A. & E. 688; 7 Dowl. 741; *S. C.* (in error), 8 Cl. & F. 231; 1 West, 671; *Eaton v. Swansea W. Co.*, 17 Q. B. 272; Gale, 161 (4th ed.).

(h) *Lawson v. Langley*, 4 A. & E. 890.

(i) *Clayton v. Corby*, 2 Q. B. 813; and see *Pye v. Mumford*, 11 Q. B. 666.

(j) *Welcome v. Upton*, 6 M. & W. 536.

(m) *Phillips v. Hudson*, L. R., 2 Ch. 243; 36 L. J., Ch. 301; 15 W. R. 370.

(b) *Common of Pasture.*

CH. XVIII. s. 1

*Rights of
Common
(Pasture).*Description
and Kinds of
Common of
Pasture.

Common of pasture is a right or liberty to depasture cattle, &c. on another's land. It is generally restricted to commonable cattle, i. e. such as plough and manure the land—as horses, oxen, cows and sheep—and seldom extends to swine, goats, geese and the like (*n*). It is usually stinted as to the number of cattle to be depastured, either by an express limitation of number, or by those only being allowed to depasture which are “levant and couchant” upon the land in respect of which the right of common is claimed; i. e. such cattle as the winter catage of the land, together with the produce of it in summer, and the food obtained from the common, is capable of maintaining (*o*). A right of common of pasture for cattle levant and couchant cannot be claimed by prescription as appurtenant to a house without any curtilage or land (*p*). A right of common of pasture without stint, as annexed to an ancient messuage without land, cannot exist by law (*q*); but common of pasture may exist in respect of land to which there is no house attached (*r*). Common of pasture is sometimes limited as to the times or periods of the year during which it may be exercised. But all such restrictions depend upon the terms of the grant (express or implied), or the extent of the user. Common of pasture is divided into—1. Common appendant. 2. Common appurtenant. 3. Common in gross. 4. Common *pur cause de vicinage*.

Common of pasture *appendant* is a common law right, and must have existed from time immemorial (*s*). It belongs of common right only to arable land, for commonable cattle: i. e. horses and oxen to plough the land, kine and sheep to compost it (*t*): which cattle must be “levant and couchant.” Therefore it can only be claimed for as many cattle as are necessary to plough and manure the tenant's arable land (*u*). Or, perhaps, more accurately speaking, for such cattle as the land, or the produce thereof, will keep during the winter (*x*). Tenants of a manor have no general common law right of common appendant on the waste (*y*).

Common of pasture *appurtenant* is a right or liberty annexed to land, of depasturing cattle, &c. on another's land. It is not (like common appendant) confined to arable land or to commonable cattle (*z*),

(*n*) Tudor L. C. Real Prop. 109 (2nd ed.).

(*o*) *Whitelock v. Hutchinson*, 2 Moo. & R. 205; *Carr v. Lambert*, 3 H. & C. 499; 34 L. J., Ex. 66.

(*p*) *Scholes v. Hargreaves*, 5 T. R. 46.

(*q*) *Benson v. Chester*, 8 T. R. 396.

(*r*) *Ricketts v. Salwey*, 2 B. & A. 360.

(*s*) Tudor L. C. Real Prop. 109 (2nd ed.).

(*t*) Co. Lit. 122 a; Bac. Abr. tit. *Common* (A. 1).

(*u*) *Bennett v. Reeve*, Willes, 227; *Tyringham's case*, 4 Co. R. 36 a; Tudor L. C. Real Prop. 101—126 (2nd ed.).

(*x*) *Benson v. Chester*, 8 T. R. 396; *Cheesman v. Hardham*, 1 B. & A. 711; Tudor L. C. Real Prop. 110 (2nd ed.); supra (*o*).

(*y*) *Earl of Dunraven v. Llewellyn*, 15 Q. B. 791.

(*z*) Co. Lit. 122 a; 4 Co. R. 37; Plow. 161; 3 Petersdorff New Abr. 146; Tudor L. C. Real Prop. 111 (2nd ed.).

CH. XVIII. s. 1
*Rights of
 Common
 (Pasture).*

but it may be annexed to meadow, pasture or other land, and may extend to swine, goats, geese, &c., according to the terms of the grant or the extent of the user. It may be claimed by modern grant (a), or by user under the statute (b), or by prescription at common law (c). In a plea prescribing for common of pasture appurtenant to land, it was, even before the Judicature Act, essential to aver that the cattle were the party's own cattle levant and couchant on his land; and if the claim were for an unlimited number, without these qualifying words, it could not be supported (d). But a person might claim common appurtenant for a certain number, and in such case need not aver that they were levant or couchant (e).

Common in
 gross.

Common of pasture *in gross* is a right or liberty to depasture cattle, &c. in another's land, independently of being the owner or occupier of any other land; and may be granted by deed to a man and his heirs, or for life (f). It is not an easement, because not annexed to any dominant tenement; and there can be no easement, properly so called, unless there be both a servient and a dominant tenement (g). Neither a common appendant nor a common appurtenant for cattle levant and couchant can be turned into a common in gross, because they cannot be severed from the land to which they appertain without extinguishment; but a common appurtenant for a certain number of beasts may, for such a grant has no reference to connection of tenure (h). A right of common in gross does not confer a vote for the coroner of a county (i).

Common by
 Vicinage.

Common *pur cause de vicinage*, or common by reason of neighbourhood, is a liberty the tenants of one lord in a town have to enjoy a common of pasture with the tenants of another lord in another town (k). It can only be claimed by grant, or by prescription from time immemorial, or by user for sixty or thirty years under 2 & 3 Will. 4, c. 71, but not by custom (l). This is not properly a right of common, but rather an excuse for a trespass, and at most but a permissive right, which was originally allowed for the prevention of suits in neighbourhoods where a boundary could not easily be established (m). It exists where the tenants of two lords have used, time out of mind, to have common promiscuously in both lordships, lying

(a) *Sacheverill v. Porter*, Cro. Car. 482; *Cowclan v. Slack*, 15 East, 108; Fitz. N. B. 180, N.; Bac. Abr. tit. *Common* (A. 2).

(b) 2 & 3 Will. 4, c. 71, s. 1; ante, 655.

(c) Co. Lit. 122.

(d) *Benson v. Chester*, 8 T. R. 396, 401.

(e) Tudor L. C. Real Prop. 111 (2nd ed.).

(f) Co. Lit. 122 a; Fitz. N. B. 37; 4 Co. R. 30; 1 Chit. Gen. Prac. 213; 3 Petersdorff New Abr. 144 (2); Tudor L. C. Real Prop. 111, 112 (2nd ed.).

(g) *Rangleley v. Midland R. Co.*, L. R.,

3 Ch. Ap. 306, 310, Lord Cairns, L. J.

(h) *Bunn v. Channen*, 5 Taunt. 244.

(i) *Reg. v. Day*, 3 E. & B. 859.

(k) Co. Lit. 122 a; *Jones v. Robin*, 10 Q. B. 620, 632; Tudor L. C. Real Prop. 112, 113 (2nd ed.).

(l) *Jones v. Robin*, 10 Q. B. 581, 620; *Clarke v. Tinker*, id. 604; *Prichard v. Powell*, id. 589, 603; Tudor L. C. Real Prop. 113 (2nd ed.).

(m) Co. Lit. 122 a; Willes, R. 322; Bac. Abr. tit. *Common* (A. 4); Tudor L. C. Real Prop. 112 (2nd ed.).

together and open to one another (*n*); it is therefore necessary that these adjoining lands should both be commonable (*o*). It seems that common pur cause de vicinage may also exist between the proprietors of neighbouring lands, though there are no commons on either side (*p*); and the lord of a manor may have, in respect of the waste or common land in his own manor, a right to turn his own cattle upon the common of an adjoining manor (*q*). Every common pur cause de vicinage is a common appendant (*r*). Where one of two adjoining commons, with common of vicinage, was inclosed and fenced off by the owner of the soil, leaving open only a passage sufficient for the highway which led over the one to the other; yet as the separation was not complete so as to prevent the cattle straying from one to the other by means of the highway, it was held, that the common by vicinage still continued (*s*).

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*Rights of
Common
(Pasture).*

There is frequently a mutual right of intercommoning between the owners of the land in open common fields: the extent of this right and the mode of exercising it varies according to the custom which has prevailed among the occupiers of such land. Where, however, there is no custom which has become binding upon the parties, the common law rule appears to be, that those persons only who are owners of land within an open common-field are entitled to enjoy the right of intercommoning; and such right can be exercised at those times only when the corn is off the land, that is, after all the corn and grain have been reaped and gathered, and before any more has been sown (*t*). Where A. being possessed of a quantity of land in a common field, and having a right of common over the whole field, and B. having also a right of common over the whole field, they entered into an agreement, for their mutual advantage and convenience, not to exercise their respective rights for a certain term of years, and each party covenanted to that effect: it was held, that if, during the term, the cattle of B. came upon the land of A., he might distrain them damage feasant (*u*). There are also statutes pointing out the mode of exercising this right of common (*x*). The owners of land in open common fields may by custom mutually inclose against each other (*y*), and sometimes by statute (*z*). The remedies for a disturbance of common of pasture have been already mentioned (*a*).

Common of
Pasture in
Common
Fields.

(*n*) 8 Co. R. 78.

(*o*) *Heath v. Elliott*, 4 Bing. N. C. 388.

(*p*) *Jones v. Robin*, 10 Q. B. 581, 620.

(*q*) *Earl of Sefton v. Court*, 5 B. & C. 917.

(*r*) 1 Danv. Abr. 799.

(*s*) *Gullett v. Lopes, Bart.*, 13 East, 318.

As to distress, see *Cape v. Scott*, L. R., 9 Q. B. 269, and 659 (*m*), ante.

(*t*) *Cheesman v. Hardham*, 1 B. & A.

706; *Musgrave v. Cave*, Willes, 319.

(*u*) *Whiteman v. King*, 2 H. Blac. 4.

(*x*) 29 Geo. 2, c. 36; 13 Geo. 3, c. 81.

(*y*) *Hickman v. Thorne*, 2 Mod. 105; *Tyrringham's case*, 4 Co. R. 36 b, 38 b, 39 a; *Tudor L. C. Real Prop.* 101—126 (2nd ed.); *Corbet's case*, 7 Co. R. 5 a; *Jones v. Robin*, 10 Q. B. 587.

(*z*) Post, 666.

(*a*) Ante, 658.

CH. XVIII. s.

*Rights
of Common
(Turbary).*Nature of
Common of
Turbary.(c) *Common of Turbary.*

Common of turbary is a right or liberty to dig turf upon the ground of another, or in the lord's waste: this common is appendant or appurtenant to a house, but not to lands, for turves are to be burnt in the house (*b*). It may also be in gross, or may be granted expressly with other land (*c*). It does not give any right to the land, trees or mines; nor can it exclude the owner of the soil (*d*), nor prevent him from "approving," provided sufficiency of common be left (*e*). An occupier of a messuage and lands, who has common in the lord's waste, may set up a custom to cut rushes, as annexed to his right of common (*f*). A custom that all customary tenants of a manor having gardens, parcels of their customary tenements respectively, have immemorially, by themselves, their tenants and occupiers, dug, taken and carried away from a waste within the manor, to be used upon their said customary tenements, for the purpose of making and repairing grass plots in the gardens, parcels of the same respectively, for the improvement thereof, such turf covered with grass, fit for the pasture of cattle, as hath been fit and proper to be so used at all times of the year, as often and in such quantity as occasion hath required, is bad in law, as being indefinite and uncertain, and destructive of the common (*g*); and so is a similar custom for taking and applying such turf for the purpose of making and repairing the banks and mounds in, of and for the hedges and fences of such customary tenements (*g*). It seems that a freeman of a town may have the right of common of turbary (*h*).

(d) *Common of Estovers.*Nature and
Description of
Estovers."House-bote,
plough-
bote," &c.

Common of estovers is a right or liberty of taking necessary wood for the use and furniture of a house or farm, from off another's land (*i*). This right is generally considered as being divided into three distinct species, distinguished from each other by a different application of the Saxon word "bote," which is synonymous with the French "estovers:" thus there is a house-bote, plough-bote and hay-bote. House-bote is a sufficient allowance of wood to build or repair the house, or to burn in it, which latter is sometimes called fire-bote. Plough-bote and cart-bote are wood to be employed in making and repairing all instruments of husbandry, as ploughs,

(*b*) Tudor L. C. Real Prop. 116 (2nd ed.).

(*c*) *O' Hare v. Fahy*, 10 Ir. Com. L. Rep. 318, C. P.

(*d*) 4 Co. R. 37.

(*e*) Post, 666.

(*f*) *Beam v. Bloom*, 3 Wils. 456; 2 W. Blac. 926.

(*g*) *Wilson v. Wiles*, 7 East, 121; 3 Smith, 167. As to the right of one tenant in common to dig turves, see *Wilkinson v. Haygarth*, 12 Q. B. 837.

(*h*) *Rez v. Warkworth*, 1 M. & S. 473.

(*i*) Co. Lit. 122 a; 2 Blac. Com. 35; Tudor L. C. Real Prop. 114 (2nd ed.).

carts, harrows, rakes, forks, &c. Hay-bote or hedge-bote is wood for repairing hedges or fences, as pales, stiles, and gates to secure enclosures (*k*). These botes or estovers must be reasonable, and such as any tenant or lessee, except a strict tenant at will, may take off the land demised to him without waiting for any leave, assignment or appointment of the lessor, unless he be restrained by special covenant to the contrary (*l*). House-bote, hay-bote and fire-bote belong to a termor of common right, and he may take wood for the same; but if he take more than is needful he may be punished for waste (*m*), as if he cut down wood to burn, when he has sufficient dead wood. Although the tenant may cut down and take sufficient wood to repair walls, palings, fences or hedges as he found them, yet he cannot do so to make new ones (*n*). If a man have common of estovers by grant, he cannot build new houses to have common of estovers for those houses (*o*). The right to estovers belongs and is incident to the estate of every tenant, whether for life or years, except that of a strict tenant at will, for that is said to be too mean. Common of estovers cannot be appendant to land, but it must necessarily be to a house to be spent there (*p*). It is clear that a copyholder may take the necessary estovers or botes on his copyhold without a special custom; but to enable him to take them on the other lands, a special custom must be shown (*q*).

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Rights
of Common
(Estovers).

(e) *Common of Piscary.*

Common of piscary is a right or liberty of fishing in another man's water (*r*). It can only exist in streams which are not navigable, for the sea and all navigable rivers are open to all the king's subjects (*s*). It is a profit à prendre and not a mere easement nor an interest in land (*t*). It may be either appendant, appurtenant or in gross (*u*). It may exist by grant, or by prescription from time immemorial, or by user for thirty or sixty years under the Prescription Act (*x*), but not by custom (*y*). A custom for all the inhabitants of a town or parish to fish in a person's river is bad (*z*). So a custom for all the inhabitants in a parish to use a footpath for angling with rods and lines for fish in the daytime, for recreation only, and not profit, is bad,

Nature of
Common of
Piscary.

(*k*) Wood's Inst. 344.
(*l*) Fitz. N. B. 59, M.; Co. Lit. 41.
(*m*) Termes de Ley, 387, 396.
(*n*) Co. Lit. 53; Wood's Inst. 525; 9 Co. R. 113.
(*o*) Fitz. N. B. 180, H.; *Arundel v. Steere*, Cro. Jac. 25.
(*p*) Co. Lit. 121 b; Fitz. N. B. 180, C. b; Tudor L. C. Real Prop. 115 (2nd ed.).
(*q*) 4 Co. R. 31 b.
(*r*) Tudor L. C. Real Prop. 114 (2nd ed.).

(*s*) *Warren v. Matthews*, 6 Mod. 73; *Bagott v. Orr*, 2 Bos. & P. 472.
(*t*) *Herbert v. Laughllyn*, Cro. Car. 492; *Wickham v. Hawker*, 7 M. & W. 63.
(*u*) Tudor L. C. Real Prop. 114 (2nd ed.).
(*x*) 2 & 3 Will. 4, c. 71, s. 1, ante, 655; *Wickham v. Hawker*, 7 M. & W. 63.
(*y*) Ante, 651.
(*z*) *Lloyd v. Jones*, 6 C. B. 81, 89; 5 D. & L. 784.

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*Rights
of Common
(Piscary).*

as setting up a custom to take a profit à prendre in alieno solo (a). Common of piscary, to the exclusion of the owner of the soil, is contrary to law; though a person by prescription may have a separate right of fishing in such water, and the owner of the soil will be excluded (b); for a man may grant the water without passing the soil. If one grant a separate fishery, neither the soil nor water pass, but only a right of fishery (c).

(f) *Approvement of Common.*

Lord may inclose Common against Tenants.

The lord of a manor or the owner of the soil and freehold, or his grantee or any person seised in fee of part of the waste (d), may inclose and approve part of a common against tenants having common of pasture, notwithstanding they have also some other right on the common, as a right to dig for sand, &c., if he leave sufficient common of pasture (e); and this may be done by an owner pur autre vie of the common (f).

Sufficiency of Common must be left for Commoners.

Arlett v. Ellis.

There must be a sufficiency of common left for the commoners (g), and the onus of proving that a sufficiency was left lies with the lord (h). Besides the lord, any person who is seised in fee of part of a waste within a manor may approve, leaving a sufficiency of common. The lord, however, has not an *unlimited* right to inclose parts of a common without the consent of the homage; for an unlimited custom for the lord to inclose parts of a common and grant them in severalty, without the consent of the homage, is bad, being inconsistent with the rights of the commoners (i): although a custom for the lord, with the consent of the homage, to grant parts of a common for building is good (k), even in exclusion of the commoners (l); but a custom for the lord to grant leases of the waste of a manor, without restriction, from time immemorial cannot be presumed, and is bad in point of law (m). A custom for one commoner to inclose against another is good (n); and such a custom does not abridge the common law right of the lord to inclose (o). Where a part and not the whole of a common has been inclosed, a commoner, in asserting his right of common, may throw down the whole of the hedge erected

(a) *Bland v. Lipscombe*, 4 E. & B. 713,

n. (c).

(b) Co. Lit. 122 a.

(c) Bac. Abr. tit. *Piscary*.

(d) *Glover v. Lane*, 3 T. R. 445.

(e) 20 Hen. 3 (Statute of Merton), c. 4; 13 Edw. 1, stat. 1 (Westm. 2), c. 46; 3 & 4 Edw. 6, c. 3; 2 Inst. 87; *Strickland v. Fawcett*, Willes, 57; *Shakespeare v. Peppin*, 6 T. R. 741; Tudor L. C. Real Prop. 119 (2nd ed.).

(f) *Patrick v. Stubbs*, 9 M. & W. 830.

(g) *Arlett v. Ellis*, 7 B. & C. 346; 9 Id. 671; *Rogers v. Wynne*, 7 D. & R. 521; *Greenhow v. Haley*, 1 Willes, 619; 2 Inst. 88; *Laucelles v. Lord Onslow*, 36 L. T. 459.

(h) *Arlett v. Ellis*, supra; *Lake v. Plaxton*, 10 Exch. 196.

(i) *Arlett v. Ellis*, supra.

(k) *Folkard v. Hemmett*, 5 T. R. 417, n.

(l) *Boulcott v. Winmill*, 2 Camp. 261.

(m) *Badger v. Ford*, 3 B. & A. 153.

(n) *Barber v. Dixon*, 1 Wils. 44.

(o) *Duberly v. Page*, 2 T. R. 392, n.

on the common; and a plaintiff in trespass cannot recover against him on a new assignment, because he had thrown down more than sufficient to admit his cattle (*p*). If there be a custom within a manor for a lord to grant parcels of the waste by copy of court roll, the premises granted in that mode are well described as copyhold premises, although the date of the grant be modern (*q*).

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*Rights of
Common (Ap-
provement).*

In one case it appears to have been supposed that there can be no approver in derogation of a right of common of turbary (*r*): but that case has been misunderstood; it was lost by mispleading, and the above point was not decided. It has since been held that the lord may enclose parcels of a waste against a right of common of turbary, if he leave a sufficiency of common for turbary, &c. (*s*). A custom for the owner of a waste to set out to the owners of certain ancient messuages portions of the waste, to be by them held in severalty for getting turves therein, and when the portions set out are cleared of turves, for the owners of the waste to inclose and approve such portions, to hold at their pleasure in severalty for ever, freed of all common of turbary and pasture, is good (*t*). The lord, however, has no right, under the Statute of Merton, to inclose and approve the waste of a manor, where the tenants of a manor have a right to dig gravel on the waste and to take estovers (*u*). He can do so only under and by virtue of some common land right or custom, leaving a sufficiency of common for the purposes required (*x*).

Against what
Rights of
Common
there may be
Approver.

If an encroachment upon the waste be suffered to remain for twenty years, it gives a title to the land to the party who has made the encroachment, who may dispose of it by will or otherwise (*y*); twenty years' adverse possession of a waste inclosed is a bar to the entry of a commoner (*z*); the lord's right of entry for a forfeiture is barred after twenty years by the Statutes of Limitations (*a*). It has even been held, that an inclosure made from the waste twelve or thirteen years before, and seen by the steward of the same lord from time to time, without objection made, may be presumed by the jury to have been made by licence of the lord; and that ejectment cannot be brought against the tenant as a trespasser, without previous notice to throw it up (*b*), or some other act done, sufficient to determine any implied tenancy at will, such as entering and breaking down the

Encroach-
ment on the
Waste.

(*p*) *Arllett v. Ellis*, 7 B. & C. 346; 9 id. 674.

(*q*) *Id. Northwick v. Stanway*, 3 Bos. & P. 346.

(*r*) *Grant v. Gunner*, 1 Taunt. 435.

(*s*) *Arllett v. Ellis*, 7 B. & C. 336; 9 id. 671.

(*t*) *Clarkson v. Woodhouse*, 5 T. R. 412, n.; 3 Doug. 189; *Bateson v. Green*, 5 T. R. 411; *Place v. Jackson*, 4 D. & R. 318.

(*u*) *Duberly v. Page*, 2 T. R. 391.

(*x*) *Ante*, 666.

(*y*) *Asher v. Whitelock*, 35 L. J., Q. B. 17; 11 Jur., N. S. 925.

(*z*) *Hawke v. Bacon*, 2 Taunt. 156.

(*a*) 3 & 4 Will. 4, c. 27; *Doe d. Tarrant v. Hellier*, 3 T. R. 162; *Whitton v. Peacock*, 3 Myl. & K. 325.

(*b*) *Doe d. Foley v. Wilson*, 11 East, 56; *Rez v. Pensaz*, 3 B. & Ad. 815.

CH. XVIII. s. 1 fences, &c. (c). If a licence be given by a commoner by parol to build a cottage on a common, which is accordingly executed, he cannot maintain an action for the encroachment, although no sufficient common remains (d).

*Rights of
Common (Ap-
provement).*

For whose
Benefit the
Encroach-
ment is made.

When a lessee encroaches on the waste during his term, and is suffered to remain in uninterrupted possession, it is now settled, that it shall be considered *primâ facie* that the encroachment was made for the benefit of the tenant during his term, and afterwards of his lessor, (except as against third persons (e),) unless it appear clearly by some act done *at the time*, that the tenant intended the encroachment for his own benefit, and not to hold it as he held the farm to which it was adjacent (f). He is, therefore, bound to deliver up the land taken from the waste to his lessor at the end of his term, with the rest of the premises demised (g).

(g) *Inclosure of Common.*

Local Inclo-
sure Acts.

The inclosure of commons, otherwise than by “*approvement*” (h), can only be effected by the authority of parliament; or by a special agreement under seal between the lord and all the copyholders, under which the allotments will become of freehold tenure (i). But it is generally impracticable to procure the consent of *all* copyholders, especially where there are trustees, or persons under the disability of infancy or coverture, or having any limited estates. Local inclosure acts are very numerous, and formerly were very long and special; but in 1801 a general act was passed (41 Geo. 3, c. 109), intituled “*An Act for consolidating in one Act certain Provisions usually inserted in Acts of Inclosure, and for facilitating the Mode of Proving the several Facts usually required on the passing of such Acts.*” This was followed by various others on the same subject (k). Afterwards it became an object of the legislature to facilitate the improvement of commons and lands held in common, the exchange of lands, and the division of intermixed lands; and for that purpose to render unnecessary a separate act of parliament on each occasion. With that view the General Inclosure Act (8 & 9 Vict. c. 118 (l)) was passed, which has been amended and extended from time to time by various acts (m). These may be described concisely in deeds, &c. as “*The Acts for the Inclosure, Exchange and Improvement of Land*” (n).

(c) *Doe d. Beck v. Heakin*, 6 A. & E. 496 (3rd point); Cole Ejec. 40, 611.

(d) *Harvey v. Reynolds*, 1 C. & P. 141; *Perry v. Fitzhove*, 8 Q. B. 757.

(e) *Doe d. Raddeley v. Massey*, 17 Q. B. 373; *Doe d. Croft v. Tidbury*, 14 C. B. 304.

(f) Post, Ch. XX.

(g) *Bryan d. Child v. Winwood*, 1 Taunt. 208; *Doe d. Watt v. Morris*, 2 Bing. N. C.

189; post, Ch. XX.

(h) Ante, 666.

(i) *Paine v. Ryder*, 24 Beav. 151.

(k) 3 Chit. Stat. 722—758 (4th ed.), tit. *Inclosure*.

(l) Id.

(m) Id.

(n) 17 & 18 Vict. c. 97, s. 21.

For the mode of proceeding under these acts see the 9th edition of this work, pp. 622—625 (8th edit., pp. 594—597); Wingrove Cooke on Inclosures (4th edit.). Everything must be done with the approval, and under the direction, of the Inclosure Commissioners for England and Wales, whose office is at No. 3, St. James's Square, London, S.W.

CIV. XVIII. s. 1
Rights of Common (Inclosure).

Mode of Proceeding to inclose.

An indictment will not lie for the non-repair of a *private* road set out under an inclosure act (*o*). But where the commissioners set out "one public bridle road and private carriage road" for the use of certain named individuals, and to be at all times repaired by them, the parish may be indicted for not doing such repairs as are necessary for the public bridle road (*p*). A public road or footway cannot be stopped under an enclosure act without an order of two justices (*q*). But a private footway may be extinguished under the enclosure acts, without another being substituted (*r*).

Roads and Footways.

SECT. 2.—*Right of Way.*

(a) *Private Ways.*

A private right of way is a mere easement over the soil of another, and not an interest in the land itself (*s*). The presumption that the soil of a road *usque ad medium filum viae* belongs to the owners of the adjoining lands applies equally to a private as to a public road (*t*). A private way may be either a footway, a horseway, or a cartway (*u*). It is susceptible of almost infinite variety, according to the extent of the grant, express or implied, and of the user where no deed is produced (*x*). Thus, it may exist for agricultural purposes only (*y*); or for the carriage of coals only (*z*); or for the carriage of all articles except coals (*a*). A right of way for carts and carriages does not necessarily include a right of way for horned cattle; but the extent of the right is a question for the jury upon the evidence of user, &c. (*b*). So proof of user of a way for farming purposes does not necessarily prove a right of way for the purpose of conveying coal, the produce of a mine lying under the defendant's land (*c*). So, proof of a right

Nature of Rights of Way.

(*o*) *Rex v. Richards*, 8 T. R. 634.
(*p*) *Reg. v. Inhabitants of Cricklade*, 14 Q. B. 735; 19 L. J., M. C. 169.
(*q*) *Logan v. Burton*, 5 B. & C. 513; *Harber v. Rand*, 9 Price, 58.
(*r*) *White v. Reeves*, 2 B. Moo. 23.
(*s*) *Godley v. Frith*, Yelv. 159; *Hewlins v. Shippam*, 5 B. & C. 221.
(*t*) *Holmes v. Bellingham*, 7 C. B., N. S. 329; 29 L. J., M. C. 132; *Smith v. Howden*, 14 C. B., N. S. 398.
(*u*) Co. Lit. 56 a; *Gale*, 317 (4th ed.).
(*x*) *Gale*, 316 (4th ed.).

(*y*) *Reignolds v. Edwards*, Willes, 282; *Jackson v. Stacey*, Holt N. P. C. 455; *England v. Wall*, 10 M. & W. 699.
(*z*) *Iveson v. Moore*, 3 Ld. Raym. 291; 1 Salk. 15.
(*a*) *Marquis of Stafford v. Coyney*, 7 B. & C. 257; *Jackson v. Stacey*, Holt N. P. C. 455.
(*b*) *Ballard v. Dyson*, 1 Taunt. 279; *Gale*, 319 (4th ed.).
(*c*) *Cowling v. Higginson*, 4 M. & W. 245; *Gale*, 331 (4th ed.).

CH. XVIII. s. 2 of way for the purpose of carting timber will not support a plea of
Right of Way
(Private).
 ----- right of way for all carts, carriages, horses, and on foot; or even amount to proof of any one of those rights taken separately, so as to admit of the verdict being entered distributively (*d*). So a reservation in a lease of a right of way on foot and for horses, oxen, cattle and sheep, does not include a right to lead manure (*e*). Where premises are demised or conveyed “with a right of way thereto,” it may be a question for the jury what is a reasonable use of such right (*f*). A., having a right of way to a close, demised the close to B. by a parol demise, not mentioning the right of way. B. being possessed of an adjoining close upon which he was erecting certain houses, used the way for carting building materials to A.’s close, for the purpose of using them upon his own adjoining land:—held, that it was properly left to the jury to say whether B.’s use of the road was a bonâ fide exercise of the right of way to A.’s close, or a mere colourable mode of getting to his own land (*g*). Where a right of way was expressed to be “through the gateway” of the plaintiff (which gateway led to other premises of the plaintiff), and, at the time of the lease, carts could come in to load and unload and turn round and go out again, but through alterations of the premises could not now do so without slightly trenching upon the plaintiff’s premises: held, that in the reasonable use of the right of way the defendants had a right to do this, and that what was a reasonable user was for the jury (*f*).

Claim of
 Right of Way
 by User, or
 Prescription.

A right of way may be claimed by user for [20 or 40] years, pursuant to 2 & 3 Will. 4, c. 71, s. 2 (*h*); or by prescription from time immemorial (*i*), or by express or implied grant (lost or not lost (*k*)), and sometimes by custom (*l*). If a particular class of persons use a pathway, and the owner does not interrupt the user for some private reason not communicated to the persons using the path, a public right of way is gained by the user after a lapse of twenty years (*m*). Where the owners and occupiers of a particular close or farm have immemorially been used to cross a particular piece of land, a right of way is created by the immemorial usage which supposes an ancient grant; and in pleading such a right of way, it is not necessary to describe all the closes intervening between the two termini (*n*).

2 & 3 Will. 4, c. 71, s. 2. By the Prescription Act (2 & 3 Will. 4, c. 71), sect. 2, “No claim

(*d*) *Higham v. Rabett*, 5 Bing. N. C. 622; 7 Dowl. 653; Gale, 333 (4th ed.).

(*e*) *Brunton v. Hall*, 1 Q. B. 792; Gale, 333 (4th ed.).

(*f*) *Hawkins v. Carbines*, 27 L. J., Ex. 44.

(*g*) *Skull v. Glenister*, 16 C. B., N. S. 81; 32 L. J., C. P. 185; *Williams v. James*, L. R., 2 C. P. 577; 36 L. J., C. P. 256; and see *Dare v. Heathcote*, 25 L. J., Ex. 245; 26 id. 164.

(*h*) Bullen & L. Pl. 811 (3rd ed.).

(*i*) Id. 811; *Darling v. Clue*, 4 F. & F. 329.

(*k*) Id. 812.

(*l*) *Grimstead v. Marloues*, 4 T. R. 718; Crabb Real Prop. sects. 363, 372.

(*m*) *Reg. v. Broke*, 1 F. & F. 514.

(*n*) *Simpson v. Lowthwaite*, 3 B. & Adol. 226; *Rouse v. Bardin*, 1 H. Blac. 361; *Jackson v. Skillito*, 1 East, 381.

which may be lawfully made at common law, by custom, prescription or grant, to any way or other easement, or to any watercourse, or the use of any water, to be enjoyed or derived upon, over or from any land or water of our said lord the king, his heirs or successors, or being parcel of the Duchy of Lancaster or of the Duchy of Cornwall, or being the property of any ecclesiastical or lay person, or body corporate, when such way or other matter as herein last before mentioned shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of *twenty years*, shall be defeated or destroyed by showing only that such way or other matter was first enjoyed at any time prior to such period of twenty years; but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and where such way or other matter as hereinbefore last mentioned shall have been so enjoyed as aforesaid for the full period of *forty years*, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing" (o).

CA.XVIII.s.2
Right of Way
(Private).

Claims to
Right of
Way, &c. not
to be defeated
after 20
Years' Enjoy-
ment by
showing only
the Com-
mencement.

After 40
Years' En-
joyment,
Right to be
absolute,
unless had by
Agreement in
Writing.

The enjoyment of a way or other easement under this act means *a continuous enjoyment as of right*, for twenty (or forty) years next before the commencement of the suit (p), or of some other suit or action wherein the right was brought into question (q): *as an easement*, without interruption acquiesced in for a year; and such right is defeated by unity of possession during all or part of the period of enjoyment, though such unity of possession has its inception after the completion of the twenty (or forty) years (r). Therefore where the plaintiff had enjoyed a way as of right, and without interruption from 1800 to 1855, when the action was brought: held, that his claim under the statute was defeated by unity of possession from 1843 to 1853 (s). Evidence that during the alleged enjoyment the land over which, and the land in right of which, it has been exercised, were held by the same person, disproves the enjoyment "as of right" and "as an easement" (t).

"Enjoy-
ment" under
Act means
continuous
Enjoyment as
of Right.

A right of way *appurtenant* to land passes to the tenant by a parol demise of the land, though nothing is said about it at the time of the demise (u). A private right of way may be grounded on a special permission;—as when the owner of lands grants to another a liberty of passing over his grounds, to go to church, to market, or the like, in

Private Ways
by Grant.

(o) Sects. 1, 4, 5, 6, 7, 8, are stated, ante, 655; sect. 3 (as to lights), post, 676.

(p) Ante, 655.

(q) *Cooper v. Hubbuck*, 12 C. B., N. S. 456; 31 L. J., C. P. 323; *Beytagh v. Cassidy*, 16 W. R. 403, Ir. Exch.

(r) *Battishill v. Reed*, 18 C. B. 696; 25 L. J., C. P. 290; *Onley v. Gardiner*, 4 M. & W. 496.

(s) *Battishill v. Reed*, supra.

(t) *Clayton v. Corby*, 2 Q. B. 813.

(u) *Skull v. Glenister*, 16 C. B., N. S. 81; 32 L. J., C. P. 185; ante, 37.

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Right of Way
(Private).

which case the gift or grant is particular, and confined to the grantee alone: it dies with the person, and if the grantee quit the country, he cannot assign over his right to any other, nor can he justify taking another person in his company. Under a grant of a way from A. to B. "in, through and along" a particular way, the grantee is not justified in making a traverse road across the same (*x*). A reservation of a right of way "to a stable and loft over and the space or opening under the loft, and now used for a wood-house," does not authorize the party to use the way to a cottage built on the spot where the loft and space under was, there having been such an alteration in the substance of the place (*y*). If a right of way be granted to a cottage, and the cottage is changed into a tan-yard, the right of way ceases; but if there is a general grant of all ways to a cottage, the right is not lost by reason of the cottage being altered (*z*).

Limited
 Right of
 Way.

A right of way for agricultural purposes is a limited and qualified right of way, and does not necessarily confer a right to use such a way for general and commercial purposes (*a*). So a reservation of a right of way, on foot and for horses, oxen, cattle and sheep, does not confer a right to use it to lead manure (*b*). A lease of lands, excepting the mines, with power to work them, "with free ingress, &c. to and from the same, or to or from any other mines, quarries, lands and grounds, on foot, &c., and also all necessary ways, privileges and powers whatsoever for the purposes aforesaid, and particularly of laying, making and granting waggon-ways in and over the premises demised," does not give the lessor power to grant wayleaves for all purposes, but only a limited power for getting the expected minerals (*c*). On a grant of lands, excepting all mines, together with sufficient wayleave and stayleave to and from the mines, the grantor cannot use the wayleave for conveying minerals got out of adjoining lands, being part of the same mineral field; but his right is not confined to such a description of way as was in use at the time of the grant, and therefore may extend to a railway, although the grant is 200 years old (*d*). Under a grant of a free and convenient way for the purpose of conveying coals, among other articles, the grantee has a right to lay a framed waggon-way (*e*). If a man, upon a lease for years, reserve a way to himself through the house of the lessee to a back-house, he cannot use it but at seasonable times and on request (*f*). There being two tenants of adjoining houses held under the same landlord, the tenant of one of the houses

(*x*) *Senhouse v. Christian*, 1 T. R. 560.

(*y*) *Allan v. Gomme*, 11 A. & E. 769; explained in *Henning v. Burnet*, 8 Exch. 192, 194; Gale, 317, n. (*e*) (4th ed.).

(*z*) Per Parke, B., in *Henning v. Burnet*, 8 Exch. 192.

(*a*) *Jackson v. Stacey*, Holt, 455; *Reignolds v. Edwards*, Willes, 282.

(*b*) *Brunton v. Hall*, 1 Q. B. 792.

(*c*) *Durham and Sunderland Rail. Co. v. Walker*, 2 Q. B. 940.

(*d*) *Dand v. Kingscote*, 6 M. & W. 174; *Bishop v. North*, 11 M. & W. 418; *Sidbottom v. Bostock*, 18 Q. B. 813.

(*e*) *Senhouse v. Christian*, 1 T. R. 560.

(*f*) *Tomlin v. Fuller*, 1 Vent. 48.

acquired a right of way to his vaults through the adjoining vaults. The landlord sold both properties at one sale, with a condition that they were to be subject to, and with the benefit, as the case might be, of all subsisting rights or easements of way or passage, so far as any lot might be affected thereby: hold, that the vendor being subject to no liability as to right of way, the purchaser of one tenement could not enforce a right of way as against the other (*g*). The cesser of the use of a private way for less than twenty years, accompanied by an act clearly indicative of an intention to abandon the right, is sufficient to destroy the easement (*h*). But a parol agreement for the substitution of a new way for an old prescriptive way, and a consequent discontinuance to use the old way, afford no evidence of an abandonment thereof (*i*). The acquiring a right of way by the public does not destroy a previously-existing private right of way over the same line (*k*).

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Right of Way
(Private).

A right of way may also arise by act and operation of law: for if a man grant a piece of ground in the middle of his field, he at the same time tacitly and impliedly gives a way to come at it (*l*); and the grantee may cross the grantor's land for that purpose without being a trespasser. And it is the same though the close aliened be not totally inclosed by the grantor's land, but partly by a stranger's, for the grantee may not go over the stranger's land (*m*). The lessee of an inner close has by necessity a right of way, suitable to the business for which the lease was made, over an outer close which belongs to the same landlord: but the lessee of one close cannot as such by user acquire an easement over another close which belongs to the same landlord (*n*). When the law gives anything, it gives impliedly whatsoever is necessary for enjoying the same (*o*); therefore when one (even as trustee) conveys land to another, to which there is no access but over the grantor's land, a right of way passes of necessity, as incidental to the grant (*p*); so also, if the owner of two closes, having no way to one of them but over the other, part with the latter without reserving the way, it seems that it will be reserved for him by operation of law (*q*). A lessor demised a messuage, consisting of two parts, separated by intervening reserved land, subjected only

Private Ways
of Necessity.

(*g*) *Daniel v. Anderson*, 31 L. J., Ch. 610; *White v. Bass*, 7 H. & N. 722; 31 L. J., Ex. 283; *Scott v. Sykes*, 2 F. & F. 191; *Dodd v. Burchell*, 1 H. & C. 113; *Suffield v. Brown*, 33 L. J., Ch. 249.

(*h*) *Reg. v. Chorley*, 12 Q. B. 515.

(*i*) *Lovell v. Smith*, 3 C. B., N. S. 120; *Payne v. Sheddén*, 1 Moo. & R. 382; *Hale v. Oldroyd*, 14 M. & W. 793.

(*k*) *Duncan v. Louch*, 6 Q. B. 904; but see *Reg. v. Chorley*, 12 Q. B. 515; cited 8 E. & B. 37.

(*l*) *Oldfield's case*, Noy, 123; 2 Roll. Abr. 60, pl. 17.

(*m*) 2 Roll. Abr. 60.

(*n*) *Gayford v. Moffatt*, L. R., 4 Ch. Ap. 133.

(*o*) Hobart, 234.

(*p*) *Howton v. Frearson*, 8 T. R. 50.

(*q*) *Pomfret v. Riccroft*, 1 Wms. Saund. 321, n. (6); cited L. R., 4 Ch. Ap. 135; *Clarke v. Cogge*, Cro. Jac. 170; *Owen*, 122; *Steeple v. Heydon*, 6 Mod. 1; *Chichester v. Isthbridge*, Willes, 72, note; *Howton v. Frearson*, 8 T. R. 50.

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(Private).

to a specific right of way for the lessee to a third building, for a specific purpose, which reservation, strictly interpreted, would preclude him from all access to the one part, which was accessible only by crossing the reserved land in one of two directions, the one by entering it from the residue of the demised premises, the other, and far the more convenient, by entering it from the public street: it was held, that the lessee was entitled to a way across the reserved land from the public street in that part (*r*). By a lease of a house, with all appurtenances, a right of way *necessary* for the convenient occupation of such house and previously enjoyed by the tenant will pass (*s*). If a way granted by a lease cannot be used by reason of its passing over the land of a third person, and there is no other way to the lessee's house, he is entitled to a way of necessity to the nearest highway by the shortest line across the grantor's land (*t*).

Way of Necessity,
limited by
Necessity
which created
it.

A way of necessity is limited by the necessity which created it, and when such necessity ceases, the right of way also ceases: therefore, if at any subsequent period, the party formerly entitled to such way can approach the place to which it led, by passing over his own land by as direct a course as he would have done by using the old way, the way ceases to exist as of necessity (*u*). A way of necessity exists after unity of possession of the close to which and the close over which it runs, and after a subsequent severance: therefore, if a person purchase close A., with a way of necessity thereto over close B., a stranger's land, and afterwards purchase close B., and then purchase close C., adjoining to close A., and through which he may enter to close A., and then sells close B. without reservation of any way, and then sells close A. and C.; the purchaser of close A. shall nevertheless have the ancient way of necessity to close A. over close B. (*x*).

Ways under
Leases made
pursuant to
Act of Par-
liament.

A private estate act, enabling tenants for life to grant building leases, empowered the lessors to lay out and appropriate any part of the land authorized to be leased as and for a way, street, square, passage, sewer, or other conveniences, for the general improvement of the estate, and the accommodation of the tenants and occupiers: held, that exclusive private rights of way over land so appropriated for a way might be granted to particular lessees, and that tenants under

(*r*) *Morris v. Edgington*, 3 Taunt. 24; *Wilson v. Bagshaw*, 5 Man. & R. 448; *Osborn v. Wise*, 7 C. & P. 761.

(*s*) *Minchcliffe v. Earl Kinnoul*, 5 Bing. N. C. 1; *Pheysay v. Vicary*, 16 M. & W. 484; *Kavanagh v. Coal Mining Co. of Ireland*, 14 Ir. Com. L. R. 82, Q. B. But it is otherwise where the way is not mentioned and not absolutely necessary; *Dodd v. Burchall*, 1 H. & Colt. 113; 31 L. J., Ex. 364, and see *Dyer v. Carter*, 1 H. &

N. 916; *Worthington v. Gimson*, 2 E. & E. 618; 29 L. J., Q. B. 116; *Pearson v. Spencer*, 1 B. & S. 571; 3 B. & S. 761; *Folden v. Bastard*, 4 B. & S. 258; 11 W. R. 778; 14 id. 199.

(*t*) *Osborn v. Wise*, 7 C. & P. 761.

(*u*) *Holmes v. Goring*, and *Same v. Elliott*, 2 Bing. 76.

(*x*) *Buckby v. Coles*, 5 Taunt. 311; *Gale*, 130 (4th ed.).

other leases granted in pursuance of the powers of the act, but containing no grant by deed of a right to use such ways, were not entitled by the provisions of the statute to use them (y).

CH. XVIII. s. 2
Right of Way
(Private).

(b) *Disturbance of Ways.*

Disturbance of ways principally happens when a person who has a right of way over another's grounds, by grant or prescription, or user for forty or twenty years, is obstructed by inclosures or other obstacles, or by ploughing across it; by which means he cannot enjoy his right of way, or at least not in so commodious a manner as he might have done (z). Although the erection of an obstruction causes no immediate damage to the plaintiff in his use of a right of way, in consequence of his own laches, yet if its existence puts his title into hazard, and prevents him from exercising his right whenever he thinks fit to resume it, he may maintain an action (a). If this be a way annexed to his estate, and the obstruction be made by the tenant of the land, it is a nuisance for which an action on the case may be maintained (b); but if the right of way, thus obstructed by the tenant, be only in gross (that is, annexed to a man's person, and unconnected with his lands or tenements), or if the obstruction of a way belonging to a house or land be made by a stranger, it is then in either case merely a disturbance: for the obstruction of a way in gross is no detriment to any lands or tenements, and therefore no nuisance properly so called.

Remedies for
Disturbance
of Ways.

Where one grants to another a private right of way, the latter must bear the expense of making it available, by forming the road, keeping it in repair, and erecting the necessary fences (c). For the want of repair of or obstruction to public highways, as that concerns the public, the remedy is by indictment (d). An action may be maintained for the obstruction of a public footway, where the plaintiff has sustained special and peculiar damage therefrom beyond the rest of the public (e); but such action should generally be brought in the county court where the damages do not exceed 10*l.* (f). An owner of land is under no legal obligation to fence an excavation therein, unless it is made so near a public road or way as to constitute a public nuisance (g).

Repair of
Private
Ways.
Non-repair of
Public Ways.

(y) *White v. Leeson*, 5 H. & N. 53; 29 L. J., Ex. 105.

(z) 3 Blac. Com. 341.

(a) *Bower v. Hill*, 1 Bing. N. C. 549.

(b) *Bullen & L. Pl.* 381 (3rd ed.); *Corby v. Hill*, 4 C. B., N. S. 556; 27 L. J., C. P. 318.

(c) *Ingram v. Morecroft*, 33 Beav. 49; *Gerrard v. Cooke*, 2 B. & P. New R. 216; *Rider v. Smith*, 3 T. R. 766; *Com. Dig.* tit. *Chemin*, D. 6; 1 Wms. Saund. 322 c, n. (3), cited 6 Q. B. 909.

(d) *Reg. v. Longton Gas Co.*, 2 E. & E. 651.

(e) *Blagrove v. The Bristol W. W. Co.*, 1 H. & N. 369; 26 L. J., Ex. 57; *Winterbotham v. Ld. Derby*, L. R., 2 Ex. 316, 322; 36 L. J., Ex. 194; 16 W. R. 15; *Bullen & L. Pl.* 377—380 (3rd ed.).

(f) See 30 & 31 Vict. c. 142, ss. 5, 12.

(g) *Polch v. Smith*, 7 H. & N. 736; 31 L. J., Ex. 201; *Hounsell v. Smith, Bart.*, 7 C. B., N. S. 731; 29 L. J., C. P. 203; *Robbins v. Jones*, 15 C. B., N. S. 221; *Fisher v. Prouse*, 2 B. & S. 770.

CH. XVIII. s. 3

*Lights.*SECT. 3.—*Lights.*Nature of
Rights to
Light and
Air.

The right to the reception of such light and air as fall *perpendicularly* on a man's land is a natural right of property incident to the land, and not a mere easement over the land of another: but a right to the reception of light and air, without obstruction, in a *lateral* direction over the land of another is an easement (*h*).

2 & 3 Will. 4,
c. 71, s. 3:
The Prescrip-
tion Act.

By 2 & 3 Will. 4, c. 71, s. 3, "when the access and use of light to and for any dwelling-house, workshop or other building shall have been actually enjoyed therewith (*i*) for the full period of *twenty years*, without interruption (*k*), the right thereto shall be deemed absolute and indefeasible, any local usage or custom (*l*) to the contrary notwithstanding, unless it shall appear that the same was enjoyed by some consent or agreement expressly made or given for that purpose (*m*) by deed or writing" (*n*).

Decisions.

This section puts the right on a simple foundation, and with the simplest exception (*o*). The enjoyment for the requisite period may have been partly before the passing of the act, the enactment being retrospective (*p*). The enjoyment need not be adverse (*q*). The right may be gained by user for twenty years, although by permission orally given (*r*): but not by user under a consent or agreement by deed or writing (*s*). The mere payment of rent for the use of light is not an "interruption" within the meaning of sect. 4 (*t*). An user for twenty years will create a right, though interrupted by intervals of suspension, occasioned by an unity of possession, such intervals being excluded from the computation (*u*). But where the dominant and servient tenements were for sixty years in the occupation of the same person as tenant thereof respectively; it was held, that no right

(*h*) Gale, 300 (4th ed.); Tudor L. C. Real Prop. 168 (2nd ed.).

(*i*) The words "as of right" are here purposely omitted; *Flight v. Thomas*, 11 A. & E. 695; 3 P. & D. 442; 8 Cl. & Fin. 231; 1 West, 671; *Mayor, &c. of London v. Pewterers' Co.*, 2 Moo. & R. 409; *Frewen v. Phillips*, 11 C. B., N. S. 449, 454; Gale, 158 (4th ed.).

(*k*) An interruption not submitted to or acquiesced in for one year counts as nothing, and does not amount to an "interruption" within the meaning of this act, sect. 4, ante, 656; if commenced during the last year of the prescribed period, and within one year next before action, it will not defeat the right; *Flight v. Thomas*, infra.

(*l*) This destroys the custom of the city of London to build on ancient foundations to any height, notwithstanding the obstruction of ancient lights; *Salters' Co. v. Jay*, 3 Q. B. 109; *Truscott v. Merchant*

Taylor's Co., 11 Exch. 855; 25 L. J., Ex. 173; *Cooper v. Hubbuck*, 12 C. B., N. S. 456; 31 L. J., C. P. 323; *Yates v. Jack*, L. R., 1 Ch. Ap. 295, 296, 299, note; *Crofts v. Haldane*, 8 B. & S. 194; L. R., 2 Q. B. 194; 36 L. J., Q. B. 85.

(*m*) *Bridges v. Blanchard*, 1 A. & E. 536; *Blanchard v. Bridges*, 4 A. & E. 176.

(*n*) The other sections of this act are stated ante, 656.

(*o*) Per Coleridge, J., in *Merchant Taylors' Co. v. Truscott*, 11 Exch. 863.

(*p*) *Simper v. Foley*, 2 Johns. & H. 555.

(*q*) *Tickle v. Brown*, 4 A. & E. 369.

(*r*) *Mayor, &c. of London v. Pewterers' Co.*, 2 Moo. & R. 409.

(*s*) Sect. 3, supra.

(*t*) *Plasterers' Co. v. Parish Clerks' Co.*, 6 Exch. 630; *Rogers v. Taylor*, 2 H. & N. 828, 833.

(*u*) *Thomas v. Thomas*, 2 C., M. & R. 34; *Simper v. Foley*, 2 Johns. & H. 555.

to light was acquired, the enjoyment of the light during that period not being *as an easement* (x). CH. XVIII. s. 3
Lights.

Where two houses were held by different tenants under the same landlord for long terms granted and expiring at the same time: it was held, that by twenty years' user during such terms one tenant might acquire as against the other an indefeasible right to the light (y). But whether such right would continue as against the landlord or his assigns after the expiration of the terms may be doubted (z). Two Houses
held under
the same
Landlord.
Freuen v.
Phillips.

An user for nineteen years and a fraction gives an inchoate right, which cannot be defeated by any subsequent interruption within one year next before action (a); but in such case the full period of twenty years should be allowed to elapse before the commencement of any action for disturbance of the right; and the action must be brought before the interruption has continued for one year. Where windows were shown to have existed twenty years, it was held that proof that they did not exist twenty-two years before the obstruction was insufficient to defeat the action (b). When a house is partly built and the windows put in, the twenty years begins to run, notwithstanding the house is not completed or made fit for habitation until several years afterwards (c). Although the twenty years' user must be next before some suit or action wherein the claim to the right to light is brought in question, it need not be next before the pending suit or action (d). Period of
User.

In order to establish the right to the access of an extraordinary amount of light necessary for a particular purpose or business to an ancient window, open uninterrupted and known enjoyment of such light in the manner in which it is at present enjoyed and claimed must be shown for a period of twenty years (e). The owner of ancient lights is entitled not only to sufficient light for the purposes of his then business, but to all the light which he had enjoyed previously to the interruption complained of (f). There is no distinction between the right to light and air in regard to town houses and country houses (g). Amount of
Light.

(x) *Harbidge v. Warwick*, 3 Exch. 552.

(y) *Freuen v. Phillips*, 11 C. B., N. S. 449.

(z) *Daniel v. Anderson*, 31 L. J., Ch. 610; *White v. Bass*, 7 H. & N. 722; 31 L. J., Ex. 283. Semble, that it would; see *Simper v. Foley*, 2 Johns. & H. 555.

(a) *Flight v. Thomas*, *supra* (i).

(b) *Penwarden v. Ching*, Moo. & M. 400.

(c) *Courtauld v. Legh*, L. R., 4 Ex. 126.

(d) *Cooper v. Hubbuck*, 12 C. B., N. S. 456; 31 L. J., C. P. 323; *Beylagh v. Cassidy*, 16 W. R. 403, Ir. Exch.

(e) *Lanfranchi v. Mackenzie*, L. R., 4 Eq. 421; 36 L. J., Ch. 518.

(f) *Fates v. Jack*, L. R., 1 Ch. Ap. 295.

(g) *Martin v. Headen*, L. R., 2 Eq. 425; 35 L. J., Ch. 682.

CH. XVIII. s. 3

Lights.

Presumption
of Grant not
required.

Proscrip-
tion at Com-
mon Law.

The right to what is called an ancient light now depends upon positive enactment. It is matter *juris positivi*, and does not require, and therefore ought not to be rested on, any presumption of grant, or fiction of a licence having been obtained from the adjoining proprietor (*k*). Before the above act the right to light was obtained by an express or implied grant, or covenant in the nature of a grant, by the owner of the servient tenement not to obstruct the light in the dominant tenement, and which created a sort of negative servitude "*ne facias*" (*l*). Proof of uninterrupted enjoyment of light for twenty years and upwards amounted to *prima facie* evidence of such right (*m*). The right was acquired by mere user, and might have been forfeited by non-user, though for less than twenty years, unless an intention was manifested when the non-user commenced to resume the right within a reasonable time (*n*).

By Modern
implied
Grant.

It is a maxim of law that no man shall derogate from his own grant (*o*); and this applies to all persons claiming through or under him (*p*). Therefore a right to lights may sometimes be acquired, without an *express* grant thereof, in much less time than twenty years. Thus where the plaintiff derives his title to the windows from the defendant who obstructs them, or from any person through whom the defendant claims (*q*). Where A. possesses a house having the actual use and enjoyment of certain newly-made lights, and also possesses the adjoining land, and he afterwards sells the house to B., neither A. nor any person claiming the adjoining land through or under him can lawfully obstruct B.'s lights (*q*). Where the owner of a house divided it into two tenements, and demised one of them to B.: it was held, that B. was liable to an action for obstructing windows in the house at the time of the demise, although of recent construction, and though there was no stipulation against the obstruction (*r*). But where a landowner sells any portion of his land, the purchaser has a right to build upon it so as to obstruct the ancient lights of the remaining portion of the land (*s*).

How lost—by
Alterations.

Alterations in windows by merely enlarging them, without changing their character or position, do not destroy the right to light and

(*k*) *Tapling v. Jones*, 11 H. L. Cas. 290; 34 L. J., C. P. 342; 2 Selw. N. P. 1073 (13th ed.).

(*l*) *Penwarden v. Ching*, Moo. & M. 400; Gale, 300 (4th ed.); 2 Selw. N. P. 1072 (13th ed.).

(*m*) *Cross v. Lewis*, 2 B. & C. 686; *Moore v. Rawson*, 3 B. & C. 332.

(*n*) *Moore v. Rawson*, *supra*. But see *Tapling v. Jones*, *supra*.

(*o*) 2 Prest. Conv. 42; *Swansborough v. Coventry*, 9 Bing. 309; *Aulton v. Atkins*, 18 C. B. 249; *Gerard v. Lewis*, L. R., 2 C. P. 305; 36 L. J., C. P. 173.

(*p*) *Doe d. Gaisford v. Stone*, 3 C. B.

176; *Compton v. Richards*, 1 Price, 27; *Couts v. Gorham*, 1 Moo. & M. 396; *Glave v. Harding*, 27 L. J., Ex. 286.

(*q*) *Palmer v. Fletcher*, 1 Lev. 122; *Cox v. Matthews*, 1 Vent. 237; *Rosewell v. Pryor*, 6 Mod. 116; *Compton v. Richards*, 1 Price, 27; *Couts v. Gorham*, 1 Moo. & M. 396; *Swansborough v. Coventry*, 9 Bing. 305; *Blanchard v. Bridges*, 4 A. & E. 176.

(*r*) *Riviere v. Bower*, Ry. & Moo. 24.

(*s*) *Curriers' Co. v. Corbett*, 2 Drew. & Sm. 35; 11 Jur., N. S. 719; 13 W. R. 538; *White v. Bass*, 7 H. & N. 722; 31 L. J., Ex. 283; *Daniel v. Anderson*, *id.* 610; *Suffield v. Brown*, 33 L. J., Ch. 249.

air through that part of the aperture which is old (*t*). Even opening new windows which cannot be obstructed without at the same time obstructing an ancient window will not justify or excuse any obstruction of such ancient window (*x*).

It was held in *Barnes v. Loach* (*y*)—a case of the first impression—that the implication of a grant of lights upon the alienation to different persons of tenements previously in the ownership of the same person, is not prevented by the fact that the dominant tenement at the time of the alienation is in lease, and consequently not in the possession of the alienor.

In *Master v. Hansard* (*z*), the owner of an estate granted a lease of a plot of ground to A. (with a building upon it known as the Crystal Palace Hotel), who covenanted not to do anything on the demised premises which should be an annoyance to the neighbourhood or to the lessor or his tenants. Some years afterwards the same owner granted a lease of an adjoining plot to B., who entered into a similar restrictive covenant, but had no notice that such covenant was contained in A.'s lease also. Within twenty years A. commenced, by building operations, to darken the windows of B.'s house. It was held, by the Court of Appeal, that B. could not prevent this being done, the restrictive covenants being for the benefit of the landlord, and not of the tenants.

General words in a grant must be restricted to what the grantor had power to grant at the date of it. Therefore, where the defendant, having a term for four years in premises over which light came to the premises demised to plaintiff, "together with all lights," &c. for twenty-one years, bought the first-mentioned premises at the end of the four years, it was held that the defendant might destroy the light (*a*).

A right to light under 2 & 3 Will. 4, c. 71, s. 3, may be lost by blocking up the windows for one year, and discontinuing to use them during that period (*b*); but a common law right to light is not so readily determined. It may be lost by twenty years' non-user (*c*).

(*t*) *Tapling v. Jones*, 11 H. L. Cas. 290; 34 L. J., C. P. 342; *Chandler v. Thompson*, 3 Camp. 80; *Gurrett v. Sharp*, 3 A. & E. 325; *Blanchard v. Bridges*, 4 A. & E. 191, 192.

(*x*) *Tapling v. Jones*, *supra*; overruling *Renshaw v. Dean*, 18 Q. B. 112, and *Hutchinson v. Copestake*, 8 C. B., N. S. 102; 9 id. 863; and see *Binches v. Pash*, 11 C. B., N. S. 324, which may also be considered as overruled on this point.

(*y*) L. R., 4 Q. B. D. 494.

(*z*) L. R., 4 Ch. D. 718. From a perusal of the judgments it does not seem that B. would have succeeded, if he had had

notice of A.'s covenant at the time of entering into his own.

(*a*) *Booth v. Alcock*, L. R., 8 Ch. 663; 42 L. J., Ch. 557; 29 L. T. 231; 21 W. R. 743.

(*b*) *Ante*, 655; but see *Tapling v. Jones*, 11 H. L. Cas. 290; 34 L. J., C. P. 342, in which the right given by statute after twenty years' user is considered as secure and permanent as a right at common law.

(*c*) *Lawrence v. Obce*, 3 Camp. 514; *Darwin v. Upton*, 3 T. R. 159; *Cross v. Lewis*, 2 B. & C. 686; *Moore v. Ravenon*, 3 B. & C. 332; *Lewis v. Price*, 2 Wms. Saund. 175 a.

CH. XVIII. s. 3 It may also sometimes be lost by an abandonment of the right for
Lights. less than twenty years, provided the jury find that the party thereby manifested an intention of permanently abandoning his right to the light, or that the lights had been kept so closed as to lead the owner of the adjoining land to alter his position, in the reasonable belief that the lights had been permanently abandoned (*d*). It seems doubtful whether the manifestation of an intention to abandon the lights communicated to the owner of the adjoining land would destroy the right, until such owner altered his position, and incurred expense or loss in reliance thereon (*d*). But an abandonment is effectual when communicated *and acted on* (*e*).

Action by
 either Land-
 lord or
 Tenant.
 Evidence.

Either the tenant in possession or the reversioner may sue for an obstruction to lights (*f*).

To prove a right under the statute there must be evidence of a continuous uninterrupted user in each year for twenty years next before action (*g*), or at all events a user commencing more than twenty years before action, and continued without interruption to within one year next before action (*h*). The issue is upon the user and not upon the right (*i*); but where a grant is pleaded the issue is upon the grant as alleged, and not upon the user or non-user during the last twenty years, which is merely matter of evidence (*k*). There must also be evidence of some sensible and material obstruction of the light and of the damage thereby occasioned to the plaintiff (*l*).

Injunction
 against Con-
 tinuance of
 Injury.

In an action for obstructing lights, the plaintiff may claim an injunction against a continuance of the injury (*m*).

SECT. 4.—*Watercourses.*

Definition of
 a Water-
 course.

A watercourse means water flowing between banks more or less defined. To constitute a watercourse in which rights may exist, or may be acquired by user or otherwise, the flow of water must possess that unity of character by which the flow on one person's land can be identified with that on his neighbour's land. Water which squanders itself over an indefinite surface is not a watercourse, nor a proper subject-matter for the acquisition of a right by user (*n*). But the moment

(*d*) *Stokoe v. Singers*, 8 E. & B. 31; 26 L. J., Q. B. 257.

(*e*) *Reg. v. Chorley*, 12 Q. B. 515, cited 8 E. & B. 37.

(*f*) *Jeffer v. Gifford*, 4 Burr. 2141; and see Chap. XIX., post.

(*g*) *Love v. Carpenter*, 6 Exch. 825.

(*h*) *Flight v. Thomas*, 8 Cl. & F. 231.

(*i*) *Davies v. Williams*, 16 Q. B. 546; *Battisill v. Reed*, 18 C. B. 698, 703.

(*k*) *Ward v. Ward*, 7 Exch. 838; 21 L. J., Ex. 334.

(*l*) *Manning v. Gresham Hotel Co.*, Ir. R., 1 Ch. 115.

(*m*) See further as to injunctions, post, Chap. XIX.

(*n*) *Briscoe v. Drought*, 11 Ir. Com. L. R. 250; *Rawstron v. Taylor*, 11 Exch. 369; *Broadbent v. Ramebottom*, id. 602, 615; 25 L. J., Ex. 115.

the water of a spring runs into a definite channel, it constitutes a watercourse (o). All accessions to such stream, from whatever source, form part of it (p). Where the question at the trial is whether there is a watercourse or not, the judge ought, before he leaves that question to the jury, to instruct them as to what constitutes a "watercourse" in law (q).

CH. XVIII. s. 4
Watercourses.

Flowing water is publici juris, not in the sense that it is a bonum vacans, to which the first occupant may acquire an exclusive right, but that it is public and common in this sense only, that *all may reasonably use it who have a right of access to it*; that none can have any property in the water itself, except in the particular portion which he may choose to abstract from the stream and take into his possession, and that during the term of his possession only (r). The right to the use of flowing water is clear. *Primâ facie* the proprietor of each bank is the proprietor of half the land covered by the stream, *ad medium filum aquæ*, but there is no property in the water. Each proprietor of the land has a right to the advantage of the stream *flowing in its natural course* over his land, and to use the same as he pleases for any purpose of his own, not inconsistent with a similar right in the proprietors of land above or below; so that neither can any proprietor above diminish the quantity or injure the quality of the water which would otherwise naturally descend, nor can any proprietor throw back the water without the licence or the grant of the proprietor above (s); or a right to do so acquired by prescription from time immemorial, or by user for [40 or 20] years, pursuant to 2 & 3 Will. 4, c. 71, s. 2 (t). Every riparian proprietor has a right to the reasonable use of water flowing past his land, namely, for his domestic purposes, and for his cattle. He has also the right to the use of the water for any other purpose, provided he does not thereby interfere with the rights of the proprietors either above or below him (u). Subject to this condition a riparian proprietor may dam up the stream for the purpose of a mill, or divert the water for the purposes of irrigation; but he has no right to interrupt the regular flow of the stream, if he thereby interferes with the lawful use of the water by other proprietors and inflicts upon

Nature of
Rights in
natural
Streams.

(o) *Dudden v. Guardians of Clutton Union*, 1 H. & N. 627.

(p) *Wood v. Waud*, 3 Exch. 748.

(q) *Briscoe v. Drought*, 11 Ir. Com. L. R. 250; and see *Elliott v. South Devon R. Co.*, 2 Exch. 726; *Reg. v. Cottle*, 16 Q. B. 412; *Cashell v. Wright*, 6 E. & B. 891.

(r) *Embrey v. Owen*, 6 Exch. 369; *Mason v. Hill*, 3 B. & Adol. 304; 5 id. 1.

(s) *Mason v. Hill*, 5 B. & A. 1, 24; 3 B. & Adol. 304; 5 id. 1; *Wright v. Howard*, 1 Sim. & Stu. 190, 203; *Acton v. Blundell* (in error), 12 M. & W. 348, 349; *Tyler v. Wilkinson*, 4 Mason, U. S. R. 397;

Gale, 204 (4th ed.).

(t) Ante, 670; *Drewett v. Sheard*, 7 C. & P. 465; *Sampson v. Hoddinott*, 1 C. B., N. S. 590; 3 id. 596; *Moore v. Webb*, 1 C. B., N. S. 673; *Carlyon v. Lovering*, 1 H. & N. 784; *Murgatroyd v. Robinson*, 7 E. & B. 391; *Gaved v. Martyn*, 19 C. B., N. S. 732; 34 L. J., C. P. 353; *Tudor* L. C. Real Prop. 159—168 (2nd ed.).

(u) *Muer v. Gilmour*, 12 Moore, P. C. 131; 7 W. R. 328, cited L. R., 2 Ex. 9; *Sampson v. Hoddinott*, 1 C. B., N. S. 590; 3 id. 596; 26 L. J., C. P. 148; *Embrey v. Owen*, 6 Exch. 353; *Ld. Norbury v. Kitchin*, 3 F. & F. 292; 9 Jur., N. S. 132.

CH. XVIII. s. 4 Watercourses. them a sensible injury (*x*). He has a right by means of water-wheels and machinery, erected by him for that purpose, to pump up water from the stream to a reservoir, and to convey it thence by pipes to his dwelling-house upon another estate at a distance from the stream, and there to apply such water to his domestic and other necessary purposes of utility; provided he takes only a reasonable quantity with reference to the size of the stream and the rights of his neighbour; but he has no right to take more water by means of the wheels and machinery than he would have a right to take otherwise (*y*). The proprietor of a watercourse has a right to avail himself of its momentum as a power which may be turned to beneficial purposes; and he may make a reasonable use of the water itself for domestic purposes, for watering cattle, or even for irrigation, provided it is not unreasonably detained or essentially diminished (*z*). A riparian proprietor has a right to divert water to a reasonable extent for the purposes of irrigation; but the extent of such user must depend upon the circumstances of each case. It must not be such as materially to prejudice any proprietor below (*a*). If a riparian proprietor unreasonably *detain* the water of a stream for purposes of irrigation, whereby another proprietor lower down the stream is deprived of the use of the water daily for several hours, until it is too late for him to use it for irrigating his land, or for any other lawful and necessary purpose, he may maintain an action (*b*). A proprietor of land contiguous to a stream may, *as soon as he is injured* by the diversion of the water from its natural course, maintain an action against the party so diverting it: and it is no answer to the action that the defendant first appropriated the water to his own use, unless he has had twenty years' undisturbed enjoyment of it in its altered course (*c*). So where the water is improperly heightened and penned and forced back upon the plaintiff's land situate higher up the stream (*d*). So where the stream is heated or polluted with the refuse of a mill or works higher up the stream (*e*). The right to have a stream flow in its natural state, without diminution or alteration, is a natural right incident to the property in the land through which it passes, and not a mere easement (*f*). The owner of

(*x*) *Miner v. Gilmour and Ld. Norbury v. Kitchin*, *supra*.

(*y*) *Lord Norbury v. Kitchin*, *supra*.

(*z*) *Blanchard v. Baker*, 8 Greenleaf, 258, cited 1 C. B., N. S. 604; 6 Exch. 365.

(*a*) *Embrey v. Owen*, 6 Exch. 353, 372; *Ld. Norbury v. Kitchin*, 3 F. & F. 292.

(*b*) *Sampson v. Hoddinott*, 1 C. B., N. S. 590, 612; 3 id. 596; 26 L. J., C. P. 148.

(*c*) *Mason v. Hill*, 5 B. & A. 1; 2 N. & M. 743; 3 B. & Adol. 304; 5 id. 1.

(*d*) *Saunders v. Newman*, 1 B. & A. 258; Gale, 220 (4th ed.).

(*e*) *Wood v. Waud*, 3 Exch. 748; *Carlyon v. Lovering*, 1 H. & N. 784; *Whaley v. Laing*, 2 H. & N. 476; 3 id. 675; 5 id. 480; 26 L. J., Ex. 327; 27 id. 422; *Murgatroyd v. Robinson*, 7 E. & B. 391; *Magor v. Chadwick*, 11 A. & E. 571; *Mason v. Hill*, 3 B. & Adol. 304; 5 id. 1.

(*f*) *Embrey v. Owen*, 6 Exch. 353, 369; *Dickinson v. Grand Junction Canal Co.*, 7 Exch. 282, 299; *Chasemore v. Richards*, 2 H. & N. 168; 7 H. L. Cas. 349; 29 L. J., Ex. 81; *Rawstron v. Taylor*, 11 Exch. 381, 382; *Tyler v. Wilkinson*, 4 Mason, U. S. R. 397; Gale, 202—209 (4th ed.).

such property has a right to have the stream come to him in its natural state in flow, quantity and quality, and to go from him without obstruction, upon the same principle that he is entitled to the support of his neighbour's soil for his own land in its natural state. Such a right in no way depends upon prescription, or the presumed grant of his neighbour, nor from presumed acquiescence of the proprietors above and below (*g*). By grant, or by prescription from time immemorial, or by user for forty or twenty years, pursuant to 2 & 3 Will. 4, c. 71, s. 2 (*h*), a riparian proprietor may acquire a right to use the water in a manner not justified by his natural right: but such acquired right is an easement, and has no operation against the natural rights of a landowner higher up the stream, unless the user by which it was acquired affects the use that he himself has made of the stream, or his power to use it, so as to raise the presumption of a grant, and so render the tenement above a servient tenement (*i*). Nothing short of twenty years' undisturbed possession of water diverted from the natural channel, or raised by a weir, can give a party an adverse right against those whose lands lie lower down the stream, and to whom it is injurious; a possession of above nineteen years is not sufficient (*k*). A riparian proprietor derives his right in respect of the water from possession of *land abutting on the stream*, and if, by a deed which conveys only land not abutting on the stream, he affects to grant water rights, the grant, though valid as against the grantor, can create no rights for an interruption of which the grantee can sue a third party in his own name (*l*). The abstraction of water from a natural stream openly and under a claim of right for a period of twenty years to a tenement *not abutting* on the stream will create no easement to have pure water flow down the stream to the point of abstraction (*m*).

A purchaser of land on the banks of a river takes, by his conveyance, the right of ownership of a moiety of the bed of the river *ad medium flum aquæ* (*n*). The soil of the *alveus* is not the common property of the respective owners on the opposite sides of a river; the shore of each belongs to him as severalty, and extends *usque ad medium flum aquæ*; but neither is entitled to use it in such a manner as to interfere with the natural flow of the stream (*o*). A fence or bulwark on the bank is allowable, but the *alveus* is sacred (*p*). The

CH. XVIII. s. 4
Watercourses.

The Alveus
or Bed of a
River.

(*g*) *Chasemore v. Richards*, *supra*.

(*h*) *Ante*, 670.

(*i*) *Sampson v. Hoddinott*, 1 C. B., N. S. 590; 3 *id.* 596; 26 L. J., C. P. 148; *Wright v. Williams*, 1 M. & M. 77; *Murgatroyd v. Robinson*, 7 E. & B. 391; *Wood v. Waud*, 3 Exch. 778; *Greatrex v. Hayward*, 8 Exch. 291; *Carlyon v. Lovering*, 1 H. & N. 797; Gale, 202, 254 (4th ed.).

(*k*) *Prescott v. Phillips*, cited 6 East, 213.

(*l*) *The Stockport W. W. Co. v. Potter*, 3 H. & C. 300; 10 Jur., N. S. 1005. But see *Nuttall v. Bracewell*, 4 H. & C. 714; L. R., 2 Exch. 1; 36 L. J., Ex. 1.

(*m*) *Id.*

(*n*) *Crossley v. Lightowler*, L. R., 3 Eq. 279; 2 Ch. Ap. 478; 36 L. J., Ch. 584.

(*o*) *Bickett v. Morris*, L. R., 1 H. L. Cas. 47; 12 Jur., N. S. 803.

(*p*) *Id.*

CH. XVIII. s. 4 mouth of a river comprehends the whole space between the lowest ebb
Watercourses. and the highest flood mark (g).

Evidence.

The evidence must be similar, *mutatis mutandis*, to that in actions where a right of common is pleaded (r). The plaintiff may prove his alleged right either by grant, express or implied, or by prescription from time immemorial; or by user for forty or twenty years, pursuant to 2 & 3 Will. 4, c. 71, s. 2 (s); or as a natural incident to the ownership of his mill or land. No act of appropriation of the water of a natural stream to a beneficial purpose by means of a mill or otherwise is necessary to entitle the plaintiff to complain of a wrongful diversion of the water from its natural channel (t). Where the plaintiff claims a right to a flow of water "by reason of his possession of a mill," but proves a right by reason of his possession of the land on which the mill has been recently erected, he is entitled to the verdict (u). But the usual allegation that the plaintiff was possessed of mines, lands, &c. is not proved by evidence showing that he was lessee not of the surface or banks, but only of mines, with liberty to use the streams for colliery purposes only (x). In case for the diversion of water the plaintiff alleged in his declaration a reversionary interest in three closes of land, to wit, *three ponds* filled with water, one pond being upon each of the said closes, and a right to the flow of the water into the said closes for supplying the said ponds in the said closes with water for the watering of cattle. The defendant traversed the right to the flow of the water as alleged. It appeared in evidence at the trial that the plaintiff had enjoyed an immemorial right to the flow of this water into an ancient pond in one of his closes, but that, above thirty years ago, he made a new pond in each of the three closes, and turned the water so as to supply them, *and thenceforth disused the old pond*, which was gradually filled with rubbish and overgrown with grass. The plaintiff's right in respect of the three ponds having been defeated by proof of an outstanding life estate, under 2 & 3 Will. 4, c. 71, s. 7: held, that he was entitled under this declaration to recover in respect of his right to the flow of water to the *old pond* (y). Where it appeared in evidence that the channel had been dug about thirty years before action, it was held that a prescriptive right at common law was negatived (z). But in such case the plaintiff may prove a

(g) *Horne v. Mackenzie*, 6 Cl. & Fin. 628.

(r) See Ros. Ev. (13th ed.) p. 776.

(s) Ante, 670; *Hale v. Oldroyd*, 14 M. & W. 789, 793; *Northam v. Hurley*, 1 E. & B. 665; *Whitehead v. Parks*, 2 H. & N. 870; *Whaley v. Laing*, id. 476; 3 id. 675; 27 L. J., Ex. 422; *Nuttall v. Bracewell*, 4 H. & C. 714; L. R., 2 Ex. 1.

(t) Gale, 299.

(u) *Ricketts v. Salwey*, 2 B. & Adol. 360; *Wood v. Waud*, 3 Exch. 748, 773; in which *Frankum v. Earl of Falmouth*,

2 A. & E. 452; 6 C. & P. 529, is explained and distinguished.

(x) *Insole v. James*, 1 H. & N. 243.

(y) *Hale v. Oldroyd*, 14 M. & W. 789; and see *Brown v. Best*, 2 Wils. 174; *Payne v. Shedden*, 1 Moo. & R. 382; *Drewett v. Sheard*, 7 C. & P. 465; *Ward v. Ward*, 7 Exch. 838; 21 L. J., Ex. 334; *Lovell v. Smith*, 3 C. B., N. S. 120.

(z) *Eaton v. Swansea W. W. Co.*, 17 Q. B. 267, 269.

right by user for twenty years; and if once a user as of right be proved to have commenced, it can be defeated only by subsequent interruptions not submitted to for one year. On the other hand, the defendant may prove that the user was always contentious, and never as of right (z).

The occupier of a mill may maintain an action for any back water and injury to his mill, although he has not enjoyed it precisely in the same state for twenty years: and therefore it is no defence to such an action that the occupier has within a few years erected in his mill a wheel of different dimensions, but requiring less water than the old one (a). "The owner is not bound to use the water in the same precise manner, or to apply it to the same mill: if he were, that would stop all improvements in machinery" (b). Proof of a slight alteration by the plaintiff in the course of a stream above his land is not sufficient to destroy his right (c). But proof that the defendant, or the person through whom he claims, within twenty years enlarged certain weirs, &c., so as to abstract more water from the river than he had previously been accustomed to do, whereby the plaintiff's mill was injured, is sufficient; for although the defendant and his predecessors have on several occasions (long before the last twenty years) enlarged their weirs and deepened their channels, &c., so as to appropriate to themselves as much water from the river as they from time to time wanted; yet that will not justify a further abstraction of water from the river (d).

The right of a riparian proprietor, it was clearly established by *Sampson v. Hoddinott*, is limited to natural streams, and does not attach in the case of artificial cuts or drains (e). It is also settled that the flow of water from a drain made by a landowner in his own land for the purposes of agricultural improvements for twenty years, does not give a right to the neighbour, so as to preclude the landowner from altering the level of his drain for the improvement of his land (f), and that no right can be acquired under 2 & 3 Will. 4, c. 71, s. 2 (g), to the use of an artificial watercourse made for a particular and temporary purpose (h). An artificial watercourse or drain, however, may have been originally made for permanent purposes, and under such circumstances and have been since used for

CH. XVIII. s. 4
Watercourses.

Action maintainable, although mode of enjoyment changed.

Saunders v. Newman.

Artificial
Cuts or
Drains.

Sampson v. Hoddinott.

(z) *Eaton v. Swansea W. W. Co.*, supra.

(a) *Saunders v. Newman*, 1 B. & A. 258.

(b) *Id.* 261.

(c) *Hall v. Swift*, 4 Bing. N. C. 381.

(d) *Bealey v. Shaw*, 6 East, 208, explained 5 B. & Adol. 19; Gale, 216 (4th ed.); *Mason v. Hill* (in error), 5 B. & Adol. 1, 19; *Brown v. Best*, 1 Wils. 174; *Moore v. Webb*, 1 C. B., N. S. 673.

(e) *Sampson v. Hoddinott*, 1 C. B., N.

S. 590; 3 id. 596; 26 L. J., C. P. 148 (overruling *Magor v. Chadwick*, 11 A. & E. 571); and see *Wardle v. Brocklehurst*, 1 E. & E. 1058; 29 L. J., Q. B. 145; Gale, 81 (4th ed.).

(f) *Greatrex v. Hayward*, 8 Exch. 291; *Wood v. Ward*, 3 Exch. 778.

(g) *Ante*, 670.

(h) *Arkwright v. Gell*, 5 M. & W. 203; 11 Exch. 610; Gale, 279—287 (4th ed.).

CH. XVIII. s. 4 such a period as to give all the rights that the riparian proprietors would have had if it had been a natural stream (*i*).
Watercourse.

In *Beeston v. Weate*, the plaintiff and the defendant occupied contiguous portions of land. For more than forty years, and as far back as living memory went, the occupiers of the plaintiff's land had been in the habit of passing over the defendant's land to a brook which lay on the other side of that land, and of damming up the brook when necessary, so as to force the water into an old artificial watercourse which ran across the defendant's land to the plaintiff's land. They did this, for the purpose of supplying their cattle with water, whenever they wanted the water, except when the owners of the defendant's land used the water, as they did at certain seasons of the year, for irrigation. It was held, that upon this evidence the jury was warranted in inferring an user, as of right, by the occupiers of the plaintiff's land, of the easement on the defendant's land; and that, for the interruption of such easement, the plaintiff might maintain an action against the defendant (*k*).

Implied
Grant or Re-
servation of
Drains, &c.

Where the owner of two or more adjoining houses sells and conveys one of them to a purchaser, such house is entitled to the benefit, and is subject to the burthen, of all existing drains communicating with the other house, without any express reservation or grant for that purpose: an *implied* grant or reservation (as the case may require) will be presumed in the absence of express words to the contrary (*l*). It makes no difference in this respect that the purchaser did not know of the drains under his house, if he might have ascertained their existence upon a careful inspection by a person ordinarily conversant with the subject, and it will be deemed his own fault if he did not do so at the time of his purchase (*l*). Two properties, which adjoined, were originally possessed by the same owner, in one of which was a cesspool and a drain to carry the water from the adjoining property, which was a tan-yard. The owner afterwards sold the property to different persons, and the conveyances contained no reference to the drain and cesspool:—held, that there was an implied grant of the easement of the cesspool in the conveyance of the tan-yard (*m*). Where the plaintiff excepts and reserves to himself the right to make and use a sewer in land conveyed by him to the defendant, whereby the *exclusive* use of such sewer is reserved to the plaintiff, he may maintain an action against the

(*i*) *Sutcliffe v. Booth*, 32 L. J., Q. B. 136.

(*k*) *Beeston v. Weate*, 5 E. & B. 986; 25 L. J., Q. B. 115.

(*l*) *Pyer v. Carter*, 1 H. & N. 916, 921; 26 L. J., Ex. 258. But see contra, *Suf-*

field v. Brown (on appeal), 33 L. J., Ch. 249, 259; *Polden v. Bastard*, 7 B. & S. 130, 131.

(*m*) *Ewart v. Cochrane*, 4 Macq. H. L. Cas. 117; 7 Jur., N. S. 925; but see *Suffield v. Brown*, *supra*.

defendant for opening and using the sewer (*n*). So where the defendant grants to the plaintiff the use of water, subject to a proviso for the use thereof by the defendant, the plaintiff may maintain an action on the deed for the abuse of such reservation by the defendant (*o*).

A parol licence to make a drain or watercourse *in the land of the licensor* will not, even after it has been fully executed at the expense of the licensee, confer any right or title on him to have the use and benefit of the drain or watercourse free from obstruction; nor enable him to maintain any action against the licensor for obstructing such drain or watercourse without notice (*p*). But a licence attached to a valid grant of real or personal property is irrevocable, it being a licence coupled with an interest (*q*). No man can derogate from his own grant, nor can any person claiming through or under him. But a licence connected with an invalid grant is a mere licence (whether under seal or not), and may be revoked at any time (*r*), either expressly or by implication (*s*). A parol licence to erect a skylight, or a weir, or other easement *on the land of the licensee* cannot be revoked, after it has been executed at the licensee's expense, so as to render it necessary for the licensee to incur further expense in removing it (*t*).

Nothing of *absolute necessity* to a messuage or other building is extinguished by unity of ownership or possession; as a gutter in alieno solo to carry off water, &c., or a watercourse, or a way of necessity. They are merely *suspended as easements* during the joint ownership or possession, and will revive whenever the building or the land is conveyed to another (*u*). But it is otherwise with respect to ways not of necessity or other easements not of a continuous nature (*x*).

The principles which regulate the rights of owners of land in respect to water flowing *in known and defined channels*, whether upon or below the surface of the ground, do not apply to underground

CH. XVIII. s. 4
Watercourses.

Licence to
make or use
Drains, &c.

Extinguishment or Suspension of
Drains, &c.

Underground
Water.

(*n*) *Lee v. Stevenson*, E. B. & E. 512; 27 L. J., Q. B. 263.

(*o*) *Rawstron v. Taylor*, 11 Exch. 369.

(*p*) *Hewkins v. Shippam*, 5 B. & C. 221; 7 D. & R. 783; *Cocker v. Cooper*, 1 C., M. & R. 418; *Greenslade v. Halliday*, 6 Bing. 379; *Mason v. Hill*, 5 B. & Adol. 1; *Wood v. Leadbitter*, 13 M. & W. 838; *Adams v. Andrews*, 15 Q. B. 284; *Taplin v. Florence*, 10 C. B. 744; *Roffey v. Henderson*, 17 Q. B. 574; *Roberts v. Rose*, 3 H. & C. 162; 33 L. J., Ex. 1; affirmed in error, 4 H. & C. 103; L. R., 1 Ex. 82; 35 L. J., Ex. 62.

(*q*) *Wood v. Manley*, 11 A. & E. 34; *Fellham v. Cartwright*, 5 Bing. N. C. 569.

(*r*) *Fentiman v. Smith*, 4 East, 107;

Wood v. Leadbitter, 13 M. & W. 838, 845; *Taplin v. Florence*, 10 C. B. 744, 764.

(*s*) *Roffey v. Henderson*, 17 Q. B. 574.

(*t*) *Winter v. Brockwell*, 8 East, 308; *Liggins v. Inge*, 7 Bing. 682; *Harvey v. Reynolds*, 12 Price, 724.

(*u*) *Phcysey v. Vicary*, 16 M. & W. 485, 489.

(*x*) *Pyer v. Carter*, 1 H. & N. 916; *Dodd v. Burchell*, 1 H. & C. 113; 31 L. J., Ex. 364; *Worthington v. Gimson*, 2 E. & E. 618; 29 L. J., Q. B. 116; *Pearson v. Spencer*, 1 B. & S. 571, 583; 3 B. & S. 761; *Polden v. Bastard*, 4 B. & S. 258; 32 L. J., Q. B. 372; affirmed in error, L. R., 1 Q. B. 156; 7 B. & S. 130; 35 L. J., Q. B. 92.

CH. XVIII. s. 4
Watercourses.

water 'which merely percolates through the strata in no known channels (y). The owner of land through which water flows in a subterranean course has no right or interest in it which will enable him to maintain an action against a landowner who, in carrying on mining operations on his own land in the usual manner, drains away the water from the land of the first-mentioned owner, and leaves his well dry (z). The owner of a mill on the banks of a stream cannot maintain an action against a landowner who sinks a deep well on his own land, and by pumps and steam-engines diverts the underground water which would otherwise have percolated through the soil and flowed into the river, by which, for more than sixty years, the mill was worked (a). "If a man has the misfortune to lose his spring by his neighbour digging a well, he must dig his own well deeper" (b). A mine-owner may work his coal in the manner most advantageous to himself, and remove a bar of coal therein to obtain the coal in such bar, although in consequence of his so doing the water floods an adjoining mine (c). But he has no right to pollute the water flowing through swallets in his own mine which communicate with a stream running into an adjoining mine (d). And after a demise of certain closes and all streams of water therein, reserving to the lessor all mines and minerals, with power to win and work the same, the lessor or his assigns cannot work the mines so as to cut off the springs in the closes demised (e).

Surface
 Water.

A landowner has a right to appropriate surface water which flows over his land *in no definite channel*, although the water is thereby prevented from reaching a watercourse which it previously supplied (f). He has an unqualified right to drain his land for agricultural purposes in order to get rid of mere surface water, the supply of the water being casual and its flow following no regular or definite course; and a neighbouring proprietor cannot complain that he is thereby deprived of such water, which otherwise would have come to his land (g). But where the water from a spring flowed in a gully or

(y) *Chasemore v. Richards* (in error), 2 H. & N. 168; 7 H. L. Cas. 349; 29 L. J., Ex. 81; *Reg. v. The Metropolitan Board of Works*, 3 B. & S. 710; 32 L. J., Q. B. 105; *New River Co. v. Johnson*, 29 L. J., M. C. 93; *Ibbotson v. Peat*, 3 H. & C. 644, 650.

(z) *Acton v. Blundell*, 12 M. & W. 324, 348; *New River Co. v. Johnson*, 29 L. J., M. C. 93; *Galgay v. Great Southern and Western Railway Co.*, 4 Ir. Com. L. R. 456, Q. B.; Gale, 257—277 (4th ed.).

(a) *Chasemore v. Richards* (in error), 2 H. & N. 168; 7 H. L. Cas. 349; 29 L. J., Ex. 81; *Reg. v. Metropolitan Board of Works*, 3 B. & S. 710; 32 L. J., Q. B. 105; *New River Co. v. Johnson*, 29 L. J., M. C. 93; *Ibbotson v. Peat*, 3 H. & C.

644, 650; Gale, 266 (4th ed.).

(b) Per *Bramwell, B.*, in *Ibbotson v. Peat*, 3 H. & C. 650.

(c) *Smith v. Kenrick*, 7 C. B. 515; *Fletcher v. Rylands*, 4 H. & C. 263; L. R., 1 Ex. 265; L. R., 3 H. L. Cas. 330; 37 L. J., Ex. 161; *Baird v. Williamson*, 15 C. B., N. S. 376.

(d) *Hodgkinson v. Ennor*, 4 B. & S. 229; 32 L. J., Q. B. 231.

(e) *Whitehead v. Parks*, 2 H. & N. 870.

(f) *Broadbent v. Ramsbottom*, 11 Exch. 602; 25 L. J., Ex. 115; Gale, 251 (4th ed.).

(g) *Rawstron v. Taylor*, 11 Exch. 369; 26 L. J., Ex. 33; Gale, 251 (4th ed.); *Reg. v. Metropolitan Board of Works*, 3 B. & S. 710; 32 L. J., Q. B. 105.

natural channel to a stream on which was a mill, the spring having been cut off *at its source* and the water received into a tank as it rose from the earth, by the licence of the owner of the soil on which the spring rose, it was held, that an action lay by the millowner against the person so abstracting the water (*h*).

CH. XVIII. s. 4
Watercourses.

The flow of water for twenty years from the eaves of a house cannot give a right to a neighbour to insist that the house should not be pulled down or altered so as to diminish the quantity of water flowing from the roof (*i*). On the other hand, it seems that a man may by user acquire the easement or right to project his wall or eaves over the boundary line of his property, or to discharge the rain running from the roof of his house upon the adjoining land (*k*).

Flow of
Water from
Eaves.

SECT. 5.—*Copyhold Rights, &c.*

The customary rights of copyhold tenants depend upon the special customs of the manor, and are not affected by the Prescription Act (2 & 3 Will. 4, c. 71), which is confined to easements and profits à prendre over the lands of another. They may therefore sometimes be established by less proof than thirty years' user (*l*).

Customary
Rights of
Copyholders.

The owner of land cannot, at his pleasure, create new rights or incidents of property and annex them to it; or render it subject to a new species of burden, so as to bind it in the hands of an assignee (*m*). But covenants of a restrictive nature have frequently been enforced in equity, against the owner *or his assignees* who took with notice of them, actual or constructive.

Unusual In-
cidents or
Burdens.

A custom "that all the tenants, resiants, and inhabitants within a manor, should grind at the lord's mill all their corn and grain, as well growing within the manor as brought from other places, and spent or consumed in a ground state in their respective houses" within the manor, may be a good custom; but it does not extend to restrain the inhabitants who do not grow corn and grain, or who have no corn or grain of their own, from buying or using in such houses ground corn or flour, though it may not have been ground or grown within the manor, but produced from corn ground at other mills (*n*). And where, by a similar custom, the tenants were bound to grind at two ancient mills belonging to the lord, or one of them, at their own

Custom to
grind at the
Manor Mill.

(*h*) *Dudden v. Guardians of Clutton Union*, 1 H. & N. 827; 26 L. J., Ex. 146.

(*i*) *Wood v. Waud*, 3 Exch. 778.

(*k*) *Thomas v. Thomas*, 2 C., M. & R. 34.

(*l*) *Hanmer v. Chance*, 34 L. J., Ch. 413.

(*m*) *Keppel v. Bailey*, 2 Myl. & K. 535,

Lord Brougham, C.; *Hill v. Tupper*, 2 H. & C. 121; 32 L. J., Ex. 217; *Stockport Waterworks Co. v. Potter*, 3 H. & C. 300; 10 Jur., N. S. 1005; compare last case with *Nuttall v. Bracewell*, 4 H. & C. 714; L. R., 2 Ex. 1; 36 L. J., Ex. 1.

(*n*) *Richardson v. Walker*, 2 B. & C. 827; *Cort v. Dirkbeck*, 1 Doug. 218.

CH. XVIII. s. 5 option, and the lord having pulled down one of the mills, so as to deprive the tenants of their option: it was held, that the custom was suspended (o).
Copyhold Rights, &c.

Wind and Air to a Wind-mill. The owner of a windmill erected within living memory cannot claim, either by prescription, or by presumption of a grant arising from twenty years' acquiescence, to be entitled to the free and uninterrupted passage of the currents of wind and air to his mill: and such a claim is not within the 2 & 3 Will. 4, c. 71, s. 2, which is confined to rights of way or other easements to be exercised upon or over the surface of the adjoining land (p).

Use of a Yard for certain Purposes. A reservation of a right to the use of a yard, for the occupiers of an adjoining messuage, in the same manner as the tenants had been accustomed to use the same, does not authorize the use of the yard by the tenants of a cottage built where a loft and open woodhouse under it, and forming part of the messuage, had stood at the time of the reservation (q).
 Clothes Lines to dry Linen. Proof of a privilege for the tenants of a house to hang lines across a yard adjoining for the purpose of drying the linen of their own families only, does not support a replication of a general right to put lines across and hang linen (r).

To mix Dung, &c. on adjoining Land. A right or liberty to deposit and mix dung, muck, &c. upon adjoining land, and to make the same into manure and carry away the same, is a mere easement and not a profit à prendre (s).

Suspension and Revival of necessary Easements. A necessary easement is suspended as long as the same person having a term of years in the land à quâ, and a fee-simple in the land in quâ, is in possession of both; but it revives on a cessation of the unity of possession, though the change of possession be not accompanied with an alienation of the whole or either of the estates (t).

SECT. 6.—Game, &c.

(a) Game Generally.

What is "Game." By the Game Act (1 & 2 Will. 4, c. 32), s. 2, "the word 'game' shall for all the purposes of this act be deemed to include hares, pheasants, partridges, grouse, heath or moor game, black game and bustards." Sect. 12 only mentions "game," and therefore does not extend to rabbits (u). Sect. 30 gives a summary remedy against

(o) *Richardson v. Capes*, 2 B. & C. 841.
 (p) *Webb v. Bird*, 10 C. B., N. S. 268; 13 Id. 841.

(q) *Allan v. Gomme*, 11 A. & E. 759; *Henning v. Burnett*, 8 Exch. 187; Gale, 317, 503, 523 (4th ed.).

(r) *Drewell v. Towler*, 3 B. & Adol. 735.

(s) *Pye v. Mumford*, 11 Q. B. 660, 668, n. (b).

(t) *Theysey v. Vicary*, 16 M. & W. 485, 489.

(u) *Spicer, app., Barnard, resp.*, 1 E. & E. 874; 28 L. J., M. C. 176; *Padwick app., King, resp.*, 7 C. B., N. S. 88; 29 L. J., M. C. 42.

trespassers in search or pursuit of "game or woodcocks, snipes, quails, landrails or conies." The 23 & 24 Vict. c. 90, requires a game licence to be taken out for the purpose of taking or killing "any game whatever, or any woodcock, snipe, quail or landrail, or any conies, or any deer." By 25 & 26 Vict. c. 114, entitled "An Act for the prevention of Poaching" (sect. 1), "the word 'game' in this act shall for all the purposes of this act be deemed to include any one or more hares, pheasants, partridges, eggs of pheasants and partridges, woodcocks, snipes, rabbits, grouse, black or moor game, and eggs of grouse, black or moor game." The meaning of the word "game" must be collected from the above enactments. "It is a perfectly undefined word, and one which has been used at various times in different senses, sometimes narrower, sometimes more comprehensive" (x). Game, whilst in confinement, may be the subject of larceny, and liable to a distress for rent (y).

CH. XVIII. s. 6
Game, &c.

At common law the right to take and kill game (in which, as in all animals *feræ naturæ*, there is no property) belongs to the tenant and not to the landlord, by virtue of the tenant's property in the land (z). It is and has long been very common however for the landlord to reserve the right to the game in the contract of tenancy, and the Game Act of 1831 (1 & 2 Will. 4, c. 32) which did away with the numerous restrictions and qualifications (a), whereby a tenant was almost invariably prevented, even in a case where the game did not happen to be reserved to the landlord, from enjoying his right to it, has specially protected such reservations.

Common
Law Right
of Tenant to
Game.

Where a reservation of game is spoken of, this (although from its common use in the Game Act and in leases it is more convenient to employ it) is not quite a correct term; when the lease reserves the game, and the tenant executes the lease, he by so doing regrants the game to the landlord (b), granting to the landlord a *profit à prendre*.

Reservation
of Game.

A *profit à prendre*, like other incorporeal hereditaments, can be granted by deed alone (c); but to a certain extent a landlord may "reserve" game by writing without seal, or even by words alone (d). The Game Act (1 & 2 Will. 4, c. 32), in sect. 8, expressly speaks of a

Parol Reser-
vation.

(x) Per Erle, C. J., in *Jeffries v. Evans*, 19 C. B., N. S. 246, 264.

(y) *Ante*, 409 (n).

(z) See *Moore v. Earl of Plymouth*, 7 Taunt. 614.

(a) Under the statutes repealed by the Act of 1831 the right was restricted to persons having freeholds to the amount of 100*l.* a year, or ninety-nine years' leases of 160*l.*, &c. The 7th section of the Act of 1831 gave the game to the landlord in

cases where the occupation was under a lease (not being for more than twenty-one years) made previously to the passing of the act.

(b) *Wickham v. Hawker*, 7 M. & W. 103.

(c) See *Bird v. Higginson*, 2 A. & E. 696, and *ante*, 77.

(d) See *Reg. v. Thurlstone*, 28 L. J., M. C. 106; *Jones v. Williams*, 46 L. J., M. C. 270; 36 L. T. 559.

CH. XVIII. s. 6 right of entry for sporting purposes “by lease, or any *written or parol*
Game, &c. demise or contract,” and these words have been held to shew by im-
 plication that a parol reservation is sufficient (*e*).

Terms of Re- Most agricultural leases will be found to contain a reservation of
 servation in the game to the lessor. It has been held upon the construction of such
 Writing. reservations, that a reservation to the landlord of the exclusive right
 of “hunting, shooting, fishing, and sporting,” debars the tenant from
 shooting rabbits (*f*), but a grant of lease to hunt does not include a
 Agreement to lease to shoot (*g*). An agreement by the tenant not to destroy game
 preserve. is not a reservation of game to the landlord at all (*h*), but a covenant
 to preserve runs with the land, and may be sued on by an assignee of
 the reversion (*i*).

Grant of Sporting Rights to Third Person. Sporting rights are frequently granted by a landlord to third
 persons. Such a grant has been held not to prevent the grantor
 from cutting down timber in the ordinary course of management of
 his estate, although the cutting down will prejudice the shooting (*k*),
 but not to allow the grantee to tread down the crops in an unrea-
 sonable manner (*l*), or to turn rabbits on the land (*l*), or game of any
 kind (*m*).

But if A. should demise twenty closes to B., with a right of shooting
 over all of them, and B. should covenant not to permit rabbits to
 become so numerous as to cause damage to A.’s tenants, it will be an
 answer to an action for breach of such a covenant that over some of
 the closes A. had not reserved the right of shooting, because by such
 non-reservation A. rendered it impossible for B. to enter upon all the
 demised closes for the purpose of performing the covenant (*n*).

An exception of liberty for the tenants on the farms to kill rabbits
 with ferrets only extends to plantations let as farms subsequently to
 the demise of the right of shooting (*o*). A grant to a person to come
 with servants or otherwise authorizes the grantee to hawk, &c. by his
 servants in his absence (*p*). A grant of the right of sporting to the
 lessee of the right in common with the lessor, his heirs and assigns,

(*e*) *Jones v. Williams*, 46 L. J., M. C. 270; 36 L. T. 559, per Grove, J.: “It may be taken as settled law that there may be a parol reservation of game on a parol demise.” Per Lindley, J., *ib.* See also *Ileg. v. Thurlstone*, 28 L. J., M. C. 106.

(*f*) *Jeffries v. Evans*, 34 L. J., C. P. 261, 264; 19 C. B., N. S. 246.

(*g*) *Moore v. Earl of Plymouth*, 7 Taunt. at p. 627. See also *Pickering v. Noyes*, 4 B. & C. 639; *Pannell v. Mill*, 3 C. B. 625.

(*h*) *Coleman v. Bathurst*, L. R., 6 Q. B. 366; and 694 (*b*), post.

(*i*) *Hooper v. Clark*, L. R., 2 Q. B. 200; 36 L. J., Q. B. 79.

(*k*) *Gearns v. Baker*, L. R., 10 Ch. 355; 44 L. J., Ch. 334; 33 L. T. 86; 23 W. R. 543; and see *Pattison v. Gifford*, L. R., 18 Eq. 259; 43 L. J., Ch. 524.

(*l*) *Hilton v. Green*, 2 F. & F. 821.

(*m*) *Birkbeck v. Page*, 31 Beav. 403.

(*n*) *Cornewall v. Dawson*, 24 L. T. 664.

(*o*) *Newton v. Wilmot*, 8 M. & W. 711.

(*p*) *Ewart v. Graham*, 7 H. L. Cas. 331.

and any friend of him or them confers a privilege not confined to a single friend at a time (*r*).

CH. XVIII. s. 6
Game, &c.

A power to demise lands or any part of them is not well exercised by a demise of part, with liberty of shooting over the whole (*s*). But a lease under a power may except and reserve all game, &c. on the demised premises to the lessor, his heirs and assigns, if apt and sufficient words be used (*t*).

Construction
of Power.

The Rating Act, 1874 (*u*), extends the operation of the poor rate acts to the right of sporting when severed from the occupation of the land (*x*), and provides that if such right is not let, and the owner of the right receives rent for the land, the occupier of the land may deduct from his rent such portion of the rate as is paid by him in respect of the increase, if any, of the rateable value; and that if the right of sporting is let, either the owner or lessee may be rated as the occupier. It had previously been held that when the right to take and kill game is reserved to the landlord, the tenant should be assessed to the poor rates according to the annual value of the land as reduced by such reservation (*y*); and that when the landlord himself occupied, he should be rated to the full value, notwithstanding he let off the shooting (*z*).

Rating of
Right of
Sporting, &c.

The sections of the Consolidating Act (1 & 2 Will. 4, c. 32), which principally affect landlord and tenant, are these:

1 & 2 Will. 4,
c. 32. s. 8.

Sect. 8 enacts, "nothing in this act contained shall authorize any person seised or possessed of or holding any land to kill or take the game, or to permit any other person to kill or take the game upon such land, in any case where by any deed, grant, lease or any written or parol demise or contract a right of entry upon such land for the purpose of killing or taking the game *hath been or hereafter shall be reserved or retained* by or given or allowed to any grantor, lessor, landlord or other person whatsoever."

Express Re-
servations of
Game not in-
terfered with.

By sect. 11, "where the lessor or landlord shall have reserved to himself the right of killing the game upon any land, it shall be lawful for him to authorize any other person or persons, who shall have obtained an annual game certificate (*a*), to enter upon such land, for the purpose of pursuing and killing game thereon."

Landlord en-
titled to
Game may
authorize
other Persons.

(*r*) *Gardiner v. Colyer*, 12 W. R. 979.

(*s*) *Dayrell v. Hoare*, 12 A. & E. 356.

(*t*) *Pannell v. Mill, Bart.*, 3 C. B. 625;
Jeffryes v. Evans, *supra*.

(*u*) 37 & 38 Vict. c. 54, ss. 3, 6, which
see, 548, *ante*.

(*x*) See *Rogers v. St. German's Union*,
35 L. T. 332.

(*y*) *Reg. v. Inhlts. of Thurlestone*, 1 E.
& E. 502; 28 L. J., M. C. 106; *Reg. v.*
Williams, 23 L. T., O. S. 76; *Reg. v.*
Guardians of Battle Union, L. R., 2 Q. B.
8; 8 B. & S. 12; 36 L. J., M. C. 1.

(*z*) *Reg. v. Guardians of Battle Union*,
supra.

(*a*) Now a licence pursuant to 23 & 24
Vict. c. 90; *post*, 696.

CH. XVIII. s. 6

*Game, &c.*1 & 2 Will. 4,
c. 32—*contd.*Penalty on
Tenant
Sporting,
where Land-
lord entitled
to Game.

By sect. 12, "where the right of killing the game (*x*) upon any land is by this act (*y*) given to any lessor or landlord, in exclusion of the right of the occupier of such land, or where such exclusive right hath been or shall be specially reserved by or granted to, or doth or shall belong to the lessor, landlord or any person whatsoever other than the occupier of such land, then and in every such case, if the occupier of such land shall pursue, kill or take any game (*z*) upon such land, or shall give permission to any other person so to do, without the authority of the lessor, landlord or other person having the right of killing the game upon such land, such occupier shall, on conviction thereof before two justices of the peace, forfeit and pay for such pursuit such sum of money not exceeding 2*l.*, and for every head of game so killed or taken such sum of money not exceeding 1*l.*, as to the convicting justices shall seem meet, together with the costs of the conviction" (*a*).

Coleman v.
Bathurst.

An agreement by the tenant not to destroy game, but to do all he can to preserve it, and to forbid other persons sporting at the request of the landlord, is not a "reservation" within the meaning of this section, so as to support a conviction of the tenant (*b*).

Summary
Proceedings
against Tres-
passers in
Search of
Game.

By sect. 30, after reciting that "after the commencement of this act game will become an article which may be legally bought and sold, and it is therefore just and reasonable to provide some more summary means than now by law exist for protecting the same from trespassers," it is enacted, "that if any person whatsoever shall commit any *trespass by entering or being*, in the daytime, upon any land in search or pursuit of *game or woodcocks, snipes, quails, landrails, or conies*, such person shall, on conviction thereof before a justice of the peace, forfeit and pay such sum of money, not exceeding 2*l.*, as to the justices shall seem meet, together with the costs of the conviction (*a*); and that if any persons to the number of *five or more together* shall commit any trespass by entering or being, in the daytime, upon any land in search or pursuit of game or woodcocks, snipes, quails, landrails or conies, each of such persons shall, on conviction thereof before a justice of the peace, forfeit and pay such sum of money, not exceeding 5*l.*, as to the said justices shall seem meet, together with the costs of the conviction (*a*): provided always, that any person charged with

(*x*) This does not extend to rabbits; *Spicer*, app., *Barnard*, resp., 1 E. & E. 874; 28 L. J., M. C. 176; *Padwick*, app., *King*, resp., 7 C. B., N. S. 88; 29 L. J., C. P. 80.

(*y*) The reference is to sect. 7, which gave the game to the landlord in all cases where the occupation was under a lease or agreement made previously to the passing of the act [5th October, 1831], excepting, however (inter alia), a lease for more than twenty-one years, so the section has ceased

to operate for the last twenty-five years.

(*z*) Ante, 690.

(*a*) See *Morden*, app., *Porter*, resp., 7 C. B., N. S. 641; *Osmond*, app., *Meadows*, resp., 12 C. B., N. S. 10; 31 L. J., M. C. 238; *Kenyon*, app., *Hart*, resp., 6 B. & S. 249; 34 L. J., M. C. 87; *Reg. v. Cridland and others*, 7 E. & B. 853; 27 L. J., M. C. 28.

(*b*) *Coleman v. Bathurst*, L. R., 6 Q. B. 366; 40 L. J., M. C. 131; 24 L. T. 426; 19 W. R. 848 (Lush, J., diss.).

any such trespass shall be at liberty to prove, by way of defence, any matter which would have been a defence to an action at law for such trespass; save and except that the leave and licence of the occupier of the land so trespassed upon shall not be a sufficient defence in any case where the landlord, lessor or other person shall have the right of killing the game upon such land by virtue of any reservation or otherwise as hereinbefore mentioned; but such landlord, lessor or other person shall, for the purpose of prosecuting for each of the two offences herein last before mentioned, be deemed to be the legal occupier of such land, whenever the actual occupier thereof shall have given such leave or licence."

Can. XVIII. s. 6
Game, &c.

Licence of
Occupier no
Defence
where Game
reserved to
Landlord.

By sect. 31, "where any person shall be found upon any land in the daytime in search or pursuit of game, or woodcocks, snipes, quails, landrails or conies, it shall be lawful for any person having the right of killing the game upon such land by virtue of any reservation, or for the occupier of the land (whether there shall or shall not be any such right by reservation or otherwise), or for any gamekeeper or servant of either of them, or for any person authorized by either of them," to require the person so found to quit the land, and also to tell his name and place of abode, and, in case of refusal, to apprehend such person, &c. Sect. 32 gives protection against persons in pursuit of game, to the number of five or more, using violence.

By sect. 35, "the aforesaid provisions against trespassers and persons found on any land shall not extend to any person hunting or coursing upon any lands with hounds or greyhounds, and being in fresh pursuit of any deer, hare or fox already started upon any other land, nor to any person *bonâ fide* claiming and exercising any right or reputed right of free warren or free chase, nor to any gamekeeper lawfully appointed within the limits of any free warren or free chase, nor to any lord or any steward of the lord of any manor, lordship or royalty, or reputed manor, lordship or royalty, nor to any gamekeeper lawfully appointed by such lord or steward within the limits of such manor, lordship or royalty, or reputed manor, lordship, or royalty."

Saving for
Hunting, &c.

By sect. 42, it is declared and enacted, "that it shall not be necessary, in any proceeding against any person under this act, to negative by evidence any certificate, licence, consent, authority or other matter of exception or defence; but that the party seeking to avail himself of any such certificate, licence, consent, authority, or other matter of exception or defence, shall be bound to prove the same" (c).

Defendant to
prove any
Licence on
which he re-
lies.

It is not necessary that a conviction under 1 & 2 Will. 4, c. 32, s. 30, for a trespass in search or pursuit of game, should purport to be, or should in fact be, at the instance or on the information of the owner

Informant
need not be
interested.

(c) See *Reg. v. Wood*, 25 L. J., M. C. 96; 1 Dears. & B. C. C. 1.

CH. XVIII. s. 6 or occupier of the land, or of a party interested in the game, or of a person authorized by such owner, occupier, or party (*d*).

Game, &c.

1 & 2 Will. 4,
c. 32—*contd.*

What is a
Trespass.

Any person trespassing in a highway, in search or pursuit of game, may be convicted under sect. 30 (*e*). But merely sending a dog into an adjoining cover in search or pursuit of game is not a sufficient "trespass by entering or being" in or upon such cover, the act requiring a personal trespass (*e*). A person who, in his own land, shoots a pheasant in the land of another, and goes on such other land to pick the bird up, commits a trespass of entering land in pursuit of game within the meaning of sect. 30, the shooting and picking up the bird being one transaction (*f*). But entering land for the purpose of picking up dead game is not a trespass in pursuit of game within the meaning of that section, which only applies to live game (*g*).

Proof of *Mens*
rea not neces-
sary.

Morden v.
Porter.

Proof of a *mens rea* is not necessary to support a conviction under sect. 30. It is sufficient if there be evidence of a mere trespass in pursuit of game for which a civil action might be maintained (*h*). A *bona fide* claim of title to the land as owner thereof, or as acting with the authority of such owner, is sufficient to oust the jurisdiction of the justices under this section (*i*): but not a claim of a prescriptive right in gross to kill game on the land, there being no colour for such claim; nor a claim of title in a third person under whom the defendant does not justify (*k*); nor a claim on behalf of the public generally (*l*). The bona fides of the claim is for the justices to determine (*m*). A tenant cannot be convicted under this section for killing rabbits on land in his own occupation; nor can any person acting as his servant and on his behalf with his authority and not by way of sport (*n*). No leave or licence of the tenant or occupier to kill "game" will be of any avail where the game has been expressly reserved to the landlord or lessor or to any other person. In cases where any such leave or licence is available, it must precede the act of trespass (*o*): and must be proved by the party who relies on it (*p*).

(*d*) *Middleton v. Gale*, 8 A. & E. 155; *Morden*, app., *Porter*, resp., 7 C. B., N. S. 641; 29 L. J., M. C. 213.

(*e*) *Reg. v. Pratt*, 4 E. & B. 860; 24 L. J., M. C. 113; 1 Dears. C. C. 602; *Brown*, app., *Turner*, resp., 13 C. B., N. S. 485; *Mayhew*, app., *Wardley*, resp., 14 C. B., N. S. 550; *Howells*, app., *Wynne*, resp., 15 C. B., N. S. 3; *Stacey*, app., *Whitehurst*, resp., 18 C. B., N. S. 344; 34 L. J., M. C. 94.

(*f*) *Osbond*, app., *Meadows*, resp., 12 C. B., N. S. 10; 31 L. J., M. C. 238.

(*g*) *Kenyon*, app., *Hart*, resp., 6 B. & S. 249; 34 L. J., M. C. 87.

(*h*) *Morden*, app., *Porter*, resp., 7 C. B., N. S. 641; 29 L. J., M. C. 213; followed in *Watkins v. Major*, L. R., 10 C. P. 662;

44 L. J., M. C. 164; 24 W. R. 164.

(*i*) *Reg. v. Cridland*, 7 E. & B. 853; 27 L. J., M. C. 28; *Morden*, app., *Porter*, resp., 7 C. B., N. S. 641; 29 L. J., M. C. 213; *Legg*, app., *Pardoe*, resp., 9 C. B., N. S. 289; 30 L. J., M. C. 108.

(*k*) *Cornucell*, app., *Sanders*, resp., 3 B. & S. 206; 32 L. J., M. C. 6.

(*l*) *Leatt v. Vine*, 30 L. J., M. C. 207.

(*m*) *Legg v. Pardoe*, 9 C. B., N. S. 289; 30 L. J., C. P. 108.

(*n*) *Spicer*, app., *Barnard*, resp., 1 E. & E. 874; 28 L. J., M. C. 176; *Padwick*, app., *King*, resp., 7 C. B., N. S. 88.

(*o*) *Morden*, app., *Porter*, resp., 7 C. B., N. S. 641; 29 L. J., M. C. 213.

(*p*) Sect. 42; ante, 695.

One who finds game on his own land cannot justify pursuing it on the land of another (*q*). A person whose game is enticed away from his land by a neighbour is liable to an action for exploding combustibles on his own land so as to be a nuisance to his neighbour, in order to frighten the game away from his land and to prevent him from killing them and from enticing other game (*r*). The owner of land in his own occupation has a property in game and rabbits started and killed thereon by a poacher, or strangers acting without his leave; and he may maintain trover for such dead game or rabbits (*s*). But where a poacher starts game on the land of A. and kills it on the adjoining land of B., it would rather seem to belong to the poacher than to A. or B. (*t*).

CH. XVIII. s. 6
Game, &c.

Whether the game belongs to the tenant or not, he is in general authorized by the Game Acts to arrest trespassers in search of game or poachers. Thus, in the case of poachers by day, the tenant may require them to quit the land and demand their name and abode: and if they refuse, or give a false or illusory name or place of abode, he may arrest them, and take them before a justice (*u*). So by the Night Poaching Act he may arrest the poachers if found on the land, or pursue them beyond the lands (*x*). The tenant has in general the same remedy against trespassers on his lands as the landlord or owner would have; and though when the game belongs to the landlord, the tenant has no remedy against his landlord or any persons shooting with his permission, yet he may proceed against ordinary trespassers, either by action or under the Game Acts when applicable. There is no principle of law which justifies the trespassing over the lands of others for the purpose of fox-hunting as carried on in modern times (*y*). This was laid down in *Paul v. Summerhayes*, in which case an assault by a farmer's son upon two persons following the Taunton Vale foxhounds, who persisted in entering upon a field of his father, was held to be justified; and it was pointed out that the early case (*z*) in which it was thought to have been decided otherwise, must be restricted to the destruction of a noxious animal for the good of the public. In case of hunting or coursing with hounds or greyhounds, and being in fresh pursuit of any deer, hare or fox already started upon any other

Arrest by Tenant of Trespassers and Poachers.

Action by Tenants against Trespassers.

Fox-hunting, &c.

Paul v. Summerhayes.

(*q*) *Deane v. Clayton*, 7 Taunt. 489.

(*r*) *Ibbotson v. Peat*, 3 H. & C. 644; 34 L. J., Ex. 118.

(*s*) *Earl of Londdale v. Rigg*, 11 Exch. 654; 1 H. & N. 923; *Blades v. Higgs*, 12 C. B., N. S. 501; 13 Id. 844; 11 H. L. Cas. 621; 34 L. J., C. P. 286.

(*t*) *Id. Churchward v. Shedd*, 14 East, 249; 2 Selw. N. P. 833 (13th ed.). But see contra, per Lord Chelmsford, 34 L. J., C. P. 291.

(*u*) 1 & 2 Will. 4, c. 32, s. 31; Paterson Game L. 58.

(*x*) 9 Geo. 4, c. 69, s. 2; Paterson Game L. 94; and see "An Act for the Prevention of Poaching," 25 & 26 Vict. c. 114.

(*y*) *Paul v. Summerhayes*, L. R., 4 Q. B. D. 9; 48 L. J., M. C. 33; 39 L. T. 574; 27 W. R.

(*z*) *Gundry v. Feltham*, 1 T. R. 334; and see *Essex v. Capel*, Chit. Game L. 114; Paterson Game L. 62.

CH. XVIII. s. 6 land, though there is no summary remedy under the Game Act (a),
Game, &c. an action may be brought by the tenant (b).

Licences to kill Game. The duty payable on licences to kill game is regulated by 23 & 24
 Vict. c. 90, thus—

If such licence be taken out after the 5th day of April, and before
 the 1st day of November—

	£	s.	d.
To expire on the 5th day of April in the following year	3	0	0

To expire on the 31st day of October in the same year	2	0	0
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If taken out on or after the 1st day of November, to

expire on the 5th day of April following	.	.	2	0	0
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Gamekeepers (duly appointed)	2	0	0
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Game Li-
 cence to Ten-
 nants.

Where a tenant is entitled to the game on his lands he requires, in general, a game licence, like other persons, to enable him to take, kill or pursue game. The exceptions to the necessity of this licence as regards the killing of hares and rabbits by tenants will be dealt with presently (c). As regards other game, the tenant must be licensed like other persons (d). As regards deer, the tenant, if otherwise entitled, needs no game licence to kill them on his own lands (d). Nor does he need a game licence to catch woodcocks and snipes with nets or springs: but if he pursue or kill them otherwise, he requires a licence (d): and he requires a licence to take, kill or pursue quails or landrails (d).

Gun Licence. It may be mentioned here that, by the Gun Licence Act, 1870 (33 & 34 Vict. c. 57), a ten-shilling gun licence must be taken out yearly for carrying a gun, and that the penalty for carrying a gun without licence is ten pounds. By the 7th section of that act, however, “the said penalty shall not be incurred by” (inter alios) “any person having in force a licence or certificate to kill game granted to him under the laws of excise in that behalf,” or “by the occupier of any lands using or carrying a gun for the purpose only of scaring birds or of killing vermin on such lands, or by any person using or carrying a gun for the purpose only of scaring birds or of killing vermin on any lands by order of the occupier thereof, who shall have in force a licence or certificate to kill game, or a licence under this act.”

Condition for
 Re-entry on
 Conviction.

A condition for re-entry in case the tenant or his assigns shall be convicted of any offence against the game laws will not enable an
 * assignee of the reversion to maintain ejectment against the tenant for shooting without a licence, inasmuch as such condition does not run

(a) 1 & 2 Will. 4, c. 32, s. 35.

(b) *Deane v. Clayton*, 7 Taunt. 489.

(c) Post, Sect. 6 (b), “Ground Game;”

11 & 12 Vict. c. 29, ss. 1, 2; *Paterson*
 Game L. 146, 147.

(d) 23 & 24 Vict. c. 90, s. 2.

with the reversion. So it was held in *Stevens v. Copp* (c); in which case, however, the judgment of Kelly, C. B., proceeded on the ground that shooting without licence was not an offence against the “game laws,” but against revenue laws only.

CH. XVIII. s. 6
Game, &c.
Stevens v. Copp.

(b) “Ground Game.”

Hares and rabbits being the subject of a special act of parliament in favour of the tenant, called the Ground Game Act, 1880, by sect. 8 of which the term “ground game” means hares and rabbits, may conveniently be considered together. Hares are “game” within the Game Act, 1831 (1 & 2 Will. 4, c. 32) sect. 2, but rabbits are not.

If the tenant agree to become such on condition that the landlord will keep down rabbits, such an agreement is collateral and need not be in writing, although the occupation be under a lease required to be in writing by the Statute of Frauds, and although the lease reserves the right of shooting to the landlord (f).

Agreement to keep down Rabbits.

Where there was an agreement that the tenant would pay compensation for damage done by hares and rabbits, to an amount to be determined by arbitration, it was held that a reference to arbitration was a condition precedent to suing upon the agreement (g).

Compensation for Damage by Rabbits.

We have already seen that under a reservation of sporting the tenant is not entitled to kill rabbits (h), but that on a grant by the landlord to a third person of sporting rights, the grantee is not entitled to turn rabbits on the land (i). A tenant may kill rabbits on his own land without being liable to prosecution under the Game Act (1 & 2 Will. 4, c. 32, s. 30) (j).

In *West v. Houghton* (k) a lease was made between the plaintiff and defendant by which the plaintiff granted exclusive rights of sporting over his estate to the defendant, who covenanted that he would keep down rabbits so that no appreciable damage might be done to the crops. Appreciable damage was done to the crops of a tenant, but the plaintiff was not liable to compensate, nor did he compensate the tenant. It was held, in an action by the plaintiff for breach of covenant, that having suffered no damage himself, and not being a trustee for the tenant, he was entitled to nominal damages only.

West v. Houghton.

By the Hare Act (11 & 12 Vict. c. 29) (l), a tenant is entitled to the game, but not otherwise, may kill hares on his enclosed lands

The “Hare Act, 1848.”

(c) L. R., 4 Ex. 20; 38 L. J., Ex. 31.

(f) *Morgan v. Griffiths*, L. R., 6 Ex. 70; 40 L. J., Ex. 46; 23 L. T. 86; 19 W. R. 957.

(g) *Dawson v. Fitzgerald*, L. R., 9 Ex. 7; 43 L. J., Ex. 19.

(h) *Jeffries v. Evans*, ante, 692 (f).

(i) *Hilton v. Green*, ante, 692 (l).

(j) *Spicer v. Barnard*, 28 L. J., M. C. 176.

(k) L. R., 4 C. P. D. 197; 40 L. T. 364; 27 W. R. 678.

(l) See this act (which, however, seems to be in great measure superseded by s. 4 of the Ground Game Act, 1880, 701, post), Appendix A, s. 2, 825, post.

CH. XVIII. s. 6 without a game licence, or may depute another person to kill them for him by an authority to be registered with the clerk to the justices of the petty sessional division.

Game, &c.
("Ground
Game").

Certificate.

The Game Certificate Act (23 & 24 Vict. c. 90) dispenses with a certificate in the case of a person killing rabbits on his own land.

The Ground
Game Act,
1880.

We now come to the Ground Game Act, 1880 (43 & 44 Vict. c. 47), which gives to all tenants holding *leases made after the passing of that act* (7th September, 1880) a right to ground game concurrent with that of their landlords, and a similar "concurrent right" to tenants under tenancies from year to year created before the passing of the act, notwithstanding any reservation of the game to the landlord in the contract of tenancy.

The Concur-
rent Right.

By section 1, it is provided that "every occupier" shall have as incident to and inseparable from his occupation the right to kill and take ground game concurrently with any other person who may be entitled to kill and take ground game on the same land." The words "every occupier" here will clearly include the case of joint tenants in their own right, and probably also joint tenants in the right of another as trustees or executors; for in their representative capacity they are just as much interested in keeping down the game as their beneficiaries.

Limitations of
the Concur-
rent Right.

But the same section limits the exercise of the right to the occupier himself or "persons duly authorized in writing," which persons must be either members of his household or persons in his ordinary service on the land "and any one other person" employed for reward, and further provides that only one person may be authorized to kill the game with fire-arms.

Upon the limitations it is to be observed that the authority in writing need not necessarily be signed (*m*) (though it is desirable that it should be), and that air-guns—for which, however, a licence is required by the Gun Licence Act, 1870—are not excluded. In case of a joint tenancy, the joint tenants must concur in giving the authority.

By sub-s. 1 (c) the authority must be produced to any person having the "concurrent right" or any person authorized by him in writing.

Sub-section 2 cuts down the words "every occupier" in section 1 by excluding persons of rights of common or an occupation for grazing or pasturage for not more than nine months; and section 3 cuts down the time within which the concurrent right may be exer-

(*m*) In *Pooley v. Driver*, L. R., 5 Ch. D. 458, no doubt it was held that a contract in writing under *Bovill's Act* required

signature; but the case appears not to be sufficiently in point to govern the present as an authority.

cised in the case of moorlands or uninclosed lands to the time from 11th December to 31st March. CIV. XVIII. s. 6

Section 2 provides for cases where game is not reserved and the tenant lets the right of sporting, and enacts that, although he shall so let it, “he shall nevertheless retain and have the same right to kill and take ground game as is declared by section 1 of the act.”

*Game, &c.
("Ground
Game").*

Concurrent
Right re-
tained,
though Te-
nant lets the
Sporting.

The third section provides for the absolute indefeasibility of the “concurrent right” in the following unmistakable terms :

“Every agreement, condition or arrangement which purports to divest or alienate the right of the occupier as declared given and reserved to him by this act, or which gives to such occupier any advantage in consideration of his forbearing to exercise such right, or imposes upon him any disadvantage in consequence of his exercising such right shall be void.” “Void” here would seem to mean void only *quâ* the divesting, &c. of the right of the occupier (*n*).

Agreements in
Contravention
of Right of
Occupier void.

The act contains no repeal or even mention of the Hare Act, but section 4 dispenses with the necessity for a game licence in the case of the occupier and the persons duly authorized by him.

Exemption
from Game
Licence.

The act being printed at length in the Appendix [post, p. 853], it only remains to notice here the provisions which regulate the *time* of its coming into effect.

Time for Act
coming into
Effect.

As regards *leases*, section 5 provides as follows:—“Where, at the date of the passing of this act (7th September, 1880), the right to kill and take ground game on any land is vested by lease, contract of tenancy, or other contract *bonâ fide* made for valuable consideration in some person other than the occupier, the occupier shall not be entitled under this act, until the determination of that contract, to kill and take ground game on such land.”

1. Leases.

And as regards tenancies from year to year, the same section provides—

“For the purposes of this act, a tenancy from year to year, or a tenancy at will, shall be deemed to determine at the time when such tenancy would by law (*o*) become determinable if notice or warning to determine the same were given at the date of the passing of this act.”

2. Tenancies
from Year to
Year.

A tenancy from year to year is, as has been already pointed out, determinable by half-a-year’s notice (or longer) expiring at the end of some current year of the tenancy (*p*), or if the Agricultural Holdings Act should not have been excluded by a year’s notice (or longer) expiring at the end of some current year of the tenancy (*q*).

(*n*) See *Gaskell v. King*, 11 East, 165.

(*o*) Not by notice stipulated for between the parties (*Wilkinson v. Calvert*, 3 C. P. D. 360, and ante, 309 (*b*)).

(*p*) *Right d. Flower v. Darby*, 1 T. R. 169.

(*q*) Ante, 309.

CH. XVIII. s. 6 A tenancy at will determines by the express declaration of either party (*p*).
Game, &c.
 ("Ground Game").

Therefore, in Lady-day tenancies the act comes into operation at Lady-day, 1880, and in Michaelmas tenancies at Michaelmas, 1880. In the case of tenancies at will, the act came into operation at once, i. e. on 7th September, 1880.

SECT. 7.—*Metropolitan Building Acts.*

The old Metropolitan Building Act repealed except as to sects. 83, 86.

The old Metropolitan Building Act (14 Geo. 3, c. 78) has been repealed with the exceptions of sections 83 and 86 (*q*). Section 83 relates to the application of insurance money on houses burnt. It is a general enactment, and is not confined to the metropolitan district; but it does not extend to tenants' fixtures (*r*). Sect. 86 relates to legal proceedings in respect of accidental fires.

Metropolitan Fire Brigade Act, 1865.

By the Metropolitan Fire Brigade Act, 1865 (28 & 29 Vict. c. 90), the duty of extinguishing fires and protecting life and property in case of fire shall, within the metropolis, be deemed for the purposes of this act to be entrusted to the Metropolitan Board of Works, who are to provide and maintain an efficient force of firemen, &c. (sect. 4). Sect. 23 enacts that "if the chimney of any house or other building within the metropolis is on fire, the occupier of such house or building shall be liable to a penalty not exceeding twenty shillings" (to be recovered in a summary way before two justices, sect. 24); "but if such occupier proves that he has incurred such penalty by reason of the neglect or wilful default of any other person he may recover summarily from such person the whole or any part of the penalty he may have incurred as occupier.

Sect. 23.
Chimney on Fire.

The Metropolitan Building Act of 1844 repealed, except as to sects. 64—63.

The 7 & 8 Vict. c. 84, for regulating the construction and use of buildings in the metropolis and its neighbourhood has been repealed (*s*), except as to sects. 54 to 63, which relate to certain dangerous, offensive and noxious trades and businesses, and the erection of buildings near where they are carried on, and which provide for the discontinuance of such *dangerous* trades and businesses in certain localities within twenty years next after the passing of that act (*t*); and of such *offensive and noxious* trades and businesses within such localities within thirty years (*u*), under heavy penalties, to be enforced in a summary way with costs.

The Metropolitan Building Act, 1855.

The Metropolitan Building Act, 1855 (*x*), now regulates the mode

(*p*) *Doe d. Bastow v. Cox*, 11 Q. B. 122, and ante, 213 (*y*).

(*q*) 28 & 29 Vict. c. 90, s. 34; 18 & 19 Vict. c. 122, s. 109; 7 & 8 Vict. c. 84, s. 1: Id. Sched. (A).

(*r*) *Ex parte Goreley, In re Barker*, 34 L. J., Bkty. 1; 13 W. R. 60.

(*s*) 18 & 19 Vict. c. 122, s. 109.

(*t*) I. e., on or before 9th August, 1864.

(*u*) Before 9th August, 1874.

(*x*) 18 & 19 Vict. c. 122, as amended by 23 & 24 Vict. c. 52; 1 Chit. Stat. 436—458 (3rd ed.). And see Woolrych on the Metropolitan Building Act, 2nd ed., by Paterson, A.D. 1877.

of constructing buildings in the metropolis and its neighbourhood. It extends to all places within the limits of the metropolis, as defined by the Metropolitan Management Act, 1855 (18 & 19 Vict. c. 120), and to all places to which such last-mentioned act may be extended, unless such places are, in making such extension, expressly excepted from the operation of the act (*y*). The following are the sections of the act bearing on the relation between landlord and tenant:—

By sect. 73, in default of the owner of any premises disobeying an order to pull down or repair a dangerous structure, an order for that purpose may be made upon the occupier. The owner is liable for the expenses, but “without prejudice to his right to recover the same from any lessee or other person liable to the expenses of repairs.” By sect. 97 (sub-sect. 1), an occupier who is compelled to pay expenses under the act, in default of the owner, cannot be made to pay “any sum exceeding in amount the rent due, or that will thereafter accrue due in respect of such premises during the period of his occupancy.” And by sub-sect. 5 of the same section, “any occupier of premises who has paid any expenses under this act, may deduct the amount so paid from any rent payable by him to any owner of the same premises,” and, to provide for the case of a sub-lease, “any owner of premises who has paid more than his due proportion of any expenses may deduct the amount so overpaid from any rent that may be payable by him to any other owner of the same premises.”

CH. XVIII. s 7
Metropolitan Building Acts.
Order on Occupier for Expenses, in Default of Owner.

By sect. 111, nothing in the act contained “shall vary or affect the rights or liabilities, as between landlord and tenant, under any contract between them.”

Saving for Contract.

A contract for the erection of a building in contravention of the provisions of the above act cannot be enforced (*z*).

A landlord is justified, under sect. 83 of the 18 & 19 Vict. c. 122, in entering premises in the occupation of his tenant from year to year, and pulling down and rebuilding the party-wall between it and the premises belonging to him, without giving the notice required by sect. 85, such tenant not being an owner within the interpretation clause (sect. 3), and it is no objection that he has neglected to give the notice to the district surveyor required by sect. 38 (*a*). An occupier of premises, who has paid expenses under the above act may, by sect. 97, deduct the amount from the rent payable by him to any owner of the premises; but he is not thereby precluded from recovering his claim by action (*b*).

(*y*) Sect. 4.

(*z*) *Stevens v. Gourley*, 7 C. B., N. S. 99; 6 Jur., N. S. 147.

(*a*) *Wheeler v. Gray*, 6 C. B., N. S. 606.

As to who is the “adjoining owner” and liable to contribute to the expense of re-

pairing or rebuilding a party-wall, see *Hunt v. Harris*, 19 C. B., N. S. 13; 34 L. J., C. P. 249; *Cowen v. Phillips*, 33 Beav. 18.

(*b*) *Earle v. Maugham*, 14 C. B., N. S. 666; 10 Jur., N. S. 208.

CHAPTER XIX.

RIGHTS AND LIABILITIES AS BETWEEN LANDLORD OR TENANT AND
THIRD PERSONS.

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UNDER the practice before the Judicature Act there was occasionally some difficulty in regard to questions between landlords or tenants and third parties, in consequence of the distinction between the actions of "trespass" and "case" (a); but this is now no longer a difficulty, as the technical forms of actions have been abolished, and the pleadings are now statements of facts. The important questions of substance,—as to what are the cases in which a landlord is liable to or entitled to sue third parties, and what are those in which the right or liability attaches to the tenant,—will now be considered.

SECT. 1.—*Rights and Liabilities between Landlord and Third Persons.*

Right of
Action for
Damage to
Reversionary
Interest.

Where an injury is committed to the house or land of a person who had merely a reversionary interest therein, he is entitled to recover damages for the injury which his interest sustains (b); and he may also have an action for continuing a nuisance, even after a former recovery for committing it (c). For example, where the plaintiff demised a cottage, without excepting mines, it was held, that he might maintain an action on the case for the injury done to the cottage by a stranger, who had excavated coal, though it was not clear whether the injury was from an excavation under the cottage or

(a) See *Smith v. Milles*, 1 T. R. 475; *Revett v. Brown*, 5 Bing. 7; *Wheeler v. Montefiore*, 2 Q. B. 133, 156; *Brown v. Notley*, 3 Exch. 219; *Low v. Ross*, 5 Exch. 553; *Turner v. Cameron's Coalbrook Steam Coal Co.*, 5 Exch. 932; *Litchfield v. Ready*, 5 Exch. 939; *Keyse v. Powell*, 2 E. & B. 132; *Randal v. Stevens*, Id. 641; *Barnett v. Earl of Guildford*, 11 Exch. 19; *Anderson v. Radcliffe*, E., B. & E. 806; *Harrison*

v. Blackburn, 17 C. B., N. S. 678.

(b) *Shadwell v. Hutchinson*, 2 B. & Adol. 97; 3 C. & P. 615; 4 Id. 333; *Moo. & M.* 351; *Thompson v. Gibson*, 7 M. & W. 456; see also the principle recognized in *Battis-hill v. Reed*, 18 C. B. 696, 713; and see *Hosking v. Phillips*, 3 Exch. 168; *Voules v. Miller*, 3 Taunt. 137.

(c) This he must have formerly done by an action on the case and not trespass.

under adjoining land in the occupation of the plaintiff (c). But the landlord's right is confined to the injury to his reversionary interest, inasmuch as he has no present possession of the property. He cannot therefore maintain any action for the injury done by persons by merely riding on the property, though he might if they made holes in the soil so that the subsoil was injured, if the use of the surface only was demised (d). The plaintiff in his statement of claim should show that he had a reversionary interest at the time of the injury being committed (e), but there is now a very large power of amendment vested in the judges. And even under the old system of procedure, where the plaintiff declared as for an injury to land in his possession, which turned out on the trial to have been in the possession of his tenant, the real controversy between the parties being whether the land was the plaintiff's property, and whether there was a right of way across it, it was held, that the judge had power to amend the declaration so as to adapt it to an injury to the plaintiff's reversionary interest (f).

CH. XIX. s. 1.
Rights, &c.
between Land-
lord and Third
Persons.

Statement of
Claim.

The nature of the reversion to which the plaintiff is entitled is only so far material as to regulate the amount of damages to be recovered by him. A reversioner for a life estate, for instance, can only recover such damages for an injury to the estate during the term of the lease as are equivalent to the injury done to the life estate (g).

What Title
sufficient.

Under the old practice, it was held to be fatal that the declaration alleged that the plaintiff had a reversion when the facts proved did not show any true relation of landlord and tenant (h). As the actual facts are now to be set out in pleadings this is no longer a danger, but at the same time it should always appear on the pleadings that the plaintiff has an interest entitling him to sue and what that interest is. It may be remarked, however, that payment of rent to a person has been held sufficient *prima facie* evidence of a reversion, being in him (i).

A reversioner cannot sue for anything as an injury to his reversion, unless it permanently injures his estate, or operates in denial of his right (k), even though he may have suffered a pecuniary injury thereby (l): therefore a temporary fixing of barges and planks in a part of a river near certain premises, thereby obstructing the navigation of that part and hindering persons from passing to the premises and unloading boats thereon, is not an injury to the

What is a suf-
ficient Act of
Injury.

(c) *Raine v. Alderson*, 4 Bing. N. C. 702.

(d) *Coz v. Glue*, 5 C. B. 533.

(e) See *Hosking v. Phillips*, 3 Exch. 168;

Fowles v. Miller, 3 Taunt. 137.

(f) *May v. Footner*, 5 E. & B. 505; 25 L. J., Q. B. 32.

(g) *Evelyn v. Raddish*, Holt, 543.

(h) See *Martin v. Goble*, 1 Camp. 320; *Partridge v. Bore*, 1 D. & R. 272; *Hitch-*

man v. Walton, 4 M. & W. 409.

(i) *Damtry v. Brocklehurst*, 3 Exch. 207.

(k) *Hopwood v. Schofield*, 2 Moo. & R.

34; *Baxter v. Taylor*, 4 B. & Adol. 72;

Simpson v. Savage, 1 C. B., N. S. 347;

Metropolitan Association v. Petch, 5 C. B., N. S. 504.

(l) *Mumford v. Orford*, *Worcester, &c. Rail. Co.*, 1 H. & N. 34.

CH. XIX. s. 1. *Rights, &c. between Landlord and Third Persons.* reversion (*m*). But a permanent obstruction of a way in denial of the right is an injury to the reversioner (*n*). The reversioner may sue for an injury done to his house by the defendant's neglect to scour a watercourse in an adjoining close, whereby the watercourse was obstructed, and the water thrown back from the course into the house, doing damage to it thereby (*o*); or for an injury done to it by mining under it (*p*), or by raising the pavement so much in front of it as to block up the entrance and the lower windows of it (*q*): or for the erection of a wall, whereby his lights are obstructed (*r*): or for the erection on the defendant's house of eaves and a pipe overhanging and conducting water on land in the occupation of a tenant (*s*). An action is maintainable by a reversioner against the surveyor of a highway for cutting away part of a bank adjoining a public road, though the premises are thereby in fact improved, as the removal of any part of the land is an injury to the reversion (*t*). Where a lease reserves a limited power to the lessors to make a way across the land for certain purposes; in an action by the lessee as a reversioner for making a way across the land for other purposes, it is not a ground of complaint that the intention of the defendants was to use the way for other purposes than they had a right to use it; but the question is, whether at the time it was made it had become necessary or expedient for the defendants to make a way for the purposes for which they were entitled, and whether the road made was a proper road for that purpose, in which case the action will only lie, if at all, at the instance of the tenant in possession (*u*). The statement of claim should allege the injury to have been done to the damage of the reversion, or at least state an injury of such a permanent nature as to be necessarily injurious to the reversion (*x*).

Cause of Action accrues when Damage sustained.

The cause of action does not accrue, nor the Statute of Limitations begin to run, until actual damage is sustained (*y*).

A statement of claim in an action for an injury to the reversionary interest of the plaintiff by obstructing ancient lights, is sufficient on demurrer if it show an obstruction which may operate injuriously

(*m*) *Dobson v. Blackmore*, 9 Q. B. 991.

(*n*) *Kidgill v. Moor*, 9 C. B. 364; 1 L. M. & P. 131; *Hopwood v. Schofield*, supra; see, too, *Bell v. Midland Rail. Co.*, 30 L. J., C. P. 273; and *Palk v. Shimmer*, 18 Q. B. 568, in which the point in question was apparently assumed.

(*o*) *Hell v. Twentyman*, 1 Q. B. 766; *Taylor v. Stendall*, 7 Q. B. 634; 3 D. & L. 161.

(*p*) See *Raine v. Alderson*, 4 Bing. N. C. 702; *Backhouse v. Bonomi*, 9 H. L. Cas. 603; 34 L. J., Q. B. 181.

(*q*) *Leader v. Moron*, 3 Wils. 461.

(*r*) *Jessur v. Gifford*, 4 Burr. 2141; *Shadwell v. Hutchinson*, 2 B. & Adol. 97; *Moo-*

& *M.* 350; 4 C. & P. 333; *Turner v. Sheffield and Rotherham Rail. Co.*, 10 M. & W. 425; *Metropolitan Association, &c. v. Petch*, 5 C. B., N. S. 504.

(*s*) *Tucker v. Newman*, 11 A. & E. 40; *Fay v. Prentice*, 1 C. B. 828; *Battishill v. Reed*, 18 C. B. 696; 25 L. J., C. P. 290.

(*t*) *Alston v. Seales*, 9 Bing. 3.

(*u*) *Durham and Sunderland Rail. Co. v. Walker*, 2 Q. B. 940.

(*x*) *Jackson v. Peaked*, 1 M. & S. 234; *Dobson v. Blackmore*, 9 Q. B. 991; *Kidgill v. Moor*, 9 C. B. 364; 1 L. M. & P. 131.

(*y*) *Backhouse v. Bonomi*, 9 H. L. Cas. 603; 34 L. J., Q. B. 181.

to the reversion, either by its being of a permanent character, or by its operating in denial of the right, and it will be assumed to have been so, after verdict (z). A nuisance from smoke or noise, although it may be an actionable injury to the tenant in possession, is not one to the reversioner (a), as it is only a temporary nuisance and one which may cease at any moment (b). But where a nuisance is in its nature of a permanent character and will continue after the expiration of the term unless removed, and especially if it affect any easement, or the right and title to the demised premises, the reversioner may sue, the pleadings expressly alleging injury to his reversionary interest. The measure of damage in any such action will be so much as the jury may think sufficient to compel the defendant to abate the nuisance; not the amount of the diminution of the saleable value of the reversion (c).

CH. XIX. s. 1.
Rights, &c.
between Land-
lord and Third
Persons.

Right of
Action for
Permanent
Nuisance.

Measure of
damage.

As regards the liability of landlords to third persons, it may be taken as a general rule that the tenant and not the landlord is liable to third persons for any accident or injury occasioned to them by the premises being in a dangerous condition, and the only exceptions to this rule appear to arise when the landlord has either (1) contracted with the tenant to repair, or (2) when he has let the premises in a ruinous condition (d), or (3) when he has expressly licensed the tenant to do acts amounting to a nuisance (e).

Liability of
Landlord to
Third Per-
sons.

Nelson v.
Liverpool
Brewery Co.

There is no obligation towards a neighbour cast by law on the owner and proprietor of a house, merely as such, to keep it repaired in a substantial manner, his only duty being to prevent it from being a nuisance (f). When, however, the property of the landlord is let by him in a state which is a nuisance, and he is himself responsible for its being in such a state, he is liable. Therefore where the defendant, who was the owner of a building and a stack of chimneys near to a building of the plaintiff, demised them when the chimneys were known by him to be ruinous and in danger of falling upon the building of the plaintiff, and kept and maintained them in such ruinous state until they fell upon the plaintiff's building, which they did during the occupation of the tenant under such demise, from no default of such tenant, but by the laws of nature:—it was held, that an action for the injury the plaintiff had sustained from the fall of the chimneys would lie against the defendant, though he was not the occupier at the time of the fall (g). If the landlord remains liable for repairs

Letting Pro-
mises with
Nuisance.

Todd v. Flight.

(z) *Metropolitan Association, &c. v. Fitch*, 5 C. B., N. S. 504.

(a) *Simpson v. Savage*, 1 C. B., N. S. 347; *Mumford v. Oxford, Worcester and Wolverhampton Rail. Co.*, 1 H. & N. 34.

(b) See per Jessel, M. R., *Jones v. Chappell*, L. R., 20 Eq. 539.

(c) *Battishill v. Reed*, 18 C. B. 696; 25 L. J., C. P. 290.

(d) *Nelson v. Liverpool Brewery Co.*, L. R., 2 C. P. D. 311; 46 L. J., C. P. 676; 25 W. R. 877.

(e) *White v. Jameson*, L. R., 18 Eq. 303, and 709 (x), post.

(f) *Chauntler v. Robinson*, 4 Exch. 163.

(g) *Todd v. Flight*, 9 C. B., N. S. 377; 30 L. J., C. P. 21; *Gandy v. Jubber*, 5 B. & S. 78; 33 L. J., Q. B. 151.

CH. XIX. s. 1. to the demised premises, that is evidence of his continuing the nuisance (g), the fact, on the other hand, of the tenant being bound to repair being almost conclusive evidence that the landlord is not liable (h). An action lies against the landlord of a house, who employs workmen and superintends repairs, though the lessee pays for them, for a nuisance occasioned by the negligence of the workmen (i). A person who lets premises with a nuisance upon them, and subsequently receives rent, is liable for the continuance of the nuisance (k); and so if he re-lets them after the user of the buildings has created a nuisance, or if he has undertaken the cleansing and has not performed it (l).

Liability of
Landlord in
respect of Pre-
mises occupied
by Tenant
from Year to
Year.

Where a nuisance of a permanent character is created on land in the occupation of a tenant from year to year, the reversioner is liable for damage caused by it, if it is shown that since the creation of the nuisance and before the damage he renewed the tenancy. It has indeed been held that when a landlord might have given notice to quit and did not, such continuing of the tenancy is equivalent to a re-letting (m). This, however, is distinctly dissented from in the undelivered judgment of the Exchequer Chamber in *Gandy v. Jubber* (n), which would appear to be good law, although not technically a decision of the Court of Error. And apparently on the same principle as that of the latter judgment, where a weekly tenant used a house as a brothel, and the landlord received an additional rent by reason of its occupation for such purpose, the latter, it was held, could not be convicted for keeping such a house merely because, having notice of the use the house was put to, he abstained from giving his tenant notice to quit (o).

A landlord may be liable for the continuance of a nuisance in erecting a building, though he has no right to enter upon the land and remove it (p); but he is not liable in respect of a new nuisance created by his tenant during the term if he bought the reversion during the tenancy (q).

Although the owner of property may, when he himself occupies, be responsible for injuries arising from acts done upon that property by persons who are there by his permission, though not strictly his agents or servants, such liability attaches only upon

(g) *Pretty v. Bickmore*, L. R., 8 C. P. 401; 28 L. T. 704; 21 W. R. 733; *Gwin-
nell v. Eamer*, L. R., 10 C. P. 658; 32 L.
T. 835; see, too, *Payne v. Rogers*, 2 H.
Bl. 349.

(h) *Gwinnell v. Eamer*, supra.

(i) *Leslie v. Pounds*, 4 Taunt. 649.

(k) *Rosewell v. Prior*, 2 Salk. 460; *Todd
v. Flight* and *Gandy v. Jubber*, supra.

(l) *Rich v. Basterfield*, 4 C. B. 805.

(m) *Gandy v. Jubber*, 5 B. & S. 78; 33
L. J., Q. B. 151; *Bartlett v. Baker*, 3 H.

& C. 153; 34 L. J., Ex. 11; *Rea v. Pedley*,
1 A. & E. 822.

(n) 9 B. & S. 15, n.

(o) *Reg. v. Barrett*, 32 L. J., M. C. 36;
Reg. v. Stannard, 33 L. J., M. C. 61; 1
Leigh & Cave C. C. 349, cited in 5 B. &
S. 83, per Crompton, J.

(p) *Thompson v. Gibson*, 7 M. & W. 456.

(q) *Rea v. Pedley*, 1 A. & E. 822; see,
too, *Saxby v. Manchester, Sheffield and Lin-
colnshire Rail. Co.*, L. R., 4 C. P. 198; 38
L. J., C. P. 153.

parties in actual possession (*r*). Where, therefore, an action was brought by an adjoining owner against A., the owner of premises, for a nuisance from the smoke of a chimney, on the ground that A., having erected the chimney, and let the premises with the chimney so erected, had impliedly authorized the lighting of a fire therein, it was held, that the action would not lie; and it was further held, that as the premises were in the occupation of B., a tenant at the time the fires were lighted, A. was entitled to a verdict on a plea of "not possessed," the allegation as to possession having reference to the time when the nuisance complained of was committed, and not to the time at which the chimney was erected (*s*). The fact of an assignment of the reversion will not necessarily relieve a landlord of his liability for the continuance of a nuisance originally caused by him, for before the assignment he was answerable for all the consequential damages: and it is not in his power to discharge himself by granting it over, though the action may be brought against the assignee (*t*).

CH. XIX. s. 1.
*Rights, &c.
between Land-
lord and Third
Persons.*

Although where a nuisance is caused by the act of a tenant, the landlord is not usually liable, yet if the act is one expressly contemplated in and authorized by the lease the landlord may be liable for any injury caused thereby (*u*), although the tenant if sued might have no defence to the action (*x*).

*Liability for
Nuisance con-
templated by
Lease.*

SECT. 2.—*Rights and Liabilities between Tenants and Third Persons.*

In almost all cases it is the person in occupation of land and premises who is *prima facie* entitled to maintain an action for any injury done to the property, even where the wrongful act has also injured the person entitled to the reversion so as to allow him also to sue. And it may be sufficient that the tenant has a right only let to him and no property in the soil; for example, where the plaintiff was entitled under a lease from the crown, to the sole right of digging lead in a certain district, to the soil of which she had no right, and let to another all her right so to dig during her term: it was held, that an action might be maintained against a person who wrongfully took the lead (*y*). Indeed an action may be brought by a tenant against a wrong-doer, although the tenant has no legal title other than actual possession; therefore, a person in possession of glebe land

*Right of
Tenant to sue
for Injury to
demised Pro-
perties.*

(*r*) *Rich v. Basterfield*, 4 C. B. 783;
*Reedie v. London and North-Western Rail.
Co.*, 4 Exch. 244; *Chauntler v. Robinson*,
Id. 163; *Bishop v. Trustees of Bedford
Charity*, 1 E. & E. 697; 28 L. J., Q. B.
215; 29 Id. 53.

(*s*) *Rich v. Basterfield*, 4 C. B. 783.

(*t*) Bull. N. P. 71.

(*u*) *Harris v. James*, 45 L. J., Q. B. 544.

(*x*) *White v. Jameson*, L. R., 18 Eq. 303;
22 W. R. 761.

(*y*) *Harker v. Birkbeck*, 3 Burr. 1563;
Taylor v. Eastwood, 1 East, 212.

CH. XIX. s. 2. under a lease, void by reason of the rector's non-residence, may yet maintain an action against a trespasser (z). A lessee for years, after his lease is expired, may also maintain an action for a trespass on the land before his lease was ended (a). But where a tenant's interest is determined, as, for instance, by the death of a tenant for life, under whom he holds, and he is then absent from the premises, and does no act indicating an intention to remain in possession, he is to be presumed to be out of possession, and therefore cannot sue (b). A lessee before entry has only an *interesse termini* (c), and cannot maintain an action for a trespass (d). Therefore, where a lease was made by way of mortgage, to hold from thenceforth, subject to a proviso that on non-payment of the money on a certain day, the mortgagee might enter, he cannot maintain trespass for an entry made by a stranger before that day (e).

*Rights, &c.
between Ten-
ants and Third
Persons.*

Right of
Tenant to
sue—*contd.*

A lessee for life or years of land has no property in the trees growing on the land (f). Therefore, if a stranger cut down any trees, the lessee may sue for damages for the trespass, and perhaps for the loss of shade from the trees, but he cannot recover damages for their value, because the property of them is in the reversioner (g).

Liability of
Tenant to be
sued for
defective
Fences;

It is the duty of the tenant and not of the landlord, in the absence of special circumstances, to see that fences are in repair, so that cattle cannot stray on the land of others (h).

A person who rents the minerals under the land of another with a licence to make a shaft into it, is, in the absence of any stipulation to the contrary, under a legal obligation to the owner of the surface soil to fence the shaft so as to prevent it from being a source of danger to persons or cattle who may be rightfully upon it (i).

for Nuisances
in Public
Ways, &c.

When any injury is caused to third persons by the state of the premises, it is always *primâ facie* the tenant who is liable (k). For instance, it is the duty of the *occupier* (not of his landlord (l)) of a house, having an area fronting the public street, so to fence it as to make it safe to passengers; and it is no defence to an action against him for neglecting to do so, whereby the plaintiff fell down into the

(z) *Graham v. Peat*, 1 East, 244.

(a) Bro. Tresp. 456; 2 Roll. Abr. 551, l. 46; *Symonds v. Seaborne*, Cro. Car. 326; *Bedingfield v. Onslow*, 3 Lev. 209; *Evelyn v. Raddish*, Holt N. P. C. 543.

(b) *Brown v. Nolley*, 3 Exch. 219.

(c) *Low v. Ross*, 5 Exch. 553.

(d) Co. Lit. 296 b; Com. Dig. Trespas, B. 1, 2; Cole Ejec. 287, 459; *Harrison v. Blackburn*, 17 C. B., N. S. 678, 691.

(e) *Wheeler v. Montefiore*, 2 Q. B. 133; *Turner v. Cameron's Coalbrook, &c. Co.*, 5 Exch. 932. See, too, *Litchfield v. Ready*, 5 Exch. 939.

(f) Ante, 591.

(g) Esp. N. P. 384; 4 Co. R. 62 a.

(h) *Cheetham v. Hampson*, 4 T. R. 318.

(i) *Re Williams v. Groucott*, 4 B. & S. 149; 32 L. J., Q. B. 239.

(k) *Reg. v. Watts*, 1 Salk. 357; *Cheetham v. Hampson*, 4 T. R. 318. See, too, *Rich v. Basterfield*, 4 C. B. 783; *Chauntler v. Robinson*, 4 Exch. 163. As to the duties and liabilities of occupiers of adjoining premises for nuisances from defective drains, &c., see *Humphries v. Cousins*, L. R., 2 C. P. D. 239.

(l) *Cheetham v. Hampson*, 4 T. R. 318; *Russell v. Shenton*, 3 Q. B. 449; *Rich v. Basterfield*, 4 C. B. 783; *Bishop v. Trustees of Bedford Charity*, 1 E. & E. 697; 28 L. J., Q. B. 215; 29 Id. 53.

area and was hurt, that when he took possession of the house, and as long back as could be remembered, the area was in the same open state as when the accident happened (*m*). The occupier is bound to see that his drains are in order (*n*). Again, the occupier of land is bound to fence off any hole or area upon it which adjoins or is near to a highway, and is *primâ facie* liable for any damage arising from his neglecting to do so (*o*). If a grating on a public footway is broken, the occupier is *primâ facie* bound to repair it (*p*).

The occupier of a house is *primâ facie* liable for an injury sustained by a person from the want of repair of the covering to a cellar (*q*), as he is even on criminal process where a public nuisance is caused by a ruinous house (*r*). The tenant in actual occupation may also be liable for the acts of persons who are on the property by his permission, though they are not strictly his agents or servants (*s*).

CH. XIX. s. 2.
*Rights, &c.
between Ten-
ants and Third
Persons.*

Liability
Tenant.

SECT. 3.—*Remedy by Injunction.*

In addition to the right to damages, which has been treated of in this chapter, there are many cases in which the party aggrieved may obtain an injunction, but it is not usual to grant injunctions except in cases where the injury is of a permanent and irreparable nature (*l*); and if the applicant be a tenant, the injunction is usually limited in duration to the length of the tenant's interest in the property (*u*). An interlocutory injunction may be obtained on application made at any stage of an action, and either *ex parte* or after notice if the applicant be the plaintiff in the action; if any other party apply, notice must be given to the plaintiff, and the application cannot be made until after appearance by the party applying (*x*).

(*m*) *Coupland v. Hardingham*, 3 Camp. 398; cited 9 C. B. 417.

(*n*) *Russell v. Shenton*, 3 Q. B. 449.

(*o*) *Barnes v. Ward*, 2 C. & K. 661; 9 C. B. 392; *Hadley v. Taylor*, L. R., 1 C. P. 53; *Indermaur v. Dames*, *Id.* 274.

(*p*) *Gandy v. Jubber*, 5 B. & S. 78, 485; 31 L. J., Q. B. 151; cited L. R., 4 C. P. 202. See, too, *Daniels v. Potter*, 4 C. & P. 262; *Hughes v. Macfie and Abbott v. Macfie*, 2 H. & C. 744; 33 L. J., Ex. 177; *Proctor v. Harris*, 4 C. & P. 337; *Chapman v. Rothwell*, E., B. & E. 168. See, too, *Pretty v. Bickmore*, L. R., 8 C. P. 401;

Gwinnell v. Famer, L. R., 10 C. P. 658.

(*q*) *Payne v. Rogers*, 2 H. Blac. 349;

Tennant v. Golding, 1 Salk. 21, 360, 770.

(*r*) *Reg. v. Watts*, 1 Salk. 357.

(*s*) *Rich v. Basterfield*, 4 C. B. 783; per Rolfe, B., in *Reedie v. London and North-Western Rail. Co.*, 4 Exch. 244; *Dishop v. Trustees of Bedford Charity*, 1 E. & E. 697; 23 L. J., Q. B. 215; 29 *Id.* 53.

(*l*) Story's Eq. Jur., sect. 925.

(*u*) *Sumper v. Foley*, 2 Johns. & H. 555; 5 L. T., N. S. 669.

(*x*) Jud. Act, 1873, sect. 25 (8); R. S. C., Ord. LII., r. 4.

CHAPTER XX.

RIGHTS AND LIABILITIES ON CESSER OF THE TENANCY.

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SECT. 1.—*Tenant's Duty, &c. at end of Tenancy.*

Tenant must deliver up the Premises with all Erections, &c.

THE ordinary rule is, that the tenant must, on the expiration or sooner determination of his tenancy, deliver up to his landlord the peaceable and quiet possession of the demised premises, and every part thereof (*a*), together with all erections, buildings, improvements and fixtures which he is not entitled to remove; and the growing crops of every description. To this rule, however, there are important exceptions. First, there may be some stipulation in the lease to the contrary (*b*). Secondly, there may be a custom of the country for the tenant to hold over any part of the demised premises, or to take any of the crops, the proof of which custom lies on the tenant (*c*). Thirdly, the tenant is in some cases entitled to emblements or to a prolongation of his term in lieu thereof (*d*). If the tenant hold over without objection after the expiration of his term, he becomes a tenant on sufferance (*e*); and while he continues such tenant it seems that he may remove such fixtures, &c. as he was entitled to remove during his original tenancy: but it is extremely dangerous to delay such removal until *after* his term expires (*f*).

Ejectment of subtenant.
Henderson v. Squire.

If the tenant has let the whole or any part of the premises to a subtenant, who is in possession at the time of the determination of the term, he must get him out, for otherwise he will not be in a situation to render that complete possession to which the landlord is entitled (*g*).

(*a*) Post, Sect. 2 (*a*).

(*b*) *Hyatt v. Griffiths*, 17 Q. B. 505; *Newson v. Smythies*, 1 F. & F. 477; 3 H. & N. 840; 28 L. J., Ex. 97.

(*c*) *Caldecott v. Smythies*, 7 C. & P. 808, Parke, B.; see post, Sect. 4 (*a*), (*b*).

(*d*) Post, Sect. 3.

(*e*) Ante, 215.

(*f*) Ante, 613.

(*g*) *Harding v. Crethorn*, 1 Esp. 57; *Ibbs v. Richardson*, 9 A. & E. 849.

If he omit to do so, the landlord may maintain an action against him for not having quitted and delivered up possession at the end of the term, and may recover in such action, as special damage, the costs of an ejectment against the subtenant (*h*). The landlord is also entitled to recover against him the reasonable damages and costs sustained by him in an action at the suit of a party to whom he had contracted to let the premises, but to whom the tenant's wrongful act had prevented him from delivering possession (*i*).

CH. XX. s. 1.
*Tenant's Duty
at end of
Tenancy.*

If, at the expiration of the term, the tenant and his family have gone away from the house, and the house is locked up, no one being in possession, the landlord would be justified in breaking into the house forcibly and obtaining possession; and trespass quare clausum fregit, at the suit of the tenant, could not be maintained against him (*k*). A tenant wrongfully holding over cannot maintain trespass quare clausum fregit against his landlord for a peaceable entry (*l*), or even for an entry with strong hand (*m*); but the landlord having entered may maintain trespass quare clausum fregit against such tenant for remaining in the possession (*n*). It was once held that the landlord could not acquire lawful possession by a forcible entry after the expiration of the term (*o*): but the contrary has since been repeatedly decided (*p*); and it is now settled that a lessor, at the determination of the term, may enter forcibly into possession of the demised premises, and after civilly requesting the tenant to depart, may, in case of his refusal or neglect to comply with such request, gently lay hands upon him to turn or push him out; and in case of any resistance on his part, may use such force and violence as may be necessary to overcome such resistance (but no more), and so expel the tenant from the possession without being liable to an action of trespass quare clausum fregit, or for assault, at the suit of the tenant; although he may have made himself liable to an indictment for a forcible entry (*q*). But excess of violence must be avoided, and that creates the principal difficulty and danger in proceeding to expel a tenant in the manner above mentioned, and often renders it more

Power of
Landlord to
break in.

(*h*) *Henderson v. Squire*, L. R., 4 Q. B. 170; 38 L. J., Q. B. 73; 19 L. T. 601.

(*i*) *Bramley v. Chesterton*, 2 C. B., N. S. 592; 27 L. J., C. P. 23.

(*k*) *Turner v. Meymott*, 1 Bing. 158; *Hillary v. Gay*, 6 C. & P. 284; *Davison v. Wilson*, 11 Q. B. 890; *Burling v. Read*, Id. 904. See also *Wildbor v. Rainforth*, 8 B. & C. 4.

(*l*) *Taunton v. Costar*, 7 T. R. 431; *Turner v. Meymott*, 1 Bing. 158; *Lacey v. Lear*, Penke, Add. Cas. 210.

(*m*) *Burling v. Read*, 11 Q. B. 904; *Davison v. Wilson*, Id. 890; *Meriton v. Coombes*, 1 L. M. & P. 510; *Harvey v. Bridges*, 14 M. & W. 437, 442; 3 D. & L. 60; *Jones v. Chapman* (in error), 2 Exch.

803, 821; *Broune v. Dawson*, 12 A. & E. 621; *Blads v. Higgs*, 10 C. B., N. S. 713, 721; 12 Id. 501; 13 Id. 844; 11 H. L. Cas. 621; 31 L. J., C. P. 286.

(*n*) *Butcher v. Butcher*, 7 B. & C. 399; *Key v. Moorhouse*, 6 Bing. N. C. 52; Co. Lit. 245; *Cole Ejec.* 67, 68.

(*o*) *Newton v. Harland*, 1 M. & G. 644.

(*p*) *Harvey v. Bridges*, 14 M. & W. 437—442; 3 D. & L. 60; 1 Exch. 261; *Jones v. Chapman* (in error), 2 Exch. 803, 821; *Davis v. Burrell*, 10 C. B. 821, 825; *Pollen v. Brewer*, 7 C. B., N. S. 371; *Appleton v. Murray*, 8 W. R. 653; *Cole Ejec.* 71.

(*q*) *Davison v. Wilson*, 11 Q. B. 890; *Burling v. Read*, Id. 904.

CH. XX. s. 1. advisable to proceed by action of ejectment (*r*). A proviso for re-
Tenant's Duty
at end of
Tenancy.
 entry may be so framed as expressly to justify the lessor, on breach of any of the covenants, in forcibly resuming possession of the premises and expelling the tenant (*s*): but if the breach of covenant be the nonpayment of rent, such proviso will not dispense with a legal demand of the rent according to the strict rules of the common law, unless it contain words to that effect (*t*). Where a landlord having, in respect of a breach of covenant, entered his tenant's premises in his absence, and put locks on the doors, and the tenant on his return broke the locks, it was ruled at *Nisi Prius* that the landlord, being lawfully in possession of the premises, might justify giving his tenant into custody under the Metropolitan Police Act (2 & 3 Vict. c. 47), ss. 54, 66 (*u*).

Encroach-
 ments by
 Tenant are
 for Benefit of
 Landlord.

Earl of Lis-
burne v. Davis.

Encroachments made by a tenant from the adjoining waste, during the term, are *prima facie* for the benefit of the tenant during the term, and afterwards of his landlord, unless it appear by some evidence that the tenant at the time they were made intended them for his own exclusive benefit, and not to hold them as he held the farm to which they were adjacent (*r*): and the consent of the landlord to an encroachment will not give the tenant the benefit of it (*x*). The landlord may afterwards maintain ejectment to recover possession of them with or without the other premises comprised in the lease (*y*). The covenants to repair, &c. contained in the lease will be held to extend, by implication, to the encroachments and the buildings thereon (*z*). The above-mentioned presumption, however, holds only as between the tenant and his landlord, and will not prevail for the landlord's benefit against third persons (*a*). A conveyance by a lessee of the encroachment to his son not appearing to have been delivered, and not followed by possession, does not rebut the presumption that the lessee made the encroachments for the benefit of his lessor (*b*). An indorsement on a lease, by which the lessee agrees to surrender all inclosures made by him at the end of his lease, and to pay 6*d*.

(*r*) *Cole Ejec.* 70, 71. And see *Smith L. & T.* 331.

(*s*) *Kavanagh v. Gudge*, 8 Scott, N. R. 508; 7 Id. 1025; 7 M. & G. 316; 1 D. & L. 928; *Milner v. Myers*, 15 L. J., Q. B. 157.

(*t*) *Acocks v. Phillips*, 5 H. & N. 183; *Barry v. Glover*, 10 Ir. Com. L. R. 113.

(*u*) *Davis v. Burrell*, 10 C. B. 821.

(*v*) *Doe d. Lewis v. Rees*, 6 C. & P. 610; *Doe d. Earl of Dunraven v. Williams*, 7 C. & P. 322; *Doe d. Harrison v. Murrell*, 8 C. & P. 134; *Doe d. Lloyd v. Jones*, 15 M. & W. 580; *Andrews v. Hailes*, 2 E. & B. 349; *Doe d. Croft v. Tidbury*, 14 C. B. 304; 23 L. J., C. P. 57; *Kingsmill v. Millard*, 11 Exch. 313; *Earl of Lisburne*

v. Davis, L. R., 1 C. P. 259; 35 L. J., C. P. 193.

(*x*) *Whitmore v. Humphries*, L. R., 7 C. P. 1; 41 L. J., C. P. 43; 25 L. T. 496; 20 W. R. 79.

(*y*) *Andrews v. Hailes*, 2 E. & B. 349; *Doe d. Croft v. Tidbury*, 14 C. B. 304; *Doe d. Earl of Dunraven v. Williams*, 7 C. & P. 332; *Cole Ejec.* 248.

(*z*) *In re Newbury, White v. Wakeley*, 26 Beav. 17; 28 L. J., Ch. 77.

(*a*) *Doe d. Baddeley v. Massey*, 17 Q. B. 373; *Doe d. Bluck v. Moyes*, 13 L. T., O. S. 325.

(*b*) *Doe d. Lloyd v. Jones*, 15 M. & W. 580.

annually, as an acknowledgment, is an admission they were made for the benefit of the lessor (*c*). CH. XX. s. 1.
*Tenant's Duty
at end of
Tenancy.*

On the expiration of a lease by forfeiture or otherwise, the lessor is not entitled to have the indenture of lease from the lessee (*d*).

*Custody of
Lease.*

SECT. 2.—Consequences of holding over.

(a) *Continuance of Liability.*

Upon the determination of the tenancy, by any means whatever, the landlord is entitled to receive the full and complete possession of the premises from his tenant (*e*); for although the lease has expired, the tenant's responsibility is not at an end until possession is given up. This is so even where a subtenant wrongfully holds over and refuses to quit (*f*); the lessee is liable for the period of such holding over, but not for a whole year's rent (*g*). The landlord may, however, discharge the original lessee by accepting the subtenant as his immediate lessee (*h*). Where four persons, directors of a bank, hired a house for a year, before the expiration of which negotiations were entered into for a further hiring, with an intimation to the lessor that the parties were different, but the negotiations were not perfected, though the premises were held over for another quarter; it was held, that all four were liable in an action for use and occupation, though two had ceased to be directors before the expiration of the first year (*i*). In a second action for subsequent use and occupation of the same premises, it was held, that if premises are let to two persons for a term, at the end of which one holds over with the assent of the other, both continue liable for the time the one actually occupies (*k*); but both will not be liable if the holding over has been without such assent (*l*). Where a tenancy from year to year has been determined by a regular notice to quit, the mere accidental detention of the key by the tenant (who has quitted the premises and removed his goods) for two days beyond the expiration of the term, does not amount to any evidence of use and occupation, so as to make him liable for another quarter (*m*). To hold him liable for a quarter's rent would fix him with a renewed tenancy for a whole year; which could not be created without the assent of *both* parties, and would render a

Tenant's Liability by holding over.

(*c*) *Doe d. Lloyd v. Jones*, 15 M. & W. 580.

(*d*) *Hall v. Ball*, 3 M. & G. 242; *Doe d. Earl of Egremont v. Pulman*, 3 Q. B. 622; *Elworthy v. Sandford*, 3 H. & C. 330; 34 L. J., Ex. 42.

(*e*) *Ante*, 712.

(*f*) *Harding v. Crethorn*, 1 Esp. 67.

(*g*) *Ibbs v. Richardson*, 9 A. & E. 849.

(*h*) *Harding v. Crethorn*, 1 Esp. 67.

(*i*) *Christy v. Tancred*, 7 M. & W. 127.

(*k*) *Christy v. Tancred*, 9 M. & W. 438; *Tancred v. Christy*, 12 M. & W. 316.

(*l*) *Id.*; *Draper v. Crofts*, 15 M. & W. 160.

(*m*) *Gray v. Bompas*, 11 C. B., N. S. 520.

CH. XX. s. 2. fresh notice to quit necessary. In an action for rent of coal, the issue being whether the defendants, who had given notice to quit, had afterwards waived such notice and agreed to continue the tenancy; it was proved that after the time fixed had expired, they *continued for two months* working out certain portions of the coal—which, however, as they contended, it was usual for a tenant to take away on abandoning such a work. It was ruled, that it was for the jury to decide on this issue, whether or not the defendants, in remaining for the two months, intended to waive the notice and continue the tenancy. The jury found they did not, and the court refused to disturb their verdict (*u*). Where a person who took premises for nine months, with an option at the end of that time of taking a lease for seven, fourteen or twenty-one years, before the expiration of the nine months sublet the premises for six months after the nine, and the sublessee occupied them for that time, it was held, that the lessee was liable for a whole year's rent (*o*).

Creation of
Tenancy from
Year to Year
by holding
over.

Hyatt v.
Griffiths.

We have already seen that a tenant holding over after the expiration of a lease for years may be taken to hold upon such of the terms of the former lease as are consistent with a yearly tenancy, and that whether he does hold on any of such terms or how otherwise, is a question for the jury on the facts proved (*p*). Where a tenant holds over and nothing is said as to the amount of rent to be paid, it is not necessarily to be the same as before, but the landlord may be entitled to an increased rent if the circumstances exclude the first agreement from attaching to the subsequent holding (*q*). It would appear that where the landlord has given a notice to quit or pay a specified rent, he may recover that amount of rent if the tenant hold over, it being a question for the jury whether the tenant has acquiesced (*r*). Where the tenant held over, and paid rent after the expiration of a lease, which contained covenants for a particular mode of husbandry; it was held, that the landlord might compel him to perform such covenants, in the same manner as if they were still expressly agreed upon between them (*s*). A covenant in a lease for years, ending at Michaelmas, that the tenant shall and may retain and sow forty acres of wheat on the arable land demised (consisting of 213 acres), at the seed-time next after the term, and have the standing thereof till the harvest then next following, rent free, with the use of premises for the threshing, &c. till a day named, is a term which may be made incident to a tenancy from year to year (*t*).

(*u*) *Jones v. Shears*, 4 A. & E. 832.

(*o*) *Waring v. King*, 8 M. & W. 571.

(*p*) *Hyatt v. Griffiths*, 17 Q. B. 505, ante, 207.

(*q*) *Elgar v. Watson*, 1 Car. & M. 494; *Mayor, &c. of Thetford v. Tyler*, 8 Q. B. 95.

(*r*) *Anon.*, Lofft, 153; *Roberts v. Hayward*, 3 C. & P. 432; *Hyatt v. Griffiths*, 17 Q. B. 505.

(*s*) *Roe d. Jordan v. Ward*, 1 H. Blac. 97.

(*t*) *Hyatt v. Griffiths*, 17 Q. B. 505.

(b) *Double Value.*

An action for double the yearly value of the premises is given to the landlord in case of the tenant holding over after the landlord's demand of the premises in writing. It is enacted by 4 Geo. 2, c. 28, s. 1, that "in case any tenant or tenants for any term *of life, lives or years*, or other person or persons who are or shall come into possession of any lands, tenements or hereditaments, by, from or under, or by collusion with such tenant or tenants, shall *wilfully hold over* any lands, tenements or hereditaments after the determination of such term or terms, and *after demand made*, and *notice in writing* given, for delivering the possession thereof by his or their landlords or lessors, or the person or persons to whom the remainder or reversion of such lands, tenements or hereditaments shall belong, his or their agent or agents *thereunto lawfully authorized*, then and in such case such person or persons so holding over shall, *for and during the time he, she or they shall so hold over*, or keep the person or persons entitled out of possession of the said lands, tenements and hereditaments as aforesaid, pay to the person or persons so kept out of possession, their executors, administrators or assigns, *at the rate of double the yearly value* of the lands, tenements and hereditaments so detained, for so long time as the same are detained, 'to be recovered in any of his majesty's courts of record, by action of debt (*u*), whereunto the defendant or defendants shall be obliged to give special bail (*x*); against the recovering of which said *penalty* there shall be no relief in equity."

CH. XX. s. 2.
Holding over
(Double Value
—after Land-
lord's Notice).

Action for
double Value
for wilful
holding over
after Land-
lord's Notice.
4 Geo. 2,
c. 28.

This is a penal statute, and is to be construed strictly (*y*). It does not extend to weekly tenancies (*z*); nor, as it seems, to a tenancy from quarter to quarter (*a*). One tenant in common may maintain an action for the double value of his moiety (*b*). But tenants in common cannot sue jointly for double value for holding over unless there has been a joint demise (*c*). An action for double value cannot be maintained by husband *and wife* when the tenant holds over the wife's land after the expiration of a term therein granted by the husband alone (*d*). The administratrix of an executor cannot sue for the double value of lands demised by the testator and held over by the defendant; but must obtain letters of administration de bonis non, even though the tenant has attorned to her (*e*). Only the landlord or lessor, or the assignee of the immediate reversion, can sue: not a tenant to whom a fresh

Decisions.

(u) See a Form of Declaration, Bullen & L. Pl. 215.

(x) Now see 32 & 33 Vict. c. 62, ss. 4, 6.

(y) *Lloyd v. Rosbee*, 2 Camp. 453; *Robinson v. Learoyd*, 7 M. & W. 54.

(z) *Lloyd v. Rosbee*, 2 Camp. 453; *Sullivan v. Bishop*, 2 C. & P. 359.

(a) *Sullivan v. Bishop*, 2 C. & P. 359; *Wilkinson v. Hall*, 3 Bing. N. C. 508.

(b) *Cutting v. Derby*, 2 W. Blac. 1077; *Wilkinson v. Hall*, *supra*.

(c) *Wilkinson v. Hall*, 1 Bing. N. C. 713; *Cole Ejec*. 647.

(d) *Harcourt v. Wyman*, 3 Exch. 817.

(e) *Tingrey v. Brown*, 1 Bos. & P. 310.

CH. XX. s. 2. lease has been granted to commence on the expiration of the defendant's tenancy (*f*).

*Holding over
(Double Value
—after Land-
lord's Notice).*

The Tenant
must hold
over *wilfully*.

The tenant must *wilfully* hold over, i. e. contumaciously, and not merely by mistake, under a fair and reasonable claim of title (*g*). Whether his claim to hold over be *bonâ fide* or a mere pretence is a question for the jury: a claim to hold over by virtue of a custom of the country, which does not apply to the demised premises, will not protect the tenant from liability to double value (*h*). Where a tenant held over possession during a treaty for a further term, which went off, Lord Mansfield held that the penalty in the statute did not apply (*i*). Where one of several tenants wilfully holds over without the assent of his co-tenants, the latter will not be liable (*j*); nor is a tenant liable for the holding over by a sub-tenant without his assent (*k*). Where husband and wife hold over after notice given to the wife before her marriage, the husband may be sued alone for double value (*l*).

Demand and
Notice in
Writing.

There must be a "demand made and notice in writing given" pursuant to the act (*m*). The notice and demand may be served before the expiration of the term requiring the tenant to deliver up possession on the expiration of his term (*n*); and in such case no further demand or notice is necessary after the expiration of the term; and the double value should be calculated from the expiration of the term for so long as the tenant holds over (*o*). Or the demand and notice may be given within a reasonable time after the expiration of the term (the sooner the better), provided the landlord has done no act in the meantime to acknowledge the continuance of the tenancy, or rather to create a new one; and he will thereupon be entitled to double value calculated from the time of such demand, and not from the expiration of the tenancy (*p*). If the rent was before reserved quarterly and such demand is made in the middle of a quarter, the landlord cannot recover any rent or compensation for use and occupation for the antecedent fraction of such quarter (*p*). The demand and notice should always be given before, or as soon as possible after, the expiration of the term. Where the tenancy was only from year to year, the usual written notice to quit is a sufficient demand and notice whereby to satisfy the statute, and no further demand or notice need be made after the tenancy has ceased (*q*). But the notice must

(*f*) *Blatchford*, app., *Cole*, resp., 5 C. B., N. S. 514.

(*g*) *Cole Ejec.* 646; *Wright v. Smith*, 5 Esp. 203; *Soulby v. Neving*, 9 East, 313; *Poole v. Warren*, 8 A. & E. 582; *Swinfen v. Bacon*, 6 H. & N. 184, 846; 30 L. J., Ex. 33.

(*h*) *Hirst v. Horn*, 6 M. & W. 393.

(*i*) *Anon.*, 5 Esp. 215.

(*j*) *Draper v. Crofts*, 15 M. & W. 166.

(*k*) *Randa v. Clark*, 19 W. R. 48.

(*l*) *Lake v. Smith*, 1 B. & P. 174.

(*m*) Ante, 717; see Form, Appendix C., No. 11, post.

(*n*) *Messenger v. Armstrong*, 1 T. R. 53; *Wilkinson v. Colley*, 5 Burr. 2694; *Cutting v. Derby*, 2 W. Blac. 1075.

(*o*) *Id.*; *Soulby v. Neving*, 9 East, 310; *Wright v. Smith*, 5 Esp. 203; *Booth v. Macfarlane*, 1 B. & Adol. 904.

(*p*) *Cobb v. Stokes*, 8 East, 358.

(*q*) *Wilkinson v. Colley*, 5 Burr. 2694, 2698; *Cutting v. Derby*, 2 W. Blac. 1075; *Hirst v. Horn*, 6 M. & W. 393; *Cole Ejec.* 646.

amount to a valid and binding notice to quit (*r*). If it requires the tenant to quit on the wrong day, or on the right day at twelve o'clock at noon, that is not sufficient (*s*). A notice requiring the tenant to quit on the proper day "or I shall insist on double rent" (instead of double value) is sufficient, and does not give the tenant the option of holding over (*t*). A second notice, given after the expiration of the term, to quit on a subsequent day or to pay double rent, is no waiver of the first notice given before the expiration of the term, or of the double rent which has accrued under it (*u*). A notice to quit lands on a given day, "or at such time as your holding shall expire next after the expiration of half a year from the receipt of this notice," is sufficient in an action for double value (*x*). Where a sufficient notice to quit is given to a female tenant, and she afterwards marries, no further notice need be given to the husband to support an action against him for double value for holding over (*y*). The notice must be signed by the landlord or his agent "thereunto lawfully authorized" (*z*). A receiver or agent authorized to let, and to sue or distrain for rent, has sufficient authority to give the notice (*a*), as also has a receiver appointed in the High Court, with the usual powers, who may give the notice in his own name (*b*).

CH. XX. s. 2.
Holding over
(Double Value
—after Land-
lord's Notice).

Double value cannot be distrained for, it not being in the nature of rent, but of unliquidated damages, recoverable only by action pursuant to the statute. After recovering the possession of demised premises by an ejectment, the landlord may maintain debt for double value for the time the tenant held over after the expiration of the notice to quit until possession was obtained in the ejectment (*c*). The action for double value "has no reference to any antecedent remedy which the landlord had to recover possession by ejectment, but is cumulative. The two actions are brought *diverso intuitu*; the ejectment is in order to get possession of the premises wrongfully withheld; the action of debt for the double value is in order to indemnify the landlord for the wrong" (*d*). No previous action of ejectment is *necessary* to entitle the landlord to recover double value (*e*). The action "stands in the place of an ejectment, but is more beneficial and effectual" (*f*). It is to be observed, that when the landlord gives notice the penalty is double the yearly *value*; not double the yearly rent, which might not in some cases be an adequate satisfaction (*g*).

Double Value
cannot be
distrained for.

(*r*) *Johnstone v. Hudlestone*, 4 B. & C. 922.

(*s*) *Page v. More*, 15 Q. B. 684.

(*t*) *Doe d. Matthews v. Jackson*, 1 Doug. 176; *Doe d. Lyster v. Goldwin*, 2 Q. B. 143; *Cole Ejec.* 646.

(*u*) *Messenger v. Armstrong*, 1 T. R. 53, 54.

(*x*) *Hirst v. Horn*, 6 M. & W. 393.

(*y*) *Lake v. Smith*, 1 B. & P. New R. 174.

(*z*) *Ante*, 717.

(*a*) *Poole v. Warren*, 8 A. & E. 582.

(*b*) *Wilkinson v. Colley*, 5 Burr. 2694; and see *Trent v. Hunt*, 9 Exch. 14.

(*c*) *Soulsby v. Nering*, 9 East, 310.

(*d*) *Id.* 314.

(*e*) *Cole Ejec.* 645.

(*f*) *Cutting v. Derby*, 2 W. Blac. 1077.

(*g*) *Soulsby v. Nering*, 9 East, 313; *Cole Ejec.* 645.

CH. XX. s. 2. In estimating the double value, the value of power supplied by the owner of a mill by means of a revolving shaft, and let together with a room in the mill, cannot be included, such power not being "lands, tenements or hereditaments" (h).

*Holding over
(Double Value
—after Land-
lord's Notice).*

Action in
County
Court.

An action for double value not exceeding 50*l.* may be brought in the County Court (i), and the defendant cannot oust the jurisdiction by alleging title to the premises in himself, if it be proved that he has admitted himself to have been tenant to the plaintiff at the times when the rent accrued, and from which the holding over commenced (k). It is not a dividing of the cause of action within the meaning of the County Courts Act (9 & 10 Vict. c. 95), s. 63, to levy one plaint for rent of premises and another for double value for holding them over, the two demands constituting distinct causes of action (l).

(c) *Double Rent.*

Action for
double Rent
for holding
over after
Tenant's
Notice.

11 Geo. 2,
c. 19.

By 11 Geo. 2, c. 19, s. 18, "in case any *tenant or tenants shall give notice* of his, her or their intention to quit the premises by him, her or them holden, at a time mentioned in such notice, and shall not accordingly deliver up the possession thereof at the time in such notice contained, then the said tenant or tenants, his, her or their executors or administrators, shall from thenceforward pay to the landlord or landlords, lessor or lessors, *double the rent* or sum which he, she or they should otherwise have paid, to be levied, sued for and recovered at the same time and in the same manner as the single rent or sum before the giving such notice could be levied, sued for or recovered; and such double rent or sum shall continue to be paid *during all the time such tenant or tenants shall continue in possession as aforesaid.*"

To what
Cases the
Statute ap-
plies.

It seems that the tenant need not hold over *wilfully or contumaciously* to render himself liable to double rent, there being no such words in the act, although it is otherwise with respect to "double value" (m). The statute only applies to those cases where the tenant has the power of determining his tenancy by a notice; and where he has actually given a valid notice sufficient to determine such tenancy (n). Unlike the act 4 Geo. 2, c. 28, s. 1, which, as we have seen, applies to tenants for lives or years only, this statute seems to apply to all kinds of tenancies, and has been held to apply to parol demises from year to year (o). If a tenant from year to year gives his landlord notice that he will quit upon a contingency, e. g. "as soon as he gains another situation,"

(h) *Robinson v. Learoyd*, 7 M. & W. 48.
(i) *Blatchford, app., Cole, resp.*, 5 C. B.,
N. S. 514.

(k) *Wickham v. Lee*, 12 Q. B. 521.

(l) *Id.*; *Ryal v. Rich*, 10 East, 48.

(m) *Ante*, 718.

(n) *Johnstone v. Hudlestone*, 4 B. & C. 922.

(o) *Timmins v. Rowlinson*, 3 Burr. 1607;
1 W. Blac. 533; *Sullivan v. Bishop*, 2 C.
& P. 359, in which the act was ruled not
to apply to a weekly tenancy, appears to
have proceeded upon a mistaken view of
Lloyd v. Rousee, 2 Camp. 453, and *ante*,
717 (z).

and do not quit when the contingency happens, he is not liable to an action on the statute for double rent (*p*). The notice to quit mentioned in the statute need not necessarily be in writing; a parol notice is sufficient to enable the landlord to recover double rent (*q*). A tenant who has given notice and paid double rent may quit at any time without fresh notice, and thereupon his liability to double rent will cease (*r*).

CH. XX. s. 2.
Holding over
(Double Rent
—after Te-
nant's Notice).

The acceptance of single rent, which has accrued due subsequently to the notice, is, it seems, a waiver of the landlord's right to double rent, although it does not necessarily imply that the tenancy should continue (*s*).

Waiver of the
Right to
double Rent.

By the above statute the double rent may be levied, sued for and recovered, at the same times and in the same manner as the single rent might have been levied, sued for and recovered before the giving of such notice. The mode of proceeding, therefore, to recover double rent under the statute, is by distress (*t*), or by action at law. Such action may sometimes be brought in the County Court, where the sum claimed does not exceed 50*l*. (*u*).

Proceedings
for double
Rent.

SECT. 3.—*Emblements*.

(*a*) *Nature of Emblements*.

The word "emblements" means a right given by law in certain cases to the tenant of an estate of uncertain duration, which has unexpectedly determined, without any fault of such tenant, to take the crops growing upon the land when his estate determines, although the estate itself has ceased (*x*). It is derived from the French *emblance de bled* (corn sprung or put up above ground), and strictly signifies the growing crops of sown land; but the doctrine of emblements extends not only to corn sown, but to roots planted, and other annual artificial profits (*y*). The growing crops of those vegetable productions of the soil which are annually produced by the labour of the cultivator are emblements (*z*). Fruit-trees, therefore, or oak, elm, ash or other trees, cannot be comprehended under emblements (*a*); but there may be a right of emblements in teazles (*b*). Where there is a right to take emblements, they belong either to the tenant himself, whose estate is determined in such a manner as to give him the right; to his grantee or devisee, where he has granted or devised them; or to

What are
Emblements.

Teazles.

(*p*) *Farrance v. Elkington*, 2 Camp. 591.

(*q*) *Timmins v. Rowlinson*, 3 Burr. 1607;

1 W. Blac. 533; *Johnstone v. Hudlestone*,

4 B. & C. 922.

(*r*) *Booth v. Macfarlane*, 1 B. & Adol.

904.

(*s*) *Doe d. Cheney v. Batten*, Cowp. 243.

(*t*) *Humbertson v. Dubois*, 10 M. & W.

765; 2 Dowl. N. S. 506; *Timmins v.*

Rowlinson and *Johnstone v. Hudlestone*,

supra; *Cole Ejec.* 649.

(*u*) *Wickham v. Lee*, 12 Q. B. 521.

(*x*) *Smith L. & T.* 339 (2nd ed.). See

14 & 15 Vict. c. 25, s. 1, post, 722.

(*y*) *Latham v. Attwood*, Cro. Car. 615;

Co. Lit. 55 b, note (1).

(*z*) *Smith L. & T.* 348 (2nd ed.).

(*a*) Co. Lit. 55 b; Com. Dig. *Biens*

(G. 1); 1 Wms. Exors. 632 (6th ed.).

(*b*) *Kingsbury v. Collins*, 4 Bing. 202.

CH. XX. s. 3. his personal representatives, where the right arises upon the death of a tenant who has made no disposition respecting them (c).

*Emblements.
(Nature of).*

Rights inci-
dent to Em-
blements.

Where there is a right to emblements, ingress, egress and regress are allowed by law to enable the party to enter, cut and carry them away after the estate is determined (d): so if a party who is entitled to emblements grant them to another, the grantee may cut and take them away after the death of the grantor (e). The right to emblements does not, however, give a title to the exclusive occupation of the land; therefore it seems that if the executors occupy till the corn or other produce be ripe, the landlord may maintain an action for the use and occupation of the land (f).

(b) *Prolongation of Term instead of Emblements.*

Agricultural
Tenant of
Landlord
having uncer-
tain Interest
may occupy
till End of
current Year
of Tenancy.

14 & 15 Vict.
c. 25, s. 1.

The right to emblements is practically almost abolished by an act passed in 1851 (14 & 15 Vict. c. 25), which substitutes for claims to emblements the right of continued occupation. By sect. 1, "where the lease or tenancy of any farm or lands held by a *tenant at rack-rent* (g) shall determine by the death or cesser of the estate of any landlord entitled for his life, or for any other uncertain interest, *instead of claims to emblements*, the tenant shall continue to hold and occupy such farm or lands *until the expiration of the then current year of his tenancy*, and shall then quit, upon the terms of his lease or holding, in the same manner as if such lease or tenancy were then determined by effluxion of time or other lawful means during the continuance of his landlord's estate; and the succeeding landlord or owner shall be entitled to recover and receive of the tenant in the same manner as his predecessor or such tenant's lessor could have done if he had been living or had continued the landlord or lessor a fair proportion of the rent for the period which may have elapsed from the day of the death or cesser of the estate of such predecessor or lessor to the time of the tenant so quitting, and the succeeding landlord or owner and the tenant respectively shall, as between themselves and as against each other, be entitled to all the benefits and advantages, and be subject to the terms, conditions and restrictions to which the preceding landlord or lessor and such tenant respectively would have been entitled and subject in case the lease or tenancy had determined in manner aforesaid at the expiration of such current year; provided always, that no notice to quit shall be necessary or required by or from either party to determine any such holding and occupation as aforesaid." This enactment applies only to those tenants *at rack-rent* who before the statute would have been

(c) 2 Blac. Com. 404.

(d) Co. Lit. 56 a; *Hayling v. Okey*, 8 Exch. 531, 545; *Smith L. & T.* 349 (2nd ed.).

(e) *Shep. Touch.* 244.

(f) *Plowden's Queries*, No. 239; 1 Wms. Exors. 679 (6th ed.); *Chamb. L. & T.* 340.

(g) That is, a rent of the full annual value, or near it.

entitled to emblements (*h*); and seems to include all such persons except those who are tenants for their own lives, or the life of another—in which cases the executors of such persons have still a right to emblements. But it applies to all such tenancies in which there might have been a claim to emblements, ex. gr. a tenancy from year to year of a cottage with about an acre of land, cultivated as a garden, and partly sown with corn, and planted with potatoes (*i*). The succeeding owner may after the expiration of the current year of the tenancy distrain for his proportion of the rent (*i*).

CH. XX. s. 3.
*Emblements
(Prolongation
of Term
instead).*

(c) *Who entitled to Emblements.*

Those only are entitled to emblements who are not within the act 14 & 15 Vict. c. 25, s. 1, above set forth, and have an uncertain estate or interest in land, which is determined, either by the act of God or of the law, between the period of sowing and the severance of the crop (*k*). If the state, although uncertain in its nature, be determined by the tenant's own act—as by forfeiture for waste committed, or by marriage of a female tenant who held during widowhood—the claim to emblements never arises (*l*); nor does it as against a lessor who enters for a condition broken, or by title paramount (*m*). And where a lease was granted with a condition for re-entry in case of the tenant contracting a debt upon which judgment and execution should issue, it was held that the condition was broken, and the emblements lost to the tenant, by execution issuing, although it was argued that a tenant under such a condition would be led to cultivate after contracting a debt, because it would never be certain whether the debt would be followed by execution, which was partly the act of the law (*n*).

General Rule
as to Persons
entitled to
Emblements.

Tenants for life, whether for their own lives or *pur autre vie*, are strictly within the rule applicable to persons entitled to emblements (*o*). The same rule applied to the subtenants or lessees of tenants for life before the above act, and they had not only the same privileges respecting emblements, but in some instances greater; for in those cases where the tenant for life should not have emblements because the estate was determined by his own act, it should not prejudice his subtenant, who could not be answerable for it, and he had, therefore, a right to emblements (*p*).

Tenants for
Life and their
Subtenants.

The parochial clergy are entitled to emblements (*q*); but a parson

Clergymen
and their
Subtenants.

(*h*) *Ld. Stradbrooke v. Malchy*, 2 Ir. Rep., N. S. 406.

(*i*) *Haines v. Welch*, L. R., 4 C. P. 91; 38 L. J., C. P. 118.

(*k*) *Smith L. & T.* 339 (2nd ed.).

(*l*) *Oland's case*, 5 W. R. 116; *Bulwer v. Bulwer*, 2 B. & A. 470.

(*m*) *Nicholas v. Simonds*, 2 Roll. R. 468; *Bulwer v. Bulwer*, 2 B. & A. 471; *Johns v. Whitley*, 3 Wils. 127.

(*n*) *Davis v. Eyton*, 7 Bing. 154.

(*o*) Co. Lit. 55 b.

(*p*) *Knevet v. Poole*, Cro. Eliz. 463; *Bulwer v. Bulwer*, 2 B. & A. 470.

(*q*) 28 Hen. 8, c. 11, s. 6.

CH. XX. s. 3. who resigns his living is not entitled to emblements, although his lessees and subtenants are (*s*).
Emblements (Who entitled to).

Tenants in Dower and Jointure.

A tenant in dower is entitled to emblements: she may dispose of corn sown on the ground; or it may go to her executors, if she die before soverance (*t*). Where lands are limited to a woman during life for her jointure, she has the same rights with respect to estovers and emblements, and is under the same restrictions respecting waste (unless there is a deficiency in her jointure), as other tenants for life (*u*). A jointress is not, however, entitled to the crop *sown at the time of her husband's death*; because a jointure is not a continuance of the estate of her husband, like dower (*u*).

Tenants from Year to Year.

Tenants from year to year seem to be entitled to emblements (*x*), although not entitled to a prolongation of their term under 14 & 15 Vict. c. 25, s. 1, except where their tenancy is determined by the death of their landlord or the happening of some other uncertain event over which they have no control (*y*).

Strict Tenants at Will.

A strict tenant at will is entitled to emblements where his estate is determined either by his own death or by the act of the landlord; but not to cases where the tenant has himself determined the will (*z*).

Tenants under Execution.

Tenants under execution—as under extent (*a*), or elegit—are entitled to emblements, where the tenancy is put an end to by the judgment being satisfied.

SECT. 4.—*Outgoing and Incoming Tenants.*

(a) *The Custom of the Country.*

At common law a tenant who knows when his tenancy will end (whether he be a tenant for years, or a tenant from year to year, having received due notice to quit) has no rights on or out of the land at the end of his tenancy (*b*). But this rule (which may, of course, be modified by agreement) the common law allows to be modified by custom, by what is called, in relation to agricultural holdings, the “custom of the country.”

The customs of the country, as we shall see presently, vary in respect of place, and change in respect of time to a very remarkable degree. Nor are they always for the benefit of agriculture. In forward districts, they will indeed be found to move with the times, or to be superseded by special agreements; but in backward districts this is often not the case. However this may be, the object of all

(*s*) *Bulwer v. Bulwer*, 2 B. & A. 470.
 (*t*) 2 Inst. 80; 20 Hen. 3, c. 2 (Stat. of Merton); 1 Wms. Exors. 677 (6th ed.).
 (*u*) *Fisher v. Forbes*, 9 Vin. Abr. tit. Emblements, pl. 82.
 (*x*) *Kingsbury v. Collins*, 4 Bing. 207.
 (*y*) *Kingsbury v. Collins*, 4 Bing. 207;

Haines v. Welch, L. R., 4 C. P. 91.
 (*z*) Co. Lit. 55 b; *Kingsbury v. Collins*, supra; Smith L. & T. 342 (2nd ed.).
 (*a*) *Barden's case*, 2 Leon. 54.
 (*b*) *Wiggleworth v. Dallison*, 1 Sm. L. C. 598 (7th ed.). See *Caldecott v. Smythies*, 7 C. & P. 808, per Parke, B.

customs of the country applicable to the end of the tenancy is to extend the doctrine of emblements, and to allow him who sows to reap. With this object, the outgoing tenant is allowed to occupy his farm—for periods and under limitations infinitely varying in extent—after the expiration of his tenancy: to re-enter and carry away crops: and to receive compensation for “unexhausted improvements.”

CH. XX. s. 4.
*Outgoing
and Incoming
Tenants.*

Every custom of the country must be proved as a fact by the party setting it up (c). It need not have existed from time immemorial (d): a common usage of the neighbourhood is sufficient.

Custom must
be proved as
a Fact.

The landlord and tenant are presumed to have contracted with reference to the custom, and the custom is incorporated into the contract, whether oral, in writing, or by deed, unless the custom and the terms of the contract are expressly or impliedly inconsistent with it. This rule was laid down in the leading case of *Wigglesworth v. Dallison* (e), and may be found fully expounded in *Hutton v. Warren* (f).

Custom in-
corporated in
Contract of
Tenancy.
*Wigglesworth
v. Dallison.*

In practice there is generally a sale of growing crops, &c. by the outgoing to the incoming tenant, and such a sale is within the Statute of Frauds, sect. 4, so as to require to be in writing (g), and can of course be recovered upon in an action by the outgoing against the incoming tenant (h). But it is clear from *Pariell v. Gaskoin* (i) that the outgoing tenant has, where a custom to be paid for tillages, &c. exists, an absolute right to be paid by the landlord, and not merely a right conditional on there being an incoming tenant. Moreover, a custom that the outgoing tenant shall look to the incoming tenant, to the exclusion of the landlord's liability, cannot be supported in law, such a custom being unreasonable, uncertain, and prejudicial to the interests both of landlords and tenants (j).

Remedy of
Outgoing
Tenant is
against
Landlord.
*Pariell v.
Gaskoin.*

In *Stafford v. Gardner* (k) the plaintiff was outgoing and the defendant incoming tenant. A valuation of tillages was made as between them with the consent of the landlord. The plaintiff owing rent to an amount exceeding that found to be due to him on the valuation, the landlord gave notice to the defendant to pay the amount of the valuation to himself, and not to the plaintiff, which the defendant did. It was held that the plaintiff could not recover

Right of
Landlord to
Rent out of
Valuation.
*Stafford v.
Gardner.*

(c) *Caldecott v. Smythies*, 7 C. & P. 808.

(d) *Senior v. Armytage*, Holt N. P. 197; *Leigh v. Hewitt*, 4 East, 160; *Dalby v. Hirst*, 1 B. & B. 224.

(e) 1 Doug. 201; 1 Sm. L. C. 598 (7th ed.).

(f) 1 M. & W. 466. For cases where the custom was held excluded on the ground of the contract of tenancy being inconsistent with it, see *Roberts v. Barker*, 1 Cr. & M. 808; *Clarke v. Royston*, 13 M.

& W. 752.

(g) *Earl of Palmouth v. Thomas*, 1 Cr. & M. 82; *Harvey v. Graham*, 5 A. & E. 61.

(h) *Tanner v. Washbourne*, 1 F. & F. 330.

(i) 7 Exch. 273.

(j) *Bradburn v. Joley*, L. R., 3 C. P. D. 129; 47 L. J., C. P. 331; 38 L. T. 421; 26 W. R. 423.

(k) L. R., 7 C. P. 242; 25 L. T. 876; 20 W. R. 899.

CH. XX. s. 4. the amount of the tillages from the defendant, inasmuch as the contract to be implied between them was subject to the right of the landlord to be paid the arrears of rent out of the valuation.

*Outgoing
and Incoming
Tenants.*

(b) *Partial Occupation.*

Occupation of
Part, after
Tenancy
ended.

It is very generally the case, that by the terms of the lease or the custom of the country, outgoing tenants of farms leave, and incoming tenants enter upon, the premises at different periods of the year; as, the house and buildings at one time, the arable land at another, and the pasture and meadow land at a third. Sometimes, however, the general quitting of the farm takes place at one time; and there exists the privilege for the outgoing tenant to retain possession of the land upon which his away-going crops are growing, and the use of some of the barns and stables for the purpose of threshing and conveying them to market. This privilege is occasionally given on condition of his paying the rent and taxes applicable to the premises which he retains; but, perhaps, more commonly without any such stipulation. The incoming tenant has sometimes also the privilege of entering before the expiration of the existing tenancy, for the purpose of ploughing and preparing for his crops; particularly where there is a Lady-day holding. A custom that the tenant should hold over for half a year after the expiration of his term is bad (*l*); but a custom to take an away-going crop, and house the same in the barns of the farm for a certain time after he has quitted possession of the bulk of the farm, is good (*m*). A stipulation on the occasion of a weekly letting that after the expiration of the tenancy by the usual week's notice the tenant shall have a reasonable time to remove his goods has been held valid (*n*).

Right to
retain Posses-
sion operates
as Prolonga-
tion of Term.

Where by the custom of the country, or by the terms of the lease, the tenant has a right to retain possession of any part of the demised premises after the end of the term, ex. gr. a right to retain the barns for the purpose of threshing out his crops, &c., such right will in effect operate as a prolongation of the term as to such part; and therefore during that period the landlord may distrain (*o*). For a like reason the outgoing tenant, or his assignees, may maintain trespass (*p*), or defend an action of trespass at the suit of the incoming tenant (*q*), or defend an action of ejectment at the suit of the landlord (confining his defence by notice to the particular part) (*r*), and cannot remove any of the straw, &c. which he has covenanted not to remove "during

(*l*) *White v. Sayer*, Palm. 211.
(*m*) *Wigglesworth v. Dallison*, 1 Doug. 201; 1 Smith L. C. 598 (7th ed.); *Beavan v. Delahay*, 1 H. Blac. 5; *Boraston v. Green*, 16 East, 71.
(*n*) *Cornish v. Stubbs*, L. R., 5 C. P. 331; 39 L. J., C. P. 202.

(*o*) *Beavan v. Delahay*, 1 H. Blac. 5; *Knight v. Bennett*, 3 Bing. 364.
(*p*) *Beaty v. Gibbons*, 16 East, 116.
(*q*) *Griffiths v. Puleston*, 13 M. & W. 358.
(*r*) *Alcock v. Wilshaw*, 2 E. & E. 833; 29 L. J., Q. B. 143.

the leased term”(s). So, where there is a right reserved to the tenant to take the away-going crop, it operates as a prolongation of the term on which such crop grows, and the possession of the land continues in the tenant till the crop is or might be cut and carried away (t). If also retains his parliamentary franchise during such holding over, if the part held over is of sufficient value (u).

CH. XX. s. 4.
*Outgoing
and Incoming
Tenants.*

Parliamentary Franchise.

The following Table, made up from the information supplied by the schedules to the Report of the Central Associated Chambers of Agriculture upon Agricultural Customs (x), shows the “custom of the country” as regards partial occupation existing in certain districts in 1874:—

Berkshire	“Usual” for incoming tenant to enter upon the fallows intended for roots on the previous Lady-day.
(Newbury).	
Cambridgeshire	Outgoing tenant retains possession of barns and stockyard, for a reasonable time, to thresh and market corn.
(North of Islo of Ely).	
Cheshire	Custom allows incoming tenant to take possession of the meadow land on December 29th preceding Lady-day, and of the land on February 2nd, except one field called an outlet, and the barn and buildings. Possession of this field and of house and promises is given on May 1st. Retainer of possession by outgoing tenant not permitted.
(Nantwich).	
Cheshire	Outgoing tenant may retain house and buildings and one grass field to February 2nd; arable to November 1st.
(Northwich).	
Cheshire	Incoming tenant takes possession of all the land on February 2nd, except an outlet for cattle. Outgoing tenant retains house, buildings and outlet till May 1st.
(Macclosfield).	
Cheshire	Incoming tenant enters on the land, except an outlet for cattle, on February 2nd. Outgoing tenant retains possession of the premises and outlet till 1st or 12th of May.
(Middlewich, &c.).	
Cheshire (North)	Outgoing tenant retains house, outbuildings and outlet till May 12th.
Derbyshire	Incoming tenant prepares the land for spring crops, and is allowed room on the farm for housing his horses and servants. On many estates outgoing tenant claims to hold to the 6th April in lieu of the 25th March.

(s) *Earl of St. Germain v. Willan*, 2 B. & C. 218.

(u) *Wythe's case*, 1 Knapp & O. 53.

(t) *Boraston v. Green*, 16 East, 81; *Griffiths v. Puleston*, *supra*.

(x) See further as to this Report, 737,

- CH. XX. s. 4. Dorsetshire**.....Incoming tenant allowed to enter to prepare for roots and green crops. Outgoing tenant allowed the use of barns for threshing and yards for feeding hay, straw, &c. in Michaelmas entries till the following April 1st.
Outgoing and Incoming Tenants.
- Partial Occupation by Custom of Country.**
- Dorsetshire (Central)**..A Lady-day tenant sometimes takes possession of a portion of the water meadows in January or February, to commence irrigating them. A Michaelmas tenant will have liberty to enter on the land for wheat in July or August, so as to haul out dung and get his ploughing done in good season. An outgoing Lady-day tenant, having an outgoing crop, will hold the owe leases till July 6th, all the arable land under corn till October 10th, and barns, yards, part of the stables, and the whole or part of the farm-house, till July 6th in the following year; also some of the cottages.
- Dorsetshire**.....Incoming tenant enters in May to put in his turnip crop; in some cases rent being allowed, but in most cases not anything. Outgoing tenant in most cases retains the use of the yards, sheds, barns and part of the dwelling-house for six months after the Michaelmas term.
- Durham**Incoming tenant enters May 13th; but he is empowered, six months previously, to plough all such lands as he is entitled to as incoming lands. Incoming tenant also entitled to all manure made upon the premises for six months previously, and to sow grass seeds among the corn of outgoing tenant. Outgoing tenant entitled to sow half the tillage land and to retain possession till the harvest following, and the joint occupation of the barn and stackyard for the purpose of threshing his outgoing crops.
- Gloucestershire**Principally Lady-day takings. Outgoing tenant (Dean Forest). has a right to a fold room to consume the straw, and in some instances a right to two rooms in the farm-house till the May following the expiration of the tenancy.
- Gloucestershire**Incoming tenant enters at Candlemas, to prepare (Stow-on-the-Wold). the spring corn, on a Lady-day entry; and early in August, to commence ploughing the clover ley, on a Michaelmas entry. Outgoing tenant remains to May 1st, for the purpose of spending the fodder.
- Gloucestershire**Incoming tenant enters, in case of Michaelmas (Cotswold Hills). entry, about August 20th to prepare for wheat crop. Outgoing tenant allowed to thresh out corn and consume fodder, when not taken to by incoming tenant, up to May 20th next after the expiration of the tenancy.

- Gloucestershire** No pre-entry by custom. In Lady-day entries outgoing tenant may remain about three months, and in Michaelmas entries about six months, retaining possession of a portion of the house, barns, stables, yards, &c. for threshing out corn crops, consuming hay, &c. CH. XX. s. 4.
Outgoing and Incoming Tenants.
- (Cirencester).
- Gloucestershire** Incoming tenant entitled to the whole of the pasture land, one-fourth of the arable, and the dwelling-house (excepting two rooms) from the time his tenancy commences. Outgoing tenant retains possession of barn and yard room for spending the straw and koop, stable room for horses (according to the size of the farm) for hauling out the crop, and two rooms in the house for the lodging of a workman until the Lady-day following. Partial Occupation by Custom of Country.
- (Tewkesbury).
- Gloucestershire** In Lady-day takes and sometimes in Michaelmas takes, incoming tenant prepares the fallows during the summer. "A Michaelmas tenant retains the house, yards and buildings, to consume his produce, if not taken by the incomer."
- (Vale of the Severn).
- Gloucestershire** No pre-entry. In a Michaelmas take outgoing tenant can retain barns and yards till the next Lady-day.
- (Tetbury).
- Gloucestershire** In a Lady-day take incoming tenant enters upon all the lands and premises; but under a Michaelmas take he enters upon the old ley and fallows to prepare for wheat on August 1st, and on the wheat stubble immediately after the harvest to plough and prepare for root crops. In a Lady-day take outgoing tenant holds over barns, granary, yards, stable room for four horses and part of the dwelling-house up to May 1st, to thresh out the corn and consume the hay and straw; but on a Michaelmas take he quits on September 29th, but holds over the barn, granary, stabling and part of the house, up to December 25th, to thresh out the corn only.
- (East and North of Cheltenham).
- Gloucestershire** Outgoing tenant allowed yard room for the purpose of spending his fodder, straw and roots, barn room and rickyard room, and a portion of the farm-house. Each and all of these from Michaelmas to Lady-day.
- (West of Cheltenham).
- Hampshire** (North) . . Incoming tenant may enter six months previous with portion of house and stabling. Outgoing tenant retains part of the house and stables, and the whole of the barns and yards, till the following June.
- Hampshire** Incoming tenant may enter March 25th to plough for white turnips; at Midsummer to sow turnips; in August to prepare for the wheat crop, or at such a time as outgoing tenant can get his previous green crops fed off. Outgoing tenant retains a convenient part of the house, and the whole of the barns for clearing out his corn until May.
- (Andover).

- CH. XX. s. 4. Herefordshire** Candlemas and Lady-day entries admit of incoming tenant entering after November to plough stubble ground to prepare the same for Lent grain or turnip crop. "Custom permits outgoing tenant to keep the fold yards and buildings with one grass pasture, locally termed a 'boosey' pasture, till May 1st, and a barn and granary to thresh and protect his outgoing crop of wheat. But all recent special agreements tend to break through this absurd custom."
- Outgoing and Incoming Tenants.*
- Partial Occupation by Custom of Country.**
- Hertfordshire (West)** Nearly all Michaelmas entries. Incoming tenant generally enters at Lady-day to work the fallows; but if outgoing tenant does them he is paid for the actual labour performed. Outgoing tenant mostly has to May 1st to thresh out and make off his crops.
- Lancashire (South)** Incoming tenant may enter land February 2nd, house and buildings May 1st. Outgoing tenant has the house and buildings, with one pasture field, called an "outlet," to his use until May 1st, and is "also allowed to cut and take away straw and all his portion of wheat, which is one-half, when ready, if such has not been arranged previously."
- Lincolnshire** Neither pre-entry nor retainer of possession permitted in any part of Lincolnshire.
- Norfolk** On Michaelmas farms outgoing tenant retains (Marshland District). possession of the barns and stockyard until May 1st.
- Northamptonshire** Outgoing tenant has use of premises for the consumption of produce.
- Northamptonshire** Outgoing tenant has use of premises until May 1st (Weedon). beyond Lady-day for consuming produce.
- Northumberland** Incoming tenant may enter on or after February 2nd to plough land for fallow or green crops. (Tynedale). Outgoing tenant has use of barn for his away-going crop (if not sold to incoming tenant) till May-day following.
- Nottinghamshire** Neither pre-entry nor retainer of possession permitted.
- Oxfordshire and** In some Michaelmas takes incoming tenant allowed to enter in February to work the fallows.
- Berkshire** Incoming tenant may enter, at least for wheat, the middle of August or 1st of September: for which he has stabling for his horses and lodging for his men. Lady-day tenants are generally allowed possession of a portion of the house, stables and barns till early in June. Michaelmas tenants have the same indulgence till Lady-day following.
- (Henley-on-Thames District).**

Shropshire	Incoming tenant may pre-enter to prepare stubbles, stabling for horses and room for servants being provided. In some parts of Shropshire there is no right of pre-entry. "The custom is becoming less acted upon than formerly; and arrangement is generally made with outgoing tenant to perform the necessary work at a price agreed upon." House generally retained, and a boosey pasture allowed, with a portion of the buildings, for outgoing tenant till May 1st. Outgoing tenant also allowed reasonable time for threshing his wheat, sometimes till February 2nd.	CH. XX. s. 4. <i>Outgoing and Incoming Tenants.</i> ----- Partial Occupation by Custom of Country.
Staffordshire	Incoming tenant may enter on February 1st, (Wolverhampton). "tenant and man without payment." Outgoing tenant allowed a boosey pasture up to May 5th.	
Staffordshire (South) ..	Pre-entry "irregular." Retainer of possession not permitted.	
Suffolk	Entry on October 11th. Incoming tenant has to thresh, dress and deliver the corn of outgoing tenant.	
Suffolk (South)	Incoming tenant may pre-enter only with consent of outgoing tenant, who has use of barn and granary up to Lady-day after quitting at Michaelmas.	
Surrey	In Michaelmas tenancies outgoing tenant retains the use of the barns, a part of the granaries and cart sheds till the ensuing May-day.	
Wiltshire	Incoming tenant may pre-enter to prepare for roots and fallow for wheat. In South Wiltshire custom allows outgoing tenant to retain possession of a proportion of the house, barns and buildings, for the purpose of threshing his corn and feeding the straw of the last year's corn crops.	
Worcestershire	Incoming tenant may enter on February 2nd in a Lady-day take, and is allowed part of the buildings for his own use. Outgoing tenant has the use of part of house, with fold yard and boosey pasture, until May 1st.	
Yorkshire	Incoming tenant may enter on February 1st for (East Riding). the purpose of ploughing, and stable room must be provided for horses.	
Yorkshire	Incoming tenant may enter on February 2nd. (West Riding: Wakefield). Outgoing tenant may not retain possession after that day.	
Yorkshire	Pre-entry not permitted. Most of the holdings are (West Riding: Barnsley). from Candlemas for the land, and May 1st for the homesteads.	
Yorkshire	Lady-day entry. Incoming tenant can enter at Martinmas upon all arable lands, except the fields on which outgoing tenant has his away-going crops. Outgoing tenant can retain possession of all the arable lands on which the away-going crops are growing, until such crops shall have been valued or harvested.	

CH. XX. s. 4.

Outgoing
and Incoming
Tenants.Right to an
away-going
Crop.*Wigglesworth
v. Dallison.*(c) *Away-going Crop.*

It was held in *Wigglesworth v. Dallison* (z), that a custom that a tenant, whether by parol or deed, shall have the "way-going crop" after the expiration of his term, is good. Such a custom was said by Lord Mansfield, in 1799, to be for the benefit and encouragement of agriculture (z); but in modern times strong opinions have been entertained of the propriety of getting rid of it (a), chiefly on the ground that it may compel a man to carry on his business in two distinct places; and it has become a common custom for the incoming tenant to buy the standing crop at a valuation from the outgoing tenant, the winter corn crops being so valued where the entry is at Lady-day, and the clover and root crops where the entry is at Michaelmas. As has already been pointed out, the custom of the country can have no place where the off-going tenant holds under a lease expressly making a different provision in respect of the away-going crop (b); or where he continues to hold over after the expiration of such a lease, without coming to any fresh agreement with his landlord, by which he must be taken to hold under the same terms (c). Where the lease contains no stipulations as to the mode of *quitting*, the off-going tenant is entitled to his away-going crop according to the custom, even though the terms of *holding* may be inconsistent with such a custom (d). The fact of the existence of the usage is to be collected not only from what is ~~usually~~ done in cases of tenancy from year to year, but from the usual course pursued where tenants hold under regular leases. The principle applies equally to the case of a tenancy from year to year as to a lease for a longer term, with respect to the right to take an away-going crop (e). Where a tenant held from Lady-day, and there was a custom that the tenant, at the regular expiration of a Lady-day tenancy, should have the away-going crops, and the tenancy was determined on the 1st of June by an award made on a reference of disputes between the landlord and tenant; it was held, that the custom had no operation (f).

Against
whom the
Outgoing
Tenant may
claim the
Right to an
away-going
Crop.

Where the outgoing tenant is entitled to take an away-going crop, he may avail himself of that right, whether the farm revert back into the hands of his landlord (g), or an incoming tenant take possession (h). An agreement between the outgoing and incoming tenants

(z) 1 Doug. 201; 1 Smith L. C. 598 (7th ed.).

(a) Wingrove Cooke on Agricultural Tenancies, A.D. 1850, p. 120.

(b) *Webb v. Plummer*, 2 B. & A. 746; *Hutton v. Warren*, 1 M. & W. 466; *Roberts v. Barker*, 1 Cr. & M. 808; *Clarke v. Royston*, 13 M. & W. 752.

(c) *Boraston v. Green*, 16 East, 71.

(d) *Holding v. Pigott*, 7 Bing. 465;

Webb v. Plummer, 2 B. & A. 746; *Hutton v. Warren*, 1 M. & W. 466; *Muncey v. Dennis*, 1 H. & N. 216.

(e) *Onslow v. —*, 16 Ves. 173.

(f) *Thorpe v. Eyre*, 1 A. & E. 926.

(g) *Fariell v. Gaskoin*, 7 Exch. 273; *Mousley v. Ludlam*, 21 L. J., Q. B. 64; 15 Jur. 1107.

(h) *Muncey v. Dennis*, 1 H. & N. 216.

with respect to crops does not affect any existing rights of the landlord (i). A clause in a lease that the tenant should be entitled to an away-going crop, which was to be left for the landlord or his incoming tenant at a valuation, has been held not to give the tenant the right of possession as against the landlord, after the determination of the tenancy, but at most only to go on the land for the purposes of an away-going crop, and not to exclude the landlord (j). A permission by a landlord to an outgoing tenant to sow more land than by the custom of the country he was entitled to on quitting, is good against the incoming tenant (k).

CH. XX. s. 4.
*Outgoing
and Incoming
Tenants.*

Where an outgoing tenant has no right to an away-going crop, but cuts and carries away the corn after the expiration of his term, an action of trover may be maintained against him by the landlord (l), but not by the incoming tenant (m). Where there was an agreement between an outgoing and an incoming tenant, that the latter should buy the hay, &c. of the former upon the farm, and that the former should allow to the latter the expenses of repairing the gates and fences of the farm, and that the value of the hay, &c., and of repairs should be settled by third persons; it was held, that the balance settled to be due to the outgoing tenant for his hay, &c., after deducting the value of the repairs, might be recovered by him under a common count for goods sold and delivered, although he failed upon a special count on the agreement, for want of including in it that part of the agreement which related to the valuation of the repairs (n).

*Remedies of
the Parties as
to Crops, &c.*

(d) *Straw, Hay and Manure.*

In some cases contracts relative to the disposal of manure are entered into between the landlord and tenant which may give the latter, when he leaves the farm, a power of disposing of it to an incoming tenant (o). A tenant held under the terms of an expired lease, by which it was stipulated that, on quitting, the tenant should not sell or take away any of the manure in the fold, but should leave it to be expended on the land by the landlord or his succeeding tenant, but there was no provision for payment to the tenant; by the custom, the tenant was bound in the same way, but he would have been entitled to payment: it was held, that, as an express stipulation had been made on the subject, the custom was excluded, and that the tenant was not entitled to be paid for the manure (p). A lease con-

Where an
Outgoing
Tenant can
claim Re-
muneration.

- (i) *Petrie v. Daniel*, 1 Smith R. 199.
- (j) *Strickland v. Maxwell*, 2 Cr. & M. 539.
- (k) *Griffiths v. Tombs*, 7 C. & P. 810.
- (l) *Davies v. Connop*, 1 Pricc, 53.
- (m) *Boraston v. Green*, 16 East, 71.
- (n) *Leeds v. Burrows*, 12 East, 1.

- (o) *Legh v. Lillie*, 6 H. & N. 165; 30 L. J., Ex. 25; *Hurst v. Hurst*, 4 Exch. 579; *Massey v. Goodall*, 17 Q. B. 310.
- (p) *Roberts v. Barker*, 1 Cr. & M. 808; *Webb v. Plummer*, 2 B. & A. 746; *Clarke v. Royston*, 13 M. & W. 752.

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*Outgoing
 and Incoming
 Tenants.*

taining no provisions as to straw unconsumed on quitting, is not inconsistent with a custom of the country that the tenant shall be paid for the straw and manure on leaving, and therefore the tenant is entitled to be paid for his straw (*q*). Where the tenant is entitled to be paid a fair price for the straw left, but nothing for the manure, he is only entitled to be paid for the straw at a fodder or "consuming" price, viz. one-half the market price (*r*). Where an outgoing tenant had contracted with his landlord to leave the manure on the premises, and to sell it to the incoming tenant at a valuation; it was held, that it gave him a right of *ou-stand* for the manure on the farm; and that, possession and property remaining in him until the valuation was made, a removal or use of it by the incoming tenant before that was done would render him liable to an action of trespass by the outgoing tenant (*s*). Where a tenant, who was bound to bring back dung for all hay sold by him to be carried off the premises, at the time of his quitting sold a part of a rick then standing, to a purchaser, without mentioning his liability to bring back manure; it was held, that the succeeding tenant had a right to refuse to permit the hay to be removed until the manure should be deposited (*t*). Where two parties entered into a written agreement, by which one was to take a farm of the other, and to take the straw, chaff, &c. at a valuation, to be made by such competent persons as the two parties should respectively appoint; it was held, that such an agreement was entire, and that the two parts could not be separated; and that if one person only was by parol agreement afterwards appointed to make the valuation, an action could not be maintained on the parol agreement so substituted, even though the straw, chaff, &c. had been taken and used (*u*). Where in an action by an outgoing tenant against his landlord for the value of hay and straw left on the premises that the plaintiff held, subject to the terms of a draft lease, by which it was agreed, first, that the tenant was to consume the hay and straw on the premises, and not to sell it except as afterwards mentioned; secondly, that the tenant might sell his hay and wheat-straw (except the last year's), provided for each load he brought back two loads of dung, or equivalent manure on the lands; and thirdly, that all the hay and straw not used for fodder, arising from the last year's crop, should be left on the determination of the tenancy, the tenant being paid at a fair valuation; and the words "fair valuation" had been substituted in the draft for the words "consuming price;" the court held, without considering the effect of the alteration in the draft, that the tenant was entitled to be paid according to a "fair valuation;" and that

(*q*) *Muncey v. Dennis*, 1 H. & N. 216;
 26 L. J., Ex. 66.

(*r*) *Clarke v. Westrope*, 18 C. B. 765;
 25 L. J., C. P. 287.

(*s*) *Beaty v. Gibbons*, 16 East, 116.

(*t*) *Smith v. Chance*, 2 B. & A. 753.

(*u*) *Harvey v. Grabham*, 5 A. & E. 61.

those words did not mean a “consuming price” (x). Where it is stipulated that no hay or straw shall be sold off the land during the term without the consent of the landlord or his agent, unless an equivalent in the shape of manure be returned on the land, it should be clearly expressed whether the market value or price of the straw is to be returned, or only so much manure as the straw would have made (y). A farm lease contained a covenant by the lessee that he “should not nor would *during the last year* of the term thereby granted sell or remove from the said farm and lands any of the hay, straw and fodder *which should arise and grow in the said farm and lands* :” it was held, that the prohibition was not restricted to hay, straw and fodder which arose and grew on the farm in the last year of the term, but extended to that which had arisen and grown at any time during the term (z). Where the tenant agrees to pay an additional rent of 10*l.* for every ton of “hay, straw or other dry fodder” of the growth of the premises which shall be sold off or taken away or removed therefrom, such stipulation extends to hay of such bad quality as not to be fit for food for cattle (a).

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and Incoming
Tenants.*

(e) *Tillages.*

Arable land in some localities, especially where unsuited to the growth of turnips and other root crops, is fallowed at certain periods, in order not only that it may be cleansed of couch and other weeds, but that it may be refreshed, and the vegetative powers, which have been exhausted by cropping, restored. This process requires a considerable outlay of capital whilst the land is perfectly unproductive during the fallow season; but the benefit derived is considered to extend to a series of subsequent crops. It is desirable that the regular rotation of fallowing upon a farm should be kept up, notwithstanding any change of the tenants; but it is not to be expected that a tenant should lay out capital in the process of fallowing, from which he cannot derive the complete benefit before his tenancy expires. From these circumstances has arisen the right which an outgoing tenant has to remuneration for tillage which is not exhausted at the time of his quitting. This *usago* has been held to be a valid and reasonable usage (b) for obvious reasons.

When Outgoing Tenant entitled to Remuneration.

An agreement that an outgoing tenant shall be paid for tillages on the expiration of his tenancy is not inconsistent with the terms of a tenancy from year to year (c).

(x) *Cumberland v. Bowes*, 15 C. B. 348; 24 L. J., C. P. 46.

(y) *Lowndes v. Fountain*, 11 Exch. 487; 25 L. J., Ex. 49.

(z) *Gale v. Bates*, 3 H. & C. 84; 33 L. J., Ex. 235.

(a) *Fielden v. Tattersall*, 7 L. T., N. S. 718, Exch.

(b) *Dalby v. Hirst*, 1 B. & B. 224; 3 Moo. 636; *Hutton v. Warren*, 1 M. & W. 466; *Senior v. Armytage, Bart.*, Holt, 197.

(c) *Brockington v. Saunders*, 13 W. R. 46, Q. B.

CH. XX. s. 4.

Outgoing
and Incoming
Tenants.

Where a farm was taken for fourteen years, and the tenant was to pay a given sum for tillages and improvements done before he entered, and to receive the value of such as he should leave; and in the first year he said he would leave, to which the landlord said he might, but no new bargain was made as to the tillages and improvements; it was held, that he was not entitled to the value of such as he left on so quitting (*d*). By the terms of a written agreement it was stated, that a certain quantity of manure had been spread on the land, and the tenant agreed, when given up by him, to leave the land in the same state, or allow a valuation to be made; it was held, that this agreement excluded a custom, as inconsistent with it, that the tenant should pay half-tillage on going in, and receive it on going out (*e*). An administrator of a deceased tenant is entitled to be paid according to the custom of the country for manure, tillages, &c.; but if he sues a person who purchased from another who claimed as devisee of the deceased tenant the declaration should be in trover (*f*). An outgoing tenant, administratrix of a late tenant, having (after having had the farm for above a year) assigned to an incoming tenant, in consideration of a debt due to him, all her goods and effects, and all stock, corn, grain, on the farm, and all her estate and interest thereon and therein: held, that this comprised tenant right or tillages on the farm (*g*).

How made.

The valuation of tillages, &c. between outgoing and incoming tenants should be made in like manner, *mutatis mutandis*, as hereinbefore mentioned with respect to valuation of dilapidations and fixtures (*h*). Where straw, &c. was consumed by the incoming tenant before any valuation thereof had been made or any valuers named or umpires appointed: it was held, that the outgoing tenant was entitled to recover the value under a count for money payable for straw, &c. (*i*).

SECT. 5.—*Compensation for "Temporary, Durable and Permanent" Improvements.*

Frequent reference has been made in this work to the custom of the country.

Prior to the year 1848, there appears to have been no documentary record of the complicated and varying customs existing in different districts throughout the kingdom. In 1848, a Select Committee of the House of Commons, appointed at the instance of Mr. Pusey, pre-

Parliamen-
tary Report,
1848.

(*d*) *Whittaker v. Barker*, 1 Cr. & M. 113.

(*e*) *Clarke v. Roystone*, 13 M. & W. 752.
See also *Womersley v. Dully*, 26 L. J., Ex. 219.

(*f*) *Searson v. Robinson*, 2 F. & F. 351.

(*g*) *Cary v. Cary*, 10 W. R. 669.

(*h*) *Ante*, 617.

(*i*) *Clarke v. Westrope*, 18 C. B. 766;
25 L. J., C. P. 287.

sented an exhaustive report upon the subject (*j*), which, however, is not at the present day perfectly reliable.

CH. XX. s. 5.
Compensation
for Improve-
ments.

But in 1875 there were published by the Central Chamber of Agriculture three reports on "Unexhausted Improvements" (*k*), and the last of these reports was accompanied by numerous schedules showing the then existing customs of the country in various districts of England in a tabular form.

Agriculture
Chambers
Report, 1875.

In the second report it was observed :—

Your committee desire to draw the particular attention of the council to the marked difference between customs prevailing to-day and those existing in the year 1848, when Mr. Pusey's Select Committee of the House of Commons issued its report. For example :—In Lincolnshire, at that time, no allowances were given for guano or other highly-concentrated manures, which are now universally allowed for in that county. Compensation for draining was then only partially introduced, though it is now a general custom in Lincolnshire. At that time there was no allowance in Staffordshire for purchased oil-cake, feeding-stuffs, and artificial manure, or for marling, boning, liming, planting quickset hedges, or draining, all which are now subjects of compensation in, at any rate, the southern division of that county. In Cambridgeshire, in that part called the Isle of Ely, allowance for oilcake, for artificial manures, and for claying, is new, since the date of Mr. Pusey's inquiry. In Nottinghamshire allowances for draining were only partially introduced at that time, but are now universally the custom, together with compensation of road-making, planting quickset hedges, executing irrigation works, and making main drains, watercourses and reservoirs. In Cheshire there was at that period no allowance for either draining or planting quickset hedges, which, however, obtains in North Cheshire at the present time. In parts of Oxfordshire compensation for chalking and boning has been introduced since 1848. In South Wiltshire allowance for purchased manures is now. In parts of Gloucestershire artificial manures are now allowed for, and compensation is given for draining, though neither of these improvements was recognized by custom in 1848. And in parts of Dorsetshire a small allowance for oilcake, feeding-stuffs, and purchased manures, and also for draining, has been introduced, though there was no custom of the kind mentioned in the House of Commons' report. *This is sufficient to show that an inquiry and report of so early a date as 1848 is wholly insufficient to enable anyone to arrive at a correct conclusion regarding the established customs of the various counties in the present day.*

New custom
since 1848.

Your committee would direct attention to the absence of any uniform principle upon which customs might be supposed to have originated. Thus guano is allowed for in some counties when applied to corn crops, in other counties only when applied to root or green crops; and in the latter case, some counties or districts pay for all, and some for only half the quantity used in the last year; and while some counties pay for no guano used in the last year but one of the tenancy, other counties pay for one-third of what is applied in that year. For oilcake the allowances vary from half the value of cake used in the last year, with nothing for cake used in the year before that, to one-fourth of the last year's and one-eighth of the previous year's cake, or two-thirds of the last year's and

Customs
founded on no
Principle.

(*j*) This report was reprinted in 1866.

(*k*) The committee consisted of Sir Michael Hicks-Beach, M.P., Mr. G. F.

Muntz, Mr. E. Heneage, Mr. C. S. Read, M.P., Mr. Masfen, Mr. Fowler, Mr. Little, Mr. Russon, and Mr. Lipscomb.

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Compensation
for Improve-
ments.

Agriculture
Chambers
Report, 1876
—contd.

Fixtures—no
Compensation
for.

Customs
changed by
Additions
since living
Memory.

Customs not
"County"
Customs.

one-third of the previous year's consumption of oilcake. Compensation for tile draining ranges so diversely that improvement is calculated in some counties to extend over six years, and in other counties up to fourteen years. Planting quickset is spread over varying periods from three to ten years. Liming arable land is supposed to benefit the tenant from five years down to only two years; and liming pastures is taken as lasting three years in some counties up to six years in others.

The returns show that in some counties, in lieu of money compensation for purchased feeding-stuffs and manures, the outgoing tenant is entitled to an away-going crop; but a large number of the returns show that in many counties and districts no compensation whatever for temporary improvements is secured by custom either in money or crop, and up to the present time your committee have not received a single intimation of the existence of any custom securing to the tenant compensation for buildings, excepting structures not attached to the freehold, which he is, of course, at liberty to remove.

In the third report (presented in 1874) the Committee observed:—

Your committee have experienced much difficulty in ascertaining what is understood to constitute an "established custom." According to the common acceptation of the term, a custom must have obtained from time immemorial (*l*); but your committee find from the returns received that customs affecting allowances to an out-going tenant have been considerably changed by additions from time to time within living memory. This state of transition is especially remarkable at the present time. But it is to be observed that, while the process of gradually introducing, extending, and altering custom is going on in some districts, the greater portion of England still remains without any custom affording compensation for the tenant's capital expended in improvements.

Returns have been received from fifty-five districts, namely,—Berkshire, Newbury; Cambridgeshire, Isle of Ely, North; Cheshire, Northwich; Cheshire, Knutsford; Cheshire, Nantwich; Cheshire, North; Derbyshire; Devonshire, East; Devonshire, Central; Dorsetshire, Vale of Blackmoor; Dorsetshire, Central; Dorsetshire, Blandford; Durham; Essex, North; Gloucestershire, West; Gloucestershire, Cotswold; Gloucestershire, Cirencester; Gloucestershire, West of Cheltenham; Gloucestershire, East and North of Cheltenham; Gloucestershire, Forest of Dean; Gloucestershire, Valley of the Severn; Gloucestershire, Tetbury; Gloucestershire, Stow-on-the-Wold; Gloucestershire, Ledbury; Gloucestershire, Tewkesbury; Hampshire, North; Hampshire, Andover; Herefordshire; Kent, The Weald; Kent, East; Lancashire, South; Lancashire, North; Lincolnshire; Lincolnshire, Marshes; Norfolk; Norfolk, Marshland; Northamptonshire, South; Northamptonshire, Weedon; Northumberland, Tyneside; Nottinghamshire; Oxfordshire, Henley-on-Thames; Shropshire; Somersetshire, North; Staffordshire; Staffordshire, South; Suffolk; Suffolk, Sudbury; Warwickshire; Wiltshire, Swindon; Wiltshire, South; Worcestershire; Yorkshire, North and East Ridings, Malton; Yorkshire, North and West Ridings, Ripon; Yorkshire, West Riding, Wakefield; Yorkshire, West Riding, Barnsley; Yorkshire, East Riding.

The area reported upon includes districts extending from the most northern to the most southern, and from the most eastern to the most western limits of England.

From the variations in practice occurring within comparatively limited districts, as revealed by your committee's inquiry, it is evident that customs cannot be correctly defined and classified as "county" customs,

(*l*) But see the law as to this, *Senior v. Armytage*, Holt N. P. 197, and 725 (*a*), ante.

and that, so far from each county possessing a distinct and peculiar usage co-extensive with its area, a map of England in which the prevalence of each custom should be represented by a distinguishing colour would exhibit a series of most irregularly-shaped and unequally-distributed patches—the most conspicuous feature being the very small proportion of the surface of England enjoying any custom of adequate compensation even for purchased feeding-stuffs and manures.

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*Compensation
for Improve-
ments by
Custom.*

The labour of your committee has principally consisted in preparing the forms of inquiry, and collecting, arranging and tabulating the information communicated; and they must refer the council to the voluminous details condensed in the summary schedules, it being impossible to convey, in any general statement within the ordinary limits of a report, either a full knowledge of their contents, or the comparisons and deductions which, it is hoped, will render them of great value.

The schedules annexed to this report divided improvements (*l*) into three classes—(1) “temporary,” being allowances for crops, cultivation, and farmyard manure, and for purchased feeding-stuffs and purchased manures; (2) “durable,” being allowances for liming, boning, &c.; and (3) “permanent,” being allowances for tile draining, making roads, &c. These three classes correspond to, but are more comprehensive than, the “third class,” “second class,” and “first class” improvements, for which compensation is given by the Agricultural Holdings Act in cases where that act is applicable.

“Tempo-
rary,” “Dur-
able,” and
“Permanent”
Improve-
ments.

See page 753,
post.

It is not proposed here to deal with the allowances for crops, cultivation, and farmyard manure (*m*), comprising as they do many minute distinctions, and having no corresponding allowances in the Agricultural Holdings Act.

The following account of allowances for purchased feeding-stuffs and purchased manures, for durable improvements, and for permanent improvements, is made up from the schedules to the report.

Purchased
Feeding-
stuffs and
Manures, and
“Durable”
and “Per-
manent” Im-
provements.

N.B.—Where the mark * is prefixed to the county, the committee received no actual return, but founded their return upon the House of Commons’ Report on Agricultural Customs (A.D. 1818), Cooke on Agricultural Tenancies (A.D. 1850), Diron’s Law of the Farm (A.D. 1863), Cudde on the Farming Customs and Covenants of England (A.D. 1868), and Dean’s Culture, Management, and Improvement of Landed Estates (A.D. 1872).

*Bedfordshire.....No compensation by custom for oilcake or for artificial manures, for “durable improvements,” or for drainage or any other permanent improvement.

BerkshireNo allowance for feeding-stuffs or artificial ma-
(Newbury District). nures, or for durable or permanent improve-
ments.

(*l*) The schedules also contain valuable information as to rights of pre-entry, prohibited crops, &c. See Table showing rights of pre-entry, ante, 727.

(*m*) See these allowances summarized in Buud on Compensation for Unexhausted Improvements, pp. 40—54.

- CH. XX. s. 6. **Buckinghamshire* No allowance by custom for oilcake or for artificial manures, for any durable improvement, or for drainage or any other permanent improvement.
Compensation for Improvements by Custom.
- Cambridgeshire* From one-fourth to one-half original value for (North of Isle of Ely). linseed oilcake consumed in yards or buildings or on pasture or arable land in the last year of the tenancy. When growing crops are taken at cost of seed and labour, the full cost of manures applied to them is allowed.
- Cheshire* One-half value for linseed oilcake consumed in (Wirral District). yards or buildings, or on pasture or arable land in the last year of the tenancy. One-third value for linseed oilcake consumed therein or thereon in the last year but one.
- Cheshire (North)* Full value for liming arable land in the last year of the tenancy; one-third annually deducted for liming in previous years. Full value for liming pasture land; one-seventh annually deducted for liming in previous years. Full value for boning pasture with undissolved bones; one-seventh annually deducted. Full value for tile draining, the landlord finding tiles, the tenant finding haulage and labour, in the last year of the tenancy. One-seventh annually deducted for outlay in previous years. If tenant find tiles as well as haulage and labour, one-fourteenth only deducted. Full value for filling up ponds (with landlord's written consent). One-fifth annually deducted. Full value for planting quick hedges in the last year. Full value for erecting stone, wood, or iron fencing in the last year. Annual deduction, one-tenth. Full value for making wells or planting orchards in the last year.
- *Cornwall* No allowances for any unexhausted improvements, except in occasional instances.
- *Cumberland* No allowance for oilcake, but it is usual to allow for bones and guano if put upon bare fallow for wheat in the last year of the tenancy, the outgoer having received no benefit. Liming in the last year generally paid for. Few, if any, other improvements for which a tenant can claim.
- *Derbyshire* Allowances for oilcake and for guano exist on some estates, and are extending, though not general; and in some cases one-third of the oilcake bill of the last year is allowed. An allowance is made for lime, bones and rape dust. For draining, with the landlord's written consent, the tenant is generally allowed on a seven-years' scale, sometimes on a ten-years' scale.
- *Devonshire* No allowance for purchased feeding-stuffs or other (East and Central) manures, "but the desirability of such payments is beginning to be recognized in agreements."
- Dorsetshire* One-fifth value for linseed oilcake and cotton-cake (Central). consumed on the farm in the last year of the.

tenancy. Three-fourths for guano, bone dust, superphosphate of lime or town manure applied to root or green crops or to growing corn crops, and three-fourths for bone dust (when crops or straw of crops for consumption on farm) in the last year of the tenancy; one-half in each of these cases for the last year but one. One-fifth for rape-cake applied to root and green crops in the last year of the tenancy. 15s. in the £, 10s. in the £, 5s. in the £, and 3s. in the £ for manures used in the last four years respectively.

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*Compensation
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ments by
Custom.*

Full value for thorn or wood draining in the last year of the tenancy, one-tenth being annually deducted for such outlay in previous years. "For chalking done in the last year, all; for that done in the last year but one, all; last year but two, 18s. in the £; last year but three, 16s.; last year but four, 13s.; last year but six, 7s.; last year but seven, 4s. in the £. This is done with the landlord's consent in writing. If done by the landlord, the tenant to pay 5 per cent. on the outlay. Liming on heavy soil last year, all; for previous years, 17s., 14s., 11s., 8s. and 5s. in the £. Liming light soil last year, three-fourths; for previous years, 10s. and 5s. in the £. Liming pastures ditto. Bones on arable land allowed 15s., 10s., 5s. and 3s. in the £. Guano to root or green crops on medium soils, superphosphate of lime, and night soil or town manure, allowed on the same scale."

Full value for tile drainage and stone drainage, with written consent of landlord, in the last year. If done by the landlord, the tenant pays 5 per cent. on the outlay. Sum allowed for previous years is 18s., 16s., 14s., 12s., 10s., 8s., 6s., 4s. and 2s. in the £. Full value for planting apple trees in the last year. Full value for irrigation works in the last year, with 2s. deduction in the £ for each previous year.

***Durham**.....No allowance by custom for "durable" or "permanent" improvements.

Essex (North).....No allowance for purchased feeding stuffs or purchased manures, or for away-going crop. No compensation for durable or permanent improvements.

Gloucestershire Full value for guano, nitrate of soda, sulphate of ammonia, nitro-phosphate, superphosphate of lime, kainit and town manure applied to root or green crops to be consumed on the farm in the last year. Full value for town manure applied to pasture in the last year, the value of any root crops fed off by the outgoing tenant being deducted.

(Cotswold Hills).

Full value for paring and burning in the last year of the tenancy.

- CH. XX. S. 5. Gloucestershire** Full value for guano applied to root or green crops or growing corn during the last year of the tenancy, with one-third for guano applied to root or green crops during the last year but one. Full value for nitrate of soda, sulphate of ammonia, nitro-phosphate, special concentrated manures, bone dust, superphosphate of lime and town manure applied to root or green crops during the last year; one-third for special concentrated manures, and two-fifths for bone dust so applied in the last year but one.
- Compensation for Improvements by Custom.*
- Full value for thorn or wood draining, for paring and burning with undissolved bones, or for laying down new pasture in the last year. Full value for bone dust used to root crop in last year; in last year but one, two-fifths, and last year but two, one-sixth. For bones on pasture in last year, full value; last year but one, two-fifths; last year but two, one-sixth.
- Full value for tile drainage in last year, one-fourth being annually deducted for such outlay in previous years if the landlord find the tiles, and one-seventh if he does not. Full value for filling up ponds, and stocking and grubbing trees and fences.
- Gloucestershire** Allowance for cake varies according to circumstances. Little can be claimed by custom, as it has not been used long enough to establish one. Most agreements give something where no corn has been taken. All purchased manures are allowed for if applied to root or green crops.
- The tenant is allowed to cut or crop growing underwood and pollards left in the last year of the tenancy, if at maturity.
- No compensation for permanent improvements.
- Hampshire (North)** No allowance for purchased feeding-stuffs or purchased manures. Full value for buildings of wood or other construction not attached to the freehold, and for fixed steam-engines and gear put up in the last year of the tenancy.
- Herefordshire** "No custom for feeding-stuffs or purchased manures."
- Full value for laying down new pasture in the last year of the tenancy. Seed and labour allowed where new pasture laid down in the last year but one. Tenants are required to keep and leave in good cultivation the same quantity of hop land as on entry. Hop-poles removable by outgoer by arrangement only. Pollards at maturity, generally nine years' growth, cropped and taken away by outgoer.
- Hertfordshire (West)** Full value for purchased manures applied to root or green crops for consumption on the farm in the last year of the tenancy. No allowance for oilcake or other feeding stuffs.
- "No allowances for durable improvements, as they

are seldom executed without a previous arrangement with the landlord's agent. No compensation for permanent improvements." CH. XX. s. 5.
Compensation for Improvements by Custom.

***Huntingdonshire** . . . Custom allows payment for artificial manures applied to turnips or green crops in the last year of the tenancy; also one-third of the cost of linseed cake used in the last year. Custom gives payment for claying and also for liming. Allowance for draining on a five-years' scale.

Kent (Weald of) . . . One-third value for bone dust applied to growing corn or hay to be consumed on the farm, or to pasture in the last year of the tenancy. Half value for ashes or town manure applied to pasture in the last year. One-third value for rape-cake applied to root or green crops for consumption in the last year.

Full value for thorn or wood draining done in the last year of the tenancy. Annual deduction for outlay in previous years, one-fourth. Full value for liming arable land (if no crop taken afterwards, otherwise one-half) in the last year. Annual deduction, one-half. Full value for liming pasture in the last year. Annual deduction, one-half. Full value for planting hops, or for providing new hop-poles, in the last year of the tenancy. Full value for growing underwood and pollards.

Full value for tile draining if no crop taken afterwards. Each crop takes off a third of the value. Annual deduction, one-tenth.

Kent (East) . . . An allowance for oilcake is frequently made, but no custom fixes the proportion. Full value for "durable" improvements in the last year of the tenancy if done by consent, but not otherwise. For permanent improvement done in the last year with consent the cost of the work done.

Lancashire (South) . . . Outgoing tenant has half the wheat he has sown, and sells all the hay, straw and farmyard manure. No compensation for purchased manures, "though great quantities of all sorts of manure are applied." No compensation for durable or permanent improvements. Buildings of wood erected by the tenant can be removed by him; and the landlord can compel this, if they be put up without his consent.

***Leicestershire** . . . Bones and lime allowed for. Compensation by custom is paid for draining, on a four or six-years' scale.

Lincolnshire . . . One-half original value for linseed oilcake consumed in yards or buildings, on pasture land, or on arable land in the last year of the tenancy. The same for cotton-cake and other purchased feeding-stuffs, and full original value

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 ments by
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for guano, nitrate of soda, sulphate of ammonia, nitro-phosphate or blood manure, special concentrated manures, bone dust, superphosphate of lime, kaimit, town manure, rape-cake, soot, fish, and "other fertilisers unenumerated," if consumed or applied in the last year of the tenancy. Average annual outlay calculated from two preceding years.

Full value for marling and chalking during last year of tenancy, and full value, with annual deduction of one-seventh, in other cases. Full value for liming and for boning with undissolved bones in last year of tenancy, with annual deduction of one-fifth in other cases.

Full value for tile drainage, labour and haulage, landlord finding the tiles, done in the last year of the tenancy, with an annual deduction of one-seventh (*n*) if the landlord find the tiles, and one-tenth (*n*) if he do not, for such outlay made in previous years. Guard-fencing according to value on pasture land. Fruit trees allowed for if planted during the last year of the tenancy. Fixed steam-engines and trade fixtures, put up in last year of tenancy, become property of tenant.

Lincolnshire Half original value for linseed oilcake consumed in yards or buildings on arable land or on pasture land. The same for cotton-cake. Full original value for guano, nitrate of soda, sulphate of ammonia, nitro-phosphate or blood manure, for special concentrated manures, for bone dust, for superphosphate of lime, for kaimit, applied to root or green crops for consumption on the farm in the last year of the tenancy.

Full value, when the tenant receives the benefit, allowed for rape-cake, soot, sea-weed, fish, and "other fertilisers unenumerated," applied to root or green crops for consumption on the farm in the last year of the tenancy. Average annual outlay on oilcake calculated on the last three years.

Full value allowed for thorn or wood draining, for subsoiling, marling, chalking, claying and liming arable land done in the last year of the tenancy. Proportion annually deducted for outlay in years previous to the last, in the case of marling, chalking and claying, one-seventh, and in the case of liming arable land, one-fifth.

Full value for tile drainage, labour and haulage, landlord finding tiles, in the last year of the tenancy, with an annual deduction of one-seventh for such outlay made in previous years. Full value for filling up ponds, &c., and for making or improving watercourses in last year of

(*n*) "In Lincolnshire South, Fen and Marsh," the deductions are one-fifth and one-seventh respectively.

tenancy, for buildings of wood or other construction not attached to the freehold. CH. XX. s. 5.

- Compensation
for Improve-
ments by
Custom.*
- *Middlesex** No allowance for guano or bones; and in valuing farmyard manure, no consideration taken of what cake has been used. No allowance for boning or other durable improvement. Very limited allowances for permanent improvements.
- *Monmouthshire** Compensation for unexhausted manures, for durable improvements, and for draining and other permanent improvements, "is being introduced."
- Norfolk** One-third original value for linseed oilcake or (Marshland District). cotton-cake consumed in yards or buildings, or on pasture or arable land, in the last year of the tenancy. Three-fourths value for thorn or wood draining, or for liming arable land done in the last year of the tenancy; one-fourth annually deducted for such outlay in previous years. Fixed steam-engines taken at a valuation or removed.
- Northumberland** Outgoing tenant is owner of the whole crop which (Tynedale). his rotation allows him to sow. Most of the farms are held under leases or agreements specifying allowances for purchased manures. "A custom of allowing for liming, boning and laying down to grass may be said to be growing up, owing to the prevalence of such provisions in agreements."
- Nottinghamshire** One-fourth original value for linseed oilcake, cotton-cake or other purchased feeding-stuffs consumed in yards or buildings on pasture land or arable land in the last year, and one-eighth for the same consumed in the last year but one of the tenancy. Full value for guano applied to root or green crops, hay or corn crops, whose straw is for consumption on the farm in the last year of the tenancy. One-third value for guano applied to green crops for consumption on the farm in the last year but one of the tenancy. Full value for nitrate of soda, sulphate of ammonia, nitro-phosphate, special concentrated manures, bone dust, superphosphate of lime, town manure and rape-cake applied to root or green crops for consumption on the farm during the last year of the tenancy.
- One-third value for guano, nitro-phosphate, special concentrated manures, superphosphate of lime and rape-cake, and two-thirds for bone dust applied to root or green crops for consumption on farm during last year but one, and to white corn after a bare fallow or root crop during the last year of the tenancy.
- Full value for marling, claying, liming arable land when fallow, liming pasture land, boning arable land and pasture land with undissolved bones, manuring fallow with rape-cake, laying

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 ments by
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down new pasture in the last year of the tenancy. Annual deductions for outlay in previous years:—Marling or claying, one-fifth; liming, one-third; boning arable land with undissolved bones, one-fourth; boning pastures with undissolved bones, one-sixth; manuring with rape-cake, one-third.

Full value for tile drainage, labour and haulage, stone draining, haulage and materials in the last year of the tenancy. One-sixth annually deducted for such outlay during previous years. Full value for filling up ponds, &c. stocking and grubbing trees and fences in the last year of the tenancy. Full value for planting quickset hedges, labour and quick, for erecting stone, wood or iron fencing, and for making roads in the last year of the tenancy, one-third being annually deducted for such outlay during previous years^(o). Full value for making or improving watercourses, covered main drains, well's banks and reservoirs during the last year of the tenancy, one-sixth being annually deducted for such outlay during previous years. Full value for planting orchards and gardens during the last year of the tenancy, one-seventh being annually deducted for such outlay during previous years. Buildings of wood or other construction, not attached to the freehold, become removable, or are allowed full value for. Full value allowed for haulage of material for building, one-third being annually deducted for such outlay during previous years.

Oxfordshire Value of all artificial manures applied to the green or fallow crops in the last year of the tenancy is allowed. Nothing for feeding-stuffs.

Oxfordshire Full value for guano or ashes applied to root or green crops for consumption on the farm in the last year of the tenancy. "All manures used for a root crop in the year of leaving are allowed for if the crop has not been consumed by the outgoing tenant. In some parts of Oxfordshire and Berkshire the incoming tenant pays half the amount of the tillages and manures used for a root crop if the outgoing tenant has not grown a corn crop after."

(Henley-on-Thames District).

***Rutlandshire** No compensation for manures, nor for artificial goods, except that one-fourth of the oil-cake used in the last two years is sometimes allowed for. Bones and lime are allowed for. No compensation by custom for draining or any other permanent improvement.

Shropshire "No established custom, but allowances for feeding-stuffs and artificial manures are gradually

(o) Iron fencing valued at its worth.

creeping into agreements." "Fixtures can be removed by the outgoing tenant if put up by him or purchased from his predecessor, and if not attached to the freehold. It is rather doubtful if law or custom would enable an outgoing tenant to remove fixed machinery; but on some large estates the custom is being gradually established."

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Somersetshire.....No allowances for purchased feeding-stuffs or (North, Brislington). purchased manures, or for improvements.

StaffordshireFor linseed oilcake consumed in the last year, one-third original value; in the last year but one, one-sixth. For guano, special concentrated manures, bone dust, rape-cake and soot consumed in the last year, two-thirds; in the last year but one (*p*), one-sixth.

Two-thirds value for liming in the last year of the tenancy, with an annual deduction of one-third for such outlay in previous years.

Not more than one-half corn crops allowed on light land, nor more than two white straw crops in succession.

Staffordshire (South)..For linseed oilcake or cotton-cake consumed and guano applied to green or root crops in the last year, two-thirds; in the last year but one, one-third.

For purchased feeding-stuffs, other than linseed oilcake or cotton-cake, consumed in the last year (by pigs), one-fourth; in the last year but one, one-eighth. For superphosphate of lime applied to root or green crops for consumption on the farm in the last year, one-half; in the last year but one, one-fourth. Average annual outlay calculated on two preceding years. If the occupation has been for less than four years, only half the stated allowances are made.

Full value for marling in the last year, with annual deduction of one-tenth for such outlay in previous years; for liming, with annual deduction of one-fourth; for boning with undissolved bones, with annual deduction of one-fourth in the case of arable land, and one-seventh in the case of pasture; and for manuring with rape-cake, with annual deduction of one-fourth.

Full value for tile drainage, labour and haulage, and for planting quickset hedges (properly guarded and cleaned), labour and quick, in the last year, with annual deduction of one-tenth for such outlay in previous years.

Suffolk (South)No allowances for improvements.

Surrey.....Full value for sea-weed or fish applied in the last year of the tenancy, if the incoming tenant gets the benefit.

(*p*) In the case of soot, if applied to roots only.

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- *Sussex** There are allowances for guano and nitrate of soda in the Weald district. Liming is paid for, and in the Weald district there are allowances for liming, rape-cake, rags, &c. No compensation for buildings erected by the tenant.
- *Warwickshire** No allowance for oilcake or for manures; but for bones a payment exists by custom. No permanent improvement allowed for, except draining, which is extended over only a short scale of years.
- *Westmoreland** No allowance for oilcake; but it is usual to allow for bones and guano, if put upon bare fallow for wheat in the last year of the tenancy, the outgoing tenant having received no benefit. Liming in the last year generally paid for. Few, if any, other improvements for which a tenant can claim.
- Wiltshire** Nothing allowed for oilcake or corn consumed. Half the value of artificial manures if the crop is consumed on the land in the last year of the tenancy. Full value for chalking, liming, or laying down new pasture in the last year of the tenancy. There is no custom that will guarantee an outgoing tenant being paid for fixed steam-engines or other erections; but generally an arrangement is made between the tenant and the agent of the estate previous to the outlay. Buildings of wood, and also fixed steam-engines and driving gear erected by the tenant are removable.
- Wiltshire (South)** Half original value allowed for artificial manures applied to root or green crops for consumption on the farm in the last year of the tenancy, provided the cultivation has been properly performed.
- Worcestershire** No allowances for purchased feeding-stuffs or purchased manures, or for durable or permanent improvements. Outgoing tenant has the wheat crop on one-third of the arable land.
- Yorkshire** One-third original value allowed for purchased feeding-stuffs consumed in yards or buildings, or on arable or pasture land in the last six months of a Lady-day tenancy (except on land from which an away-going crop is taken).
 (North and West; Ripon).
 One-half original value for guano applied to root or green crops for consumption on the farm, to growing corn crops when the straw is for consumption on the farm, or to hay crops for consumption on the farm in the last year of the tenancy. One-fourth value if applied in the last year but one (artificial manures not allowed for on land from which an away-going crop is taken).
 One-half value for liming arable land, or for boning pasture with undissolved bones, in the last year of the tenancy; one-fourth for these improve-

ments in the last year but one. No allowance for either on land from which away-going crop is taken. CIV. XX. s. 5.
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Four-fifths value for tile drainage, landlord finding tiles, in the last year of the tenancy (provided the drains are cut not less than three feet deep, and are in good working order upon the tenant quitting). One-fifth annually deducted for such outlay in previous years. For the same, tenant finding tiles, six-sevenths, with one-seventh annual deduction. Nine-tenths allowed for erecting buildings, landlord finding materials, in the last year of the tenancy, one-tenth being annually deducted for such outlay in previous years. For the same, tenant finding materials, nineteen-twentieths, with one-twentieth annual deduction.

Yorkshire Full value allowed for steam-engines put up in (Malton). the last year of the tenancy, or they may be removed.

Yorkshire One-third original value for linseed oilcake consumed in yards or buildings, or on arable or (North and East pasture land in the last year of the tenancy; Ridings). one-sixth for the same consumed in the last year but one. No compensation for purchased manures.

Yorkshire For linseed oilcake and cotton-cake consumed on the (West Riding; holding in the last year one-fourth the original Barnsley). value; in the last year but one, one-eighth. For guano applied to root or green crops for consumption on the farm, in the last year, full value; if applied to growing corn or hay, one-third; if applied to pasture, two-thirds, and one-third if applied in the last year but one. For bone dust applied to green or root crops in the last year, full value; for bone dust applied to growing corn or hay in the last year, full value, and two-thirds where applied in the last year but one. For town manure applied to pasture land in the last year, full value, and two-thirds where applied in the last year but one.

For liming arable land in last year, or for boning it with undissolved bones, two-thirds value after one corn crop, and one-third after two corn crops, one-third being annually deducted for such outlay in previous years. For liming pasture in the last year, or for boning it with undissolved bones, five-sixths value, one-sixth being annually deducted for each of four successive pastures.

Full value for tile (q) and stone drainage in the last year, one-tenth being annually deducted for such outlay in previous years. Full value for

(q) If the drains be cut not less than 3 feet deep, and are in good working order upon the tenant quitting.

CH. XX. s. 5.
*Compensation
 for Improve-
 ments by
 Custom.*

Yorkshire
 (West Riding;
 Wakefield).

filling up ponds, &c. For erecting buildings, nine-tenths when the landlord finds materials, nineteen-twentieths when the tenant finds materials.

For linseed oilcake or cotton-cake consumed in the last year, one-third; in the last year but one, one-fourth. For guano or town manure applied to root or green crops or hay crops in the last year, one-half; for guano applied to root or green crops in the last year but one, one-third. "No regular practice" as to the "number of years expenditure from which the average annual outlay is calculated." "Three to five years."

Half value for liming in the last year, and one-third for liming in the last year but one. Half value for boning pastures with undissolved bones in the last year. Full value for laying down pasture in the last year.

Full value for tile drainage in the last year, annual deduction being one-sixth where landlord finds tiles, and one-fifth where he does not. Full value for filling up ponds, &c.

***Wales (North)** Allowances for feeding-stuffs or artificial manures are almost unknown. No allowance by custom for durable or permanent improvements. "But in the Isle of Anglesey it has been attempted to establish a custom of tenant-right by tenants erecting houses and buildings, and then claiming either a right for themselves or their successors to stay upon the farm or to be paid compensation for the improvements."

***Wales (South)** No general customs exist in any county giving compensation for purchased feeding-stuffs and artificial manures. Very few allowances for durable improvements; but in Caermarthenshire and Glamorganshire there is a payment for lime. Buildings erected and draining executed by the tenant are paid for in Cardiganshire and in West Caermarthenshire, but not in East Caermarthenshire, Glamorganshire, Pembrokeshire or Radnorshire.

CHAPTER XXI.

THE AGRICULTURAL HOLDINGS ACT, 1875.

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SECT. 1.—*Object and Application of Agricultural Holdings Act.*

THE Agricultural Holdings Act, 1875 (38 & 39 Vict. c. 92), has no preamble, but its object may be briefly stated to be to secure to all agricultural tenants alike some uniform “tenant right” to that compensation for *certain specified* unexhausted improvements which has long been secured *over a limited area of the kingdom* to different tenants in different modes and degrees by the varying, and sometimes more extensive, “custom of the country” (a).

The act was passed on the 13th August, 1875, and commenced on the 15th February, 1876 (sect. 58).

The act applies only to a “holding that is either wholly agricultural or wholly pastoral, or in part agricultural and as to the residue pastoral,” and does not apply to such holdings unless they amount to two acres or more. But it must distinctly be borne in mind that the act applies to all such tenancies, if created after the commencement of the act, and to all such tenancies from year to year, current at the commencement of the act, unless the operation of the act has been formally excluded by writing. But although it may not have been excluded in writing, the landlord and tenant may displace its operation (1) by mutual agreement, and (2) by taking advantage of the custom of the country. Such is shortly the effect of sects. 54, 56, 57, 58, 59 and 60, which are now subjoined.

By sect. 54, “nothing in this act shall prevent a landlord and tenant, or intending landlord and tenant, from entering into and carrying into effect any such agreement as they think fit, or shall

Commencement.

Act applies only to Holdings of Two Acres or more.

Act applies, where applicable, unless excluded by Writing.

Power to displace Act by Agreement.
Sect. 54.

(a) See Cooke on the Agricultural Holdings Act, p. 14. The act is set out verbatim, post, Appendix A., Sect. 9.

CH. XXI. s. 1. interfere with the operation thereof." By sect. 55, parts only of the act may be adopted by mutual agreement in writing.

Adoption of
Parts of Act.

Sect. 55.

Exclusion of
Act by
Writing.

Sect. 56.

Tenancy from
Year to Year.
Sect. 57.

By sect. 56, "this act shall apply to every contract of tenancy beginning after the commencement of this act, unless in any case the landlord and tenant (*b*) agree in writing, in the contract of tenancy or otherwise, that this act, or any part or provision of this act, shall not apply to the contract; and in that case, this act, or the part or provision thereof to which that agreement refers (as the case may be), shall not apply to the contract."

By sect. 57, "in any case of a contract of tenancy from year to year or at will, current at the commencement of this act, this act shall not apply to the contract, if, within two months after the commencement of this act, the landlord or the tenant gives notice in writing to the other to the effect that he (the person giving the notice) desires that the existing contract of tenancy between them shall remain unaffected by this act; but such a notice shall be revocable by writing; and in the absence of any such notice, this act shall apply to the contract. In every other case of a contract of tenancy current at the commencement of this act, this act shall not apply to the contract."

Sects. 54—57
considered.

These four sections, 54, 55, 56 and 57 are best considered together. The 54th section seems to have in view agreements made after a contract of tenancy, while the 56th, which starts with agreements made simultaneously with the contract of tenancy, seems, by the use of the words "or otherwise," to provide for agreements made after the contract of tenancy also. It might, perhaps, be argued that an agreement made after the contract of tenancy will require a consideration to support it, whereas for the agreement made simultaneously with the contract of tenancy, that contract itself will be a sufficient consideration. If this argument be correct, a deed would be necessary in the case of agreements after the tenancy. But, as the section speaks specifically of an agreement in *writing*, it is conceived that a writing is sufficient, even if the waiver of the act should not be held to be in itself a legal consideration. It seems clear that section 55 may be read together with section 57, and that parties might have adopted part only of the act in reference to a tenancy from year to year, and that the whole of the act has been excluded by notice under that section. The revocation of the notice may be partial only.

Operation of
Act on Custom
of Country.
Sects. 59, 60.

By sect. 59, a tenant may not claim compensation both under the act and under a custom of the country "in respect of the same work

(*b*) By sect. 4, "landlord" means the person entitled to possession subject to the contract of tenancy, although the land is incumbered or charged; "tenant" means "the holder of land" under a contract of tenancy (and therefore includes assigns in the widest sense of the term);

and "landlord" or "tenant" includes "the agent authorized in writing to act" under the act, and "the executors, administrators, assigns, husband, guardian, committee of the estate, or trustees in bankruptcy, of a landlord or tenant."

or thing;" and by sect. 60 there is a saving for (inter alia) rights under "any customs of the country."

CIT. XXI. s. 1.
*Application of
Ag. Hold. Act.*
Threefold Ob-
ject of Act.

The operation of the act is threefold—(1) in giving tenants generally compensation for unexhausted improvements; (2) in allowing tenants to remove fixtures; and (3) in giving tenants from year to year a more secure tenure, by extending the common law notice to quit from six to twelve months. The two latter objects of the act have already been noticed (c); it remains here to deal with "compensation for unexhausted improvements,"—the main feature of the statute.

SECT. 2.—*Compensation for Unexhausted Improvements.*

The act (sects. 5—19) deals, and deals separately, with three "classes" of "improvements." These three classes correspond with, but are less inclusive than, the "permanent," "durable," and "temporary improvements" marked out in the report of the Central Chambers of Agriculture, which has been already noticed (d). Unless the improvement in respect of which compensation is claimed come within the category of one of these three classes, the tenant will still be entitled to no compensation by virtue of the act. The first class includes thirteen kinds of improvement, such as drainage and other works of construction of an extensive and expensive character. The second class includes six kinds of improvement, such as boning of land with undissolved bones and other expensive modes of fertilizing the land. The third, two kinds only, both arising from manure.

Three Classes
of "Improve-
ments."

(a) *First Class Improvements.*

The improvements of the first class are, by sect. 5, as follows:—

- | | |
|---|--------------------|
| (1) Drainage of land ; | 1st Class:— |
| (2) Erection or enlargement of buildings ; | Drainage. |
| (3) Laying down of permanent pasture ; | Buildings. |
| (4) Making and planting of osier beds ; | Pasture. |
| (5) Making of water meadows or works of irrigation ; | Osier Beds. |
| (6) Making of gardens ; | Irrigation. |
| (7) Making or improving of roads or bridges ; | Gardens. |
| (8) Making or improving of watercourses, ponds, wells, or reser-
voirs, or of works for supply of water for agricultural or
domestic purposes ; | Roads. |
| (9) Making of fences ; | Water-
courses. |
| (10) Planting of hops ; | Fences. |
| (11) Planting of orchards ; | Hops. |
| (12) Reclaiming of waste land ; | Orchards. |
| (13) Warping of land. | Inclosure. |
| | Warping. |

(c) See as to Fixtures, ante, 606; and from year to year, ante, 309.
(d) Ante, 739.

CH. XXI. s. 2. By sect. 10, the consent in writing of the landlord must be obtained previously to executing any of the above [1st class] improvements, otherwise the tenant "shall not be entitled to compensation."

*Compensation
for Improve-
ments under
Ag. Hold. Act.*

*Durability of
1st Class
Improvement,
20 Years.*

*Amount of
Compensa-
tion.*

By sect. 6, any of the above improvements "shall not in any case be deemed to continue unexhausted" beyond the end of *twenty* years "after the year of tenancy in which the outlay thereon is made."

By sect. 7, the amount of the tenant's compensation in respect of any of the above improvements is "the sum laid out by the tenant on the improvement, with a deduction of a proportionate part thereof for each year while the tenancy endures after the year of tenancy in which the outlay is made, and while the improvement continues unexhausted."

*Case of
limited
Owner.*

But in order to meet the case of limited ownership, it is provided by the same section that "where the landlord was not, at the time of the consent given to the execution of the improvement, absolute owner of the holding for his own benefit, the amount of the compensation shall not exceed a capital sum fairly representing the addition which the improvement, as far as it continues unexhausted at the determination of the tenancy, then makes to the letting value of the holding."

*Deduction for
Want of Re-
pair, &c.*

By sect. 11, "in the ascertainment of the amount of the tenant's compensation in respect of an improvement of the first class, there shall be taken into account, in reduction thereof, any sum reasonably necessary to be expended for the purpose of putting the same into tenantable repair or good condition."

(b) *Second Class Improvements.*

2nd Class:— The improvements of the second class are (sect. 5) as follows:—

- | | |
|---------------|---|
| Boning. | (1) Boning of land with undissolved bones ; |
| Chalking, &c. | (2) Chalking of land ; |
| | (3) Clay burning ; |
| | (4) Claying of land ; |
| | (5) Liming of land ; |
| | (6) Marling of land. |

*Durability of
2nd Class
Improvement,
7 Years.*

By sect. 6, any of the above improvements "shall not in any case be deemed to continue unexhausted" beyond the end of **7** years "following after the year of tenancy in which the outlay thereon is made."

*Notice to
Landlord.*

By sect. 12, "the tenant shall not be entitled to compensation in respect of any of the above improvements unless not more than **42** and not less than **7** days before beginning to execute it, he has

given to the landlord notice in writing of his intention to do so ;” CH. XXI. s. 2.
 “nor,” proceeds the section, “where it is executed after the tenant Compensation for Improvements under Ag. Hold. Act.
 has given or received notice to quit, unless it is executed with the previous consent in writing of the landlord.”

By sect. 8, the amount of compensation is “the sum *properly* laid out by the tenant on the improvement, with a deduction of a proportionate part thereof for each year while the tenancy endures after the year of tenancy in which the outlay is made and while the improvement continues unexhausted.” Consent of Landlord after Notice to Quit. Amount of Compensation.

The qualification “properly,” it will be observed, does not occur in sect. 7, which regulates the amount of compensation for first class improvements. The deductions to which the compensation for an improvement of the second class is subject, under sects. 16—19 of the act, in common with compensation for improvements of the other two classes, are noticed in sub-sect. (d) of this chapter.

(c) *Third Class Improvements.*

The third class improvements are, by sect. 5, as follow :—

3rd Class :—

Application to land of purchased artificial or other purchased manure. Manure.

Consumption on the holding, by cattle, sheep, or pigs, of cake or other feeding-stuff not produced on the holding. Consumption of Cake.

By sect. 6, the above improvements “shall not in any case be deemed to continue unexhausted” beyond the end of **2 years** following after the year of tenancy in which the outlay thereon is made.” Durability of 3rd Class Improvement, 2 Years.

By sect. 9, the amount of compensation is “such proportion of the sum *properly* [see *supra*] laid out by the tenant on the improvement as fairly represents the value thereof at the determination of the tenancy to an incoming tenant.” Amount of Compensation.

Three sections (sects. 13—15) qualify the right to compensation.

By sect. 13, the right to compensation is wholly forfeited in any case where, after the execution of the improvement, “there has been taken from the portion of the holding on which the same was executed, a crop of corn, potatoes, hay or seed, or any other exhausting crop.” Exhausting Crop excludes Compensation.

By sect. 14, the right to compensation in respect of “consumption of cake or other feeding-stuff,” is forfeited, where “under the custom of the country or an agreement,” the tenant “is entitled to *and claims* payment from the landlord or incoming tenant in respect of the additional value given by that consumption to the manure left on the holding at the determination of the tenancy.” Custom of Country excludes Compensation for Cake.

• By sect. 15, in ascertaining compensation, “there shall not be taken Deduction.

CH. XXI. s. 2. into account any larger outlay during the last year of the tenancy than the average amount of the tenant's outlay for like purposes during the **3** next preceding years of the tenancy, or other less number of years for which the tenancy has endured."

*Compensation
for Improve-
ments under
Ag. Hold. Act.*

3rd Class Im-
provement—
contd.

And by the same section, "there shall be deducted the value of the manure that would have been produced by the consumption on the holding of any hay, straw, roots or green crops sold off the holding within the last **2** years of the tenancy or other less time for which the tenancy has endured, except as far as a proper return of manure to the holding has been made in respect of such produce sold off."

(d) *General Deductions.*

The provisions of sects. 16—19 which now follow, apply to improvements of all the three classes:

Deduction for
Taxes, Rent,
&c.

By sect. 16, the tenant's compensation is subject to deductions in respect of rent, taxes, rates and tithe-rent charge due or becoming due by the tenant, and also in respect of "the landlord's compensation" under the act.

Set-off of
Benefit to
Tenant.

By sect. 17, "in the ascertainment of the amount of the tenant's compensation there shall be taken into account, in reduction thereof, any benefit which the landlord has given or allowed to the tenant in consideration of the tenant executing the improvement."

The next two sections provide a concurrent remedy with the ordinary common law remedy for breaches of contract, if any, by either landlord or tenant.

Tenant's
Compensation
for Breach of
Covenant.

By sect. 18, where a landlord commits a breach of covenant or other agreement, and the tenant claims compensation for an improvement under the act, "then the tenant shall be entitled to obtain, on the determination of the tenancy, compensation in respect of the breach, subject and according to" the provisions of the act.

Landlord's
Compensation
for Breach of
Covenant.

By sect. 19, where a tenant commits or permits waste, or commits a breach of covenant or agreement, and claims compensation for an improvement under the act, "then the landlord shall be enabled by counter-claim, but not otherwise, to obtain, on the determination of the tenancy, compensation in respect of the waste or breach" (if committed or permitted more than four years before the end of the tenancy) "subject and according to the provisions of" the act.

SECT. 3.—*Procedure to assess Compensation.*

Notice to
Landlord of
intended
Claim.

By sect. 20 of the act, "a tenant shall not be entitled to obtain compensation, unless one month at least before the determination of

the tenancy he gives notice (e) to the landlord of his intention" to claim it; and the landlord may, where such notice is given, give "before the determination of the tenancy, or within 14 days" thereafter, a counter-notice of an intention to claim compensation on his part. By sect. 21, the amount and mode and time of payment of compensation are to be settled by a reference, in case the parties do not agree.

CH. XXI. s. 3.
*Assessment of
Compensation
under
Ag. Hold. Act.*

Sects. 22—41 provide for the appointment of referees and umpire, the hearing of the reference, the form of the award, and the payment of the compensation money. For these sections, the reader is referred to the statute itself, which is set out at length in Appendix A. to this book. It may be mentioned here, that, by sect. 23, a single referee may be appointed by consent; that where two referees are appointed, either party may require the umpire to be appointed by the Inclosure Commissioners for England and Wales, and that in certain cases of failure by referees to appoint an umpire, the appointment of an umpire is vested in the County Court.

Reference.

By sect. 31, "the award shall find and state the time at which each improvement, in respect whereof compensation is awarded, is taken, for the purposes of the award, to be exhausted." And, by sect. 32, "the award shall not award a sum generally for compensation, but shall, as far as reasonably may be, specify" (1) the improvements; (2) the date of each improvement; (3) in the case of an improvement of the first class, where the landlord consenting was not absolute owner, "the extent to which the improvement adds to the letting value of the holding;" (4) "the sum awarded in respect of each improvement act or thing;" and (5) the sum laid out by the tenant on each improvement (f).

Award.

By sect. 33, all costs of and attending the reference are in the discretion of the referee or referees or umpire, but are subject to taxation by the registrar, and the taxation subject to review by the judge of the County Court.

Costs.

By sect. 36, if the sum claimed exceeds 50*l.*, but not otherwise, either party may, within 7 days after the delivery of the award, appeal against it to the judge of the County Court, but to no other court. The decision of the County Court judge on appeal is final, save that he is bound to state a case for the High Court on a question of law. The decision of the High Court is final.

Appeal.

By sect. 37, "where any money agreed or awarded or ordered on appeal to be paid for compensation costs, or otherwise, is not paid within 14 days after the time when it is agreed or awarded or ordered

Recovery of
Compensation
Money.

(e) For Form of Notice, see post, Appendix (F), Sect. 1, No. 5. As to meaning of "landlord" and "tenant," see ante, 752 (b). As to service of notices

under the act, see sect. 41.

(f) For Form of Award, see post, Appendix (F), Sect. 2, No. 9.

CH. XXI. s. 3. to be paid, it shall be recoverable, upon order made by the judge of the County Court, as money ordered by a County Court under its ordinary jurisdiction to be paid is recoverable.”
Assessment of Compensation under Ag. Hold. Act.

SECT. 4.—*Charge of Tenant's Compensation.*

Charge of Compensation Money on Holding. It may frequently happen that a landlord against whom an award for heavy compensation has been made, may desire to throw the burden from his personal estate upon his real estate. The 42nd section of the act therefore provides that the County Court, on proof of the payment of the compensation money, and “on being satisfied of the observance in good faith by the parties of the conditions imposed (g) by the act, “shall have power to make an order charging the holding with repayment of the amount paid,” by such instalments, &c. as the Court thinks fit, in favour of the landlord, his executors, administrators or assigns.

Limited Owners. Where the landlord is a limited owner, “no instalment or interest shall be made payable after the time when the improvement in respect whereof compensation is paid,” will be taken to be “exhausted” (h).

Advance by Land Improvement Company. And by sect. 43, “any company now or hereafter incorporated by Parliament, and having power to advance money for the improvement of land, may take an assignment of any charge made by a County Court under the provisions of this act, upon such terms and conditions as may be agreed upon between such company and the person entitled to such charge; and such company may assign any charge so acquired by them to any person or persons whomsoever.”

SECT. 5.—*Concluding Observations.*

Operation of Act in general excluded. It is beyond doubt that the operation of the act has been, as a general rule, excluded by landlords, and its permissive character has been severely criticised. A farmer has been known to compare it to a cow which gave a good pail of milk, and then kicked it over. Mr. Willis Bund, speaking of it in his treatise on the “Law of Compensation for Unexhausted Improvements,” observes: “As a foundation for future legislation—the thin end of the wedge—it is most valuable; as a solution of the question” [of tenant-right] “almost worthless.” On the 1st of May, 1876, the proprietors of the “Mark Lane Express” published a supplement to that journal, showing, in a tabular form, from very copious returns furnished “chiefly by farmers and land agents, with a few landowners,” how far, how, and

(g) See the various sections of the act, Appendix (A), post.

(h) As to this, see 754, 755, ante.

why the act had been excluded. These returns, it was correctly said, showed conclusively (1) that the act in May, 1876, was very nearly a dead letter; (2) that it was the landlords who, in the vast majority of instances, had given notice to exclude it; and (3) that the farmers for the most part did not desire to come under the act. The reasons for this indifference, if not hostility, on the part of the farmers are various;—most being satisfied with existing agreements, many having confidence in their landlords, preferring a custom of the country, or dreading litigation, and some few believing the act to be in the interest of landlords rather than of tenants.

CH. XXI. s. 5.
Concluding
Observations.

It must be borne in mind, however, that the act applies to all Crown and Duchy of Cornwall lands, and that inadvertence and other causes tending to prevent the exclusion of the act in *writing*, it may be expected to come into operation more and more every year, especially on small holdings. As for the desirability of excluding the act, it is hard to see how, in cases where neither agreement nor custom supply its place, the act can fail to be for the disadvantage of the landlord and the advantage of the tenant; except as regards fixtures, in which respect it seems to be for the interest of both parties, the tenant having, by sect. 53, the power of removal, subject to the landlord's option of purchase.

Desirability
of excluding
Act.

Fixtures.

The act deals in no way with valuations as between the outgoing and incoming tenant. The landlord in reletting a farm would, perhaps, stipulate that the incoming tenant, who reaps the benefit, should bear the cost of compensation, and on a sale by auction of the reversion, the landlord's liability would probably be thrown by the conditions of sale on the purchaser.

Valuations
between out-
going and
incoming
Tenant.

A landlord retaining the ownership, and failing to relet, would, of course, have to bear the whole cost of compensation himself, and this is a strong reason why, in the interest of the landlord, the act, except as regards fixtures, should always be excluded; unless it could be provided that the act should only operate *quà* a reletting at an increased value derived from the improvements effected by the outgoing tenant.

Payment of
Compensation
by Landlord.

It may be observed that, although the act has been in operation more than five years, not a single case under the compensation clauses has reached the High Court; nor is the Editor aware of any appeal under these clauses of the act coming under the notice of a County Court.

CHAPTER XXII.

RECOVERY OF THE PREMISES BY THE LANDLORD.

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Recovery of
Land.

Former Ac-
tion of Eject-
ment.

LAND, being different in its legal nature from other property, has always been recoverable by a process different from the ordinary process of law. The proceeding was known technically, and is still known popularly, as an action of ejectment. The details of this action were formerly very cumbrous, and were based upon a legal fiction of a demise to a fancied person, John Doe; this has been now

for some twenty-five years abolished, but the name “ejectment” and a certain distinction between it and other actions, the most conspicuous of which was the absence of pleadings, were maintained until the Judicature Acts came into force in 1875. Under those acts the name has disappeared, and is replaced by the term, “Action for the recovery of land.” This action, when brought in the High Court of Justice, follows in its details for the most part the ordinary course of an action in that Court.

CH. XXII. s. 1.
*Recovery of
Premises in
High Court.*

Present Ac-
tion.

SECT. 1.—*Proceedings in High Court of Justice.*

(a) *Special Proceedings under Common Law Procedure Act.*

The Common Law Procedure Act, 1852, sect. 210, provides that the landlord, where one half-year's rent is in arrear, and the landlord has a right to re-enter for non-payment, may serve a writ of ejectment without any formal demand. The cases on this section, and the provisions as to relief against forfeiture, have been already noticed (a). It should be added here, that the section provides that “in case of judgment against the defendant for non-appearance, if it appear to the court by affidavit, or be proved upon the trial, in case the defendant appears,” that half-a-year's rent was due before the writ was served, that no sufficient distress was found, and that the landlord had power to re-enter, then the landlord may recover judgment as if the rent had been legally demanded.

Special Pro-
cedure in case
of Non-pay-
ment of Rent.

Where the contract of tenancy is in writing, and the tenant holds over, the landlord may proceed against him in the special manner authorized by sect. 213 of the same act (b), whereby considerable advantages are obtained (c). This procedure will still be available, mutatis mutandis, so far as compatible with the Judicature Acts and the Rules of the Supreme Court. But the landlord is at liberty to proceed in the ordinary way (d).

Special Pro-
cedure in case
of holding
over.

Not compul-
sory.

By this section, “where the term or interest of any tenant now or hereafter holding under a lease or agreement in writing any lands, tenements or hereditaments for any term or number of years certain, or from year to year, shall have expired, or been determined either by the landlord or tenant by a regular notice to quit, and such tenant, or any one holding or claiming by or under him, shall refuse to deliver up possession accordingly, after lawful demand in writing (e), made and signed by the landlord or his agent, and served personally upon, or left at the dwelling-house or usual place of abode of such tenant or person, and the landlord shall thereupon proceed by action [of ejectment] for the recovery of possession, it shall be lawful for

15 & 16 Vict.
c. 76, s. 213.
Proceedings
in the Special
Form.

(a) Ante, 295, 304.

(b) 15 & 16 Vict. c. 76, ss. 213—217.

(c) Cole Ejec. 378.

(d) Sect. 218, post, 768.

(e) See Form, post, Appendix C., Sect. 10.

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*Recovery of
 Premises in
 High Court
 (under C. L. P.
 Act).*

Sect. 213.

Notice to
 Tenant hold-
 ing over, re-
 quiring him
 to find Bail.

him, at the foot of the writ [*in ejectment*], to address a notice (*f*) to such tenant or person, requiring him to find bail, if ordered by the court or a judge, and for such purposes as are hereinafter next specified; and upon the appearance of the party, or an affidavit of service of the writ and notice, it shall be lawful for the landlord, producing the lease or agreement, or some counterpart or duplicate thereof, and proving the execution of the same by affidavit, and upon affidavit that the premises have been actually enjoyed under such lease or agreement, and that the interest of the tenant has expired or been determined by regular notice to quit, as the case may be, and that possession has been lawfully demanded in manner aforesaid, to move the court, or apply by summons to a judge at chambers, for a rule or summons for such tenant or person to show cause within a time to be fixed by the court or judge on a consideration of the situation of the premises, why such tenant or person should not enter into a recognizance by himself and two sufficient sureties in a reasonable sum, conditioned to pay the costs and damages which shall be recovered by the claimants in the action: and it shall be lawful for the court or judge, upon cause shown, or upon affidavit of the service of the rule or summons, in case no cause should be shown, to make the same absolute in the whole or in part, and to order such tenant or person, within a time to be fixed upon a consideration of all the circumstances, to find such bail, with such conditions and in such manner as shall be specified in the said rule or summons, or such part of the same so made absolute; and in case the party shall neglect or refuse so to do, and shall lay no ground to induce the court or judge to enlarge the time for obeying the same, then the lessor or landlord filing an affidavit that such rule or order has been made and served, and not complied with, shall be at liberty to sign judgment for recovery of possession and costs of suit [*in the form contained in the schedule (A) to this act annexed, marked 21, or to the like effect*]” (*g*).

Defendant
 must not
 claim under
 distinct Title.

This enactment does not apply where the defendant *bonâ fide* claims to hold possession, not as the claimant’s tenant but under some distinct title, and makes an affidavit of such title in answer to the application (*h*).

There must
 be a Lease or
 Agreement in
 Writing,

It must be observed that to entitle a landlord to proceed under this section there must be a lease or agreement in writing under which the defendant held till the term ended, or was duly determined by a regular notice to quit; and the tenancy must have been for a term or number of years certain, or from year to year. A quarterly tenancy is not sufficient (*i*); nor a tenancy for years determinable on lives (*j*);

for a Term
 certain, or
 from Year to
 Year.

(*f*) See (*g*) *infra*.
 (*g*) For forms of proceedings under this enactment, see *Cole Ejec.* 698, 702, 717—722; *Chit. Forms*, 564—573 (9th ed.).

(*h*) *Doe d. Sanders v. Roe*, 1 Dowl. 4.
 (*i*) *Doe d. Carter v. Roe*, 10 M. & W. 670; 2 Dowl., N. S. 449; 12 L. J., Ex. 27.
 (*j*) *Doe d. Pemberton v. Roe*, 7 B. & C. 2.

for a lease for fourteen years, determined at the end of the first seven years by a six months' previous notice pursuant to a proviso therein contained (*k*). Further, the term must have expired, or been determined by a regular notice to quit; and it is not sufficient that the term has become forfeited and determined for non-performance of covenants or conditions. There must also have been a lawful demand in writing of possession made and signed by the landlord or his agent (*l*). But the usual notice to quit may of itself be a sufficient demand to satisfy the statute (*m*). It must be served as directed by the act (*n*), and if possible an express refusal to deliver up possession should be obtained; otherwise it may be difficult to satisfy the court or a judge that there has been such a refusal.

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Recovery of Premises in High Court (under C. L. P. Act).

Demand of Possession.

Refusal to deliver up.

After a sufficient refusal (express or to be implied) has been obtained, a writ in the ordinary form may be issued, but with a *notice at the foot* addressed to the defendant, requiring him, if ordered by the court or a judge, to give bail by himself and two sufficient sureties, conditioned to pay the costs and damages which shall be recovered in the action (*o*). Such writ must be served in the usual manner.

Writ of Ejectment, with Notice for Bail.

If the defendant do not appear, final judgment may be signed and execution issued in the usual manner.

Service of Writ.
Judgment by Default.

When the defendant appears, an application should be made to the court, or to a judge at chambers, founded upon a sufficient affidavit, to compel the defendant to enter into a recognizance with two sureties, pursuant to the statute (*o*). The notice of motion or summons must be served in the usual manner, and an affidavit of service made. Upon the hearing of such motion or summons, the court or judge will fix the sum and time "upon a consideration of all the circumstances" (*p*). A sum equal to one year's value of the premises, with a reasonable sum for costs (about 40*l.*) (*q*), is usually required; but not a sum to cover the mesne profits (*r*). The amount will not be increased by reason of any dilapidations, or of any damage done to the business by shutting up the premises, or the like (*s*).

Upon Appearance, Application for Bail.

On Hearing of Application, Sum and Time fixed.
Usual Amount of Bail.

A recognizance (when ordered) must be entered into by the defendant, with two sufficient sureties, in the usual manner (*t*). If taken before a commissioner in the country, there must be an affidavit of caption (*u*). The recognizance and affidavit must be filed with one of the masters (*x*). Notice thereof must be given forth-

Recognizance.
Affidavit of Caption.
Recognizance to be filed.

(*k*) See *Doe d. Cardigan v. Roe*, 1 D. & R. 640, decided under the former act, 1 Geo. 4, c. 37.

(*l*) Form, Appendix (C), No. 10.

(*m*) *Wilkinson v. Colley*, 5 Burr. 2694, 2698; *Hirst v. Horn*, 6 M. & W. 393.

(*n*) Ante, 762.

(*o*) See supra (*g*).

(*p*) *Doe d. Marquis of Anglesea v. Brown*, 2 D. & R. 688; *Colo Ejec.* 384.

(*q*) *Doe d. Levy v. Roe*, 6 C. B. 272.

(*r*) *Doe d. Sampson v. Roe*, 6 Moo. 54.

(*s*) *Doe d. Marks v. Roe*, 6 D. & L. 87; *Doe d. Levy v. Roe*, 6 C. B. 272.

(*t*) *Colo Ejec.* 385; see form, Id. 719.

(*u*) See form, *Colo Ejec.* 720.

(*x*) 15 & 16 Vict. c. 76, s. 216.

CH. XXII. s. 1. with (y). The bail may be excepted to and compelled to justify, as in other cases.

Recovery of
Premises in
High Court
(under C. I. P.
Act).

Judgment for
Want of Bail.

After the time, or the enlarged time (if any), allowed by the order for putting in bail has elapsed, "the lessor or landlord filing an affidavit that such [*rule or*] order has been made and served and not complied with (z), shall be at liberty to sign judgment for recovery of possession and costs of suit in the form contained in [*schedule (A) to this act annexed, marked No. 21, or to the like effect*]" (z).

Proceedings
after Bail put
in and com-
pleted.

No Stay of
Judgment
and Execution
except on
Condition.

If the recognizance be filed and completed in due time, the plaintiff should proceed to trial in the usual manner. He should take care to be prepared to prove at the trial (*inter alia*) the service of notice of trial, and the amount of mesne profits to which he is entitled. If a verdict be found for the plaintiff, the judge will not order a stay of judgment or execution (to allow of an application for a new trial), except on condition that within four days from the day of the trial the defendant shall actually find security by a recognizance with two sureties not to commit waste, &c. (a), unless it appear to the judge that the verdict was contrary to the evidence, or the damages given were excessive; nor will execution be stayed by proceedings in error without a recognizance pursuant to sect. 208 (b).

Unless, &c.

15 & 16 Vict.
c. 76, s. 214.
Recovery of
Mesne Profits.

By the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 214, "Whenever it shall appear on the trial of any ejectment at the suit of a landlord against a tenant that such tenant or his attorney hath been served with due notice of trial, the judge before whom such cause shall come on to be tried shall, whether the defendant shall appear upon such trial or not, permit the claimant on the trial, *after proof of his right to recover possession* of the whole or of any part of the premises mentioned in the writ in ejectment, to go into *evidence of the mesne profits thereof* which shall or might have accrued from the day of the expiration or determination of the tenant's interest in the same down to the time of the verdict given in the cause, or to some preceding day to be specially mentioned therein; and the jury on the trial, finding for the claimant, shall in such case give their verdict upon the whole matter, both as to the recovery of the whole or any part of the premises, and also as to the amount of the damages to be paid for such mesne profits; and in such case the landlord shall have judgment within the time hereinbefore provided, not only for the recovery of possession and costs, but also for the mesne profits found by the jury: provided always, that nothing hereinbefore contained shall be construed to bar any such landlord from bringing any action for the mesne profits which shall accrue from the verdict, or the day

(y) See form, Cole Ejec. 722.

(z) See the form, Cole Ejec. 722; Chit. Forms, 669.

(a) 15 & 16 Vict. c. 76, s. 215.

(b) *Roe d. Durrant v. Moore*, 7 Bing. 124; 1 Dowl. 203.

so specified therein, down to the day of the delivery of possession of the premises recovered in the ejectment." This section applies to all actions of ejectment as between landlord and tenant, and is not confined to cases in which security has been given, pursuant to sect. 213 (c). Mesne profits may be recovered under sect. 214, although the writ and issue do not contain any claim in respect of them (*d*).

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Recovery of
Premises in
High Court
(under C. L. P.
Act).

If the tenant appear at the trial, that of itself amounts to sufficient proof that due notice of trial has been given, and no further evidence on that point is necessary (*e*).

Proof of No-
tice of Trial.

It is optional with the landlord to proceed for mesne profits under this section, or to bring a subsequent action of trespass for mesne profits, &c., or for double value, or double rent (*f*). But where bail has been put in, pursuant to sect. 213 (*g*), the recognizance is conditioned "to pay the costs and damages which shall be recovered by the claimant in the action;" and this will of course include any damages recovered in the ejectment in respect of mesne profits, &c. (*h*).

Optional to
proceed under
Sect. 214, or
otherwise.

By sect. 215, "in all cases in which such security shall be given as aforesaid (*i*), if upon the trial a verdict shall pass for the claimant, unless it shall appear to the judge before whom the same shall have been had, that the finding of the jury was contrary to the evidence, or that the damages given were excessive, such judge shall not, except by consent, make any order to stay judgment or execution, except on condition that within four days from the day of the trial, the defendant shall actually find security by the recognizance of himself and two sufficient sureties, in such reasonable sum as the judge shall direct, conditioned not to commit any waste, or act in the nature of waste, or other wilful damage, and not to sell or carry off any standing crops, hay, straw or manure produced or made (if any) upon the premises, and which may happen to be thereupon, from the day on which the verdict shall have been given to the day on which execution shall finally be made upon the judgment, or the same be set aside, as the case may be: provided always, that the recognizance last above mentioned shall immediately stand discharged and be of no effect, in case proceedings in error shall be brought upon such judgment, and the plaintiff in error shall become bound in the manner hereinbefore provided" (*j*).

15 & 16 Vict.
c. 76, s. 215.
Security to be
given against
Waste, &c. if
Execution
stayed.

An order to stay judgment or execution without any such condi-

(c) *Ante*, 761.

(d) *Smith v. Tott*, 9 Exch. 307.

(e) *Doe d. Thompson v. Hodgson*, 2 Moo. & R. 283; 12 A. & E. 136; *Cole Ejec.* 292, 388.

(f) 15 & 16 Vict. c. 76, s. 218.

(g) *Ante*, 762.

(h) *Cole Ejec.* 388.

(i) Sect. 213, *ante*, 762.

(j) Sect. 208. Proceedings in error are now abolished (R. S. C. Ord. LVIII. r. 1), but it is conceived that the last paragraph of sect. 215 will be in force in case of appeal.

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*Recovery of
 Premises in
 High Court
 (under C. L. P.
 Act).*

When Order
 made under
 Sect. 216.
 Caption of
 Recogni-
 zance.

Recogni-
 zances to be
 filed.

Limitation
 of Actions
 thereon.

Order to stay,
 &c., and Pro-
 ceedings
 thereon.

15 & 16 Vict.
 c. 76, s. 217.
 Former Pro-
 cedure when
 Right accrued
 after certain
 Terms.

tion, may be made in the following cases:—1. Where it appears to the judge that the finding of the jury was contrary to the evidence. 2. Where it appears to the judge that the damages given were excessive. 3. By consent (*k*).

By sect. 216, “all recognizances and securities entered into as last aforesaid may and shall be taken respectively in such manner, and by and before such persons as are provided and authorized in respect of recognizances of bail upon actions and suits depending in the court in which any such action of ejectment shall have been commenced (*l*): and the officer of the same court, with whom recognizances of bail are filed, shall file such recognizances and securities, for which respectively the sum of two shillings and sixpence, and no more, shall be paid; but no action or other proceeding shall be commenced upon any such recognizance or security after the expiration of six months from the time when possession of the premises, or any part thereof, shall actually have been delivered to the landlord.”

The order to stay, &c., whether made with or without the above-mentioned “condition,” should be drawn up and served forthwith. And if a recognizance be ordered, the defendant should take care to enter into one, with two sufficient sureties, within four days after the verdict, *exclusive* of the day of trial. It seems that notice of such recognizance should be given forthwith, and that the sureties may be compelled to justify in like manner as where a tenant is ordered to find bail before being permitted to defend (*m*).

By sect. 217, a special procedure was provided where the right of re-entry accrued in or after Hilary or Trinity Terms. The section is as follows: “In all actions of ejectment hereafter to be brought in any of her Majesty’s Courts at Westminster, by any landlord against his tenant, or against any person claiming through or under such tenant, for the recovery of any lands or hereditaments in any county, except London or Middlesex, where the tenancy shall expire, or the right of entry into or upon such lands or hereditaments shall accrue to such landlord in or after Hilary or Trinity [*Terms*] respectively, it shall be lawful for the claimant in any such action, at any time within ten days after such tenancy shall expire, or right of entry accrue as aforesaid, to serve a writ in ejectment in the form contained in the schedule (A) to this act annexed, marked No. 13, except that it shall command the persons to whom it is directed to appear within ten days after service thereof, in the court in which such action may be brought; and the like proceedings shall be thereupon had as hereinbefore provided, save that it shall be sufficient to give at least six clear days’ notice of trial to the defendant before the commission day of the

(*k*) For form of order, see *Cole Ejec.* 776.

(*l*) See 32 & 33 Vict. c. 38.
 (*m*) *Cole Ejec.* 389.

assizes at which such ejectment is intended to be tried: and any defendant in such action may, at any time *before* the trial thereof, apply to a judge by summons to stay or set aside the proceedings, or to postpone the trial until the next assizes; and it shall be lawful for the judge, in his discretion, to make such order in the said cause as to him shall seem expedient." It would probably be held, since the decision in *The Governors of Christ's College v. Martin* (*n*), that the old terms subsist for the purposes of this enactment; and that a landlord may avail himself of the provisions of the section so far as they can be considered as still in force and of advantage to him. The obligation on the tenant to appear within ten days may be taken to be at an end, as in all cases now the appearance by a defendant must be in eight days (*o*). The object of this enactment is to enable landlords to proceed to trial at the ensuing assizes, and to prevent tenants and persons claiming through or under them, from wrongfully holding over until the second assizes, which, but for this section, they might do in many cases. The section applies not only where the tenancy has expired or been duly determined by a notice to quit, but also to cases where a right of entry has first accrued under a proviso for re-entry for non-performance of any covenant or agreement on some day in or after Hilary or Trinity Sittings (*p*). The writ is in the usual form, except that it directs the defendants to appear within eight days after service thereof. It must not only be issued, but also served within eight days after the tenancy has expired, or the right of entry first accrued, otherwise the writ, or the service thereof (as the case may be), will be irregular (*q*). But the application to set it aside must, as in other cases of irregularity, be made promptly (*r*), and must be supported by an affidavit showing specially when the tenancy expired, or the right of entry accrued, and when the writ was issued, and when the copy was served. It cannot be objected at nisi prius that the action was not commenced within eight days after the right of entry accrued, that being merely matter of *irregularity* (*s*). If the defendant appear, the proceedings to trial are the same as in other cases, except that "at least six clear days' notice of trial" must be given, i. e. *exclusive* both of the day of notice and of the commission day. The want of sufficient, or indeed of any, notice of trial will be waived if the defendant appear at the trial, and take his chance of the verdict (*t*). It is not necessary to prove at the trial that notice of trial has

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*Recovery of
Premises in
High Court
(under C. L. P.
Act).* —

Object of
Sect. 217.

When applic-
able.

Form of Writ
under Sect.
217.

Service
thereof.

Application
to set aside
the Writ, or
the Service
thereof, for
Irregularity.

Process on
Appearance.
Notice of
Trial.

(*n*) 36 L. T. 537.

(*o*) R. S. C., Ord. II., r. 3; Appendix
(A), Part I., No. 1.

(*p*) *Doe d. Antrobus v. Jepson*, 3 B. &
Adol. 402; *Doe d. Rankin v. Brindley*, 4
B. & Adol. 84.

(*q*) *Doe d. Rankin v. Brindley*, *supra*.

(*r*) *Cole Ejec.* 390; *Reg. Prac. H. T.*
1853, Nos. 135, 136.

(*s*) *Doe d. Rankin v. Brindley*, *supra*.

(*t*) *Doe d. Antrobus v. Jepson*, *supra*.

CH. XXII. s. 1. been given, unless the plaintiff seeks to recover mesne profits in the ejectment (*u*).

*Recovery of
Premises in
High Court
(under C. L. P.
Act.)*

(b) *Proceeding by ordinary Action.*

Generally advisable to proceed specially when practicable;

but never compulsory.
Sect. 218.

Sometimes there is no Option.

Ascertain clearly Right of Entry.

It is generally advisable for a landlord to proceed against a tenant in the special manner authorized by 15 & 16 Vict. c. 76, ss. 213—217, when practicable, because he thereby obtains considerable advantages; but he is always at liberty to proceed in the ordinary manner, like any other person. Sect. 218 expressly provides, that “nothing herein contained shall be construed to prejudice or affect any other right of action or remedy which landlords may possess in any of the cases hereinbefore provided for, otherwise than hereinbefore expressly enacted.” In some cases the landlord has no option to proceed otherwise than in the ordinary manner, ex. gr. where the tenant did not, at the time when his term ended or was determined, hold under any lease or agreement in writing; or where the same has not expired, or been determined by a regular notice to quit, but some forfeiture is relied on.

Before commencing an ejectment the landlord should ascertain clearly that he has a right of entry, i. e. a legal right to actual possession of the property, and not merely a right to the reversion and its incidents, such as rent, &c. The tenancy must have expired by effluxion of time, or have been determined by due notice to quit, or in some other legal manner; or the lease or agreement must have contained a proviso or condition of re-entry to take effect on some act or event which has happened, or on the breach of some covenant or stipulation which has not been performed (*v*). A mere breach of covenant is not sufficient to support an ejectment, unless the lease or agreement contains a proviso for re-entry applicable to such covenant, but the remedy is only by action for damages (*x*). Generally speaking, an ejectment cannot be maintained for non-payment of rent (notwithstanding a proviso for re-entry applicable thereto), unless half-a-year's rent or more is in arrear and there is no sufficient distress to be found on the demised premises countervailing all the arrears due (*y*), with the rent being demanded (*z*). But sometimes the lease expressly provides, that in case any rent shall be in arrear for a specified number of days (although no formal demand shall have been made thereof), it shall be lawful for the lessor to re-enter &c. (*a*). Such words, or any others to the like effect, are sufficient to dispense

(*u*) *Doe d. Antrobus v. Jepson*, supra.

(*v*) See *Hayne v. Cummings*, 16 C. B., N. S. 421.

(*x*) Lit. s. 325; *Doe d. Wilson v. Phillips*, 2 Bing. 13; *Doe d. Dark v. Bouditch*, 8 Q. B. 973.

(*y*) 15 & 16 Vict. c. 76, s. 210; *Cross v. Jordan*, 8 Exch. 149.

(*z*) *Hill v. Kempshall*, 7 C. B. 975.

(*a*) See 8 & 9 Vict. c. 124, Sched. 2, Col. 2, Form 11, post, Appendix A., Sect. 1.

with the necessity for a formal demand of the rent according to the strict rules of the common law (*b*).

Sometimes a demand of possession is necessary before an ejectment can be maintained (*c*), although the defendant is not entitled to the usual notice to quit. This happens when the defendant is, by construction of law or otherwise, a tenant at will to the plaintiff, and such tenancy has not been legally determined by entry or otherwise (*d*).

CH. XXII. s. 1.
Recovery of
Premises in
High Court
(by Ordinary
Action).
Demand of
Possession
before Action.

The procedure in an "action of ejectment," or, as it is now called, "an action for the recovery of land," is the same, for the most part, as that in use in ordinary actions. There are, however, some points in which this action is peculiar, and these will be duly noticed, and it may be well to call attention to some few details as to the writ under the old practice.

Procedure as
in other
Actions,
With certain
Exceptions.

The writ should be "directed to the persons in possession by name" (*e*). The christian and surname or title of dignity (*f*) of each person in possession as *tenant or subtenant* of all or any part of the property claimed, should be correctly stated. But the court, even under the old practice, refused to set aside the writ, or the copy and service, when the writ was faulty by reason only of a misnomer (*g*).

Writ to have
Names of
Defendants.
Effect of
Misnomer.

Only persons in possession as tenants or subtenants should be named as defendants in the writ; not their wives, children, servants, or visitors, for they do not occupy as tenants, and are not "persons in possession" within the meaning of sect. 168 of the act 15 & 16 Vict. c. 76. Generally speaking, the occupation of a servant is considered as the occupation of his master by his servant (*h*). But the servant of a deceased tenant may so act as to render himself liable to be sued personally in an ejectment (*i*); and if he appear to the writ it will be no defence that he occupied merely as the servant of another person (*k*).

Only Tenants
and Sub-
tenants in
Possession to
be named.

If there be a tenant in possession who occupies by a subtenant, the

Tenants who
have sublet.

(*b*) *Doe d. Harris v. Masters*, 2 B. & C. 490; *Goodright d. Hare v. Cator*, 2 Doug. 477, 486; *Dormer's case*, Co. R., Pt. 5, 40 b; *Cole Ejec.* 411, 412.

(*c*) See form of such demand, post, Appendix C., Sect. 9; but it need not be in writing.

(*d*) *Cole Ejec.* 58.

(*e*) See 15 & 16 Vict. c. 76, s. 168.

(*f*) Titles of dignity should be thus stated, viz.: The Most Noble A., Duke of B.; The Most Honorable C., Marquis of D.; The Right Honorable E., Earl of F.; The Right Honorable G., Viscount H.; The Right Honorable J., Baron K.; The Right Honorable L. M. [this is applicable

to members of Her Majesty's Privy Council]; The Honorable N. O. [Sons of Peers]; Sir P. Q., Baronet; Sir R. S., Knight; and the like. The title or addition of M. P., or Esquire, need not be given, but may sometimes be added by way of courtesy.

(*g*) *Doe d. Stanton v. Roe*, 6 M. & S. 203; *Wills v. Ld. Suffield*, 4 C. B. 750; 5 D. & L. 177.

(*h*) *Becke v. Beaumont*, 16 East, 33; *Mayhew v. Suttle*, 4 E. & B. 347.

(*i*) *Doe d. Atkins v. Roe*, 2 Chit. R. 179; *Doe d. Cuff v. Stradling*, 2 Stark. 137.

(*k*) *Doe d. James v. Staunton*, 2 B. & A. 371; 1 Chit. R. 113.

- CH. XXII. s. 1. former *may* be named in the writ as one of the defendants (*m*): but it is sufficient to name the subtenant, leaving him to give notice of the writ to his immediate landlord, pursuant to 15 & 16 Vict. c. 76, s. 209.
- Recovery of Premises in High Court (by Ordinary Action).
- Subtenants. Subtenants in possession of all or part of the property claimed should be named in the writ (*n*). Occupiers of apartments or lodgings are generally subtenants of part, and therefore *may* be named in the writ (*o*); but it is more usual to omit them (*p*).
- Vacant Possession. If the possession of the premises is *vacant*, the writ should be directed to the person who would have been tenant in possession if he had not abandoned the possession (*q*). If he be dead, the writ should be directed, not to him, but to his executors or administrators (*r*). If there be no rightful executor or administrator, an executor de son tort, *who has taken possession*, may be sued (*r*).
- Description of the Property. The property claimed should be described in the writ "with reasonable certainty" (*s*). The want of such certainty did not nullify the writ, but was only ground for an application to a judge or master for better particulars of the land claimed, which he has power to give in all cases (*t*). An order for such particulars has not usually been made, except under special circumstances, because any defendant may defend for the part in his own possession, and can generally be at no loss as to its identity (*u*), and now will not ordinarily be wanted, because the defendant can generally obtain such further information as he requires from the statement of claim.
- Certainty required. The property need not be described with such certainty as to identify it, or to distinguish it from other property in the same parish (*x*), although it is not unusual to do so, when conveniently practicable. A general description of the property will usually be sufficient.
- Indorsement of Writ. The form of indorsement given in the Rules of the Supreme Court is as follows:—
- "The plaintiff's claim is to recover possession of a house, No. —, in — Street, or of a farm called Blackacre, situate in the parish of —, in the county of —" (*y*).
- Parish and County. The parish and county wherein the property lies should be correctly stated. The prescribed form above given says "in the parish of —, in the county of —." If any mistake be made, an

(*m*) *Roe v. Whiggs*, 2 Bos. & P., N. R. 330.

(*n*) *Doe d. Turner v. Gee*, 9 Dowl. 612.

(*o*) *Cole Ejec.* 84; *Doe d. Henson v. Roe*, 1 D. & L. 667; *Doe d. Threader v. Roe*, 1 Dowl., N. S. 261; *Brawley v. Wade*, M'Clcl. 664.

(*p*) See *Cole Ejec.* 75, 84.

(*q*) *Id.* 85.

(*r*) *Doe d. Crouch v. Roe*, 13 L. J., Q. B.

80; *Doe d. Pamphilon v. Roe*, 1 Dowl., N. S. 186.

(*s*) See 15 & 16 Vict. c. 76, s. 168.

(*t*) *Id.* sect. 175.

(*u*) *Doe d. Saxton v. Turner*, 11 C. B. 898; *Cole Ejec.* 85, 86.

(*x*) *Id.* 86.

(*y*) R. S. C., Appendix (A), Part II., Sect. 4.

amendment will generally be permitted at the trial, unless it appear that the defendant has been actually misled or prejudiced by the misdescription (a).

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The writ should state correctly the names of all the persons in whom the title is alleged to be; but the Rules of the Supreme Court give "the court or a judge" ample powers for adding parties at any stage of the proceedings (b), and for allowing one or more of many parties having the same interest to sue on behalf of all (c). The writ need not attempt to distinguish whether all or any of the plaintiffs claim jointly or severally.

Names of
Claimants.

The writ must be served in the same way as in other actions, except where the possession is vacant, in which case service may, "when it cannot otherwise be effected, be made by posting a copy of the writ upon the door of the dwelling-house or other conspicuous part of the property" (d).

Service of
Writ.

When the property is within the jurisdiction of the High Court of Justice, an order may be made allowing the writ to be served on a defendant out of the jurisdiction (e).

Substituted service may be allowed in some cases (f).

Generally speaking, each defendant should be served separately. But where several defendants are in possession as joint tenants, and that is distinctly shown by affidavit, service on any one of them of a writ in the old form has been held to be sufficient (g).

Service on
several De-
fendants.

Therefore, also, service on one of several executors is sufficient, provided the affidavit shows them to be joint tenants in possession as such executors (h).

On Execu-
tors.

Churchwardens and overseers are not considered as joint tenants, and therefore each must be served separately (i).

On Parish
Officers.

The writ should be served on companies, public commissioners, &c. in the manner authorized by their special act, or some act incorporated therein (k).

On Com-
panies.

We have already seen that there is a special provision for service in the case of vacant possession; but it must not be supposed that the possession of land is "vacant" merely because nobody happens to be upon it at the time of issuing or serving the writ. That frequently

Where vacant
Possession.

(a) See *Doe d. Marriott v. Edwards*, 1 Moo. & R. 319; 6 C. & P. 208.

(b) R. S. C., Ord. XVI., r. 13.

(c) *Id.* r. 9. And see *Blake v. Done*, 31 L. J., Ex. 100.

(d) R. S. C., Ord. IX., r. 8.

(e) R. S. C., Ord. XI., r. 1. And see *Daniel v. Woodroffe*, 7 Dowl. 494, where personal service out of the jurisdiction was held to be sufficient.

(f) R. S. C., Ord. IX., r. 2. See, too, *Doe v. Roe*, 1 D. & R. 514; *Doe d. Harrison v. Roe*, 10 Price, 30.

(g) *Doe d. Overton v. Roe*, 9 Dowl. 1039; *Doe d. — v. Roe*, 1 D. & L. 873; *Doe d. Bennett v. Roe*, 7 C. B. 127.

(h) *Doe d. Strickland v. Roe*, 4 D. & L. 431; 1 Bail C. C. 210; *Doe d. Paul v. Hurst*, 1 Chit. R. 162.

(i) *Doe d. Weeks v. Roe*, 5 Dowl. 405.

(k) R. S. C., Ord. IX., r. 7. See the Companies Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 16), s. 135; the Railways Clauses Consolidation Act, 1845 (8 & 9 Vict. c. 20), s. 138; the Commissioners Clauses Act, 1847 (10 Vict. c. 16), s. 90.

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happens when there is a tenant in possession. There may be a legal or constructive possession without any actual occupation, or during the tenant's absence (*l*). If he has left any of his goods or chattels on the premises, or any part thereof—ex. gr. beer in a cellar, or hay in a barn—he thereby virtually retains possession of the premises, and it would be improper to proceed in ejectment as in case of a vacant possession, especially if his place of residence be known (*m*). But if the affidavit show that the person named as defendant in the writ was recently in possession as tenant of the premises sought to be recovered, and that he has since abandoned and deserted the possession of them, and cannot be served, personally or otherwise, with a copy of the writ, and that nobody was in or upon the premises, or any part thereof, at the time when a copy of the writ was posted upon the door of the dwelling-house or other conspicuous part of the property, service in the special form will probably suffice.

Notice of
 Ejectment to
 Defendant's
 Landlord.

By 15 & 16 Vict. c. 76, s. 209, "every tenant to whom any such writ in ejectment shall be delivered, or to whose knowledge it shall come, shall forthwith give notice thereof (*n*) to his landlord, or to his bailiff or receiver, under penalty of forfeiting the value of three years' improved or rack rent of the premises demised or holden in the possession of such tenant, to the person of whom he holds, to be recovered by action in any court of common law having jurisdiction for the amount." In such action the plaintiff, being considered as a "party grieved," may recover the above penalty, together with full costs of suit:

There is a corresponding enactment in the County Courts Act, 19 & 20 Vict. c. 108, s. 53 (*o*).

Of course when the claimant in the ejectment is the immediate landlord of the defendant, no such notice need be given.

Appearance
 by Defend-
 ants named in
 the Writ.

Any person *named* as a defendant in the writ may appear within the time appointed. His right to do so cannot be questioned upon a summary application to strike out or set aside the appearance, founded upon an affidavit stating that he is not in possession, by himself or his tenants, of any part of the property claimed, as that would be to allow the plaintiff to contradict his own statement made by his having named the person in question as a defendant to the action, and would amount to trying the whole question on affidavits (*p*). But, if he defend for more than he is in possession of by himself or his tenants, an application may be made to confine his appearance and defence pursuant to sect. 176 of the Common Law Procedure Act, 1852.

*Any person named in the writ may defend not only for the land in

(*l*) See *Doe d. Burrows v. Roe*, 7 Dowl. 326; *Doe d. Johnson v. Roe*, 12 L. J., Q. B. 97; 2 Chit. Arch. 1019 (11th ed.).
 (*m*) *Savage v. Dent*, 2 Stra. 1064; 1

Chit. R. 506, n.

(*n*) See Form, post, App. C., No. 24.

(*o*) Post, 791.

(*p*) *Doe d. Turner v. Gee*, 9 Dowl. 612.

his own possession, but also for other land claimed in the writ and in the possession of his tenants, whether the latter be named in the writ or not (g).

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By Servant of Tenant.

If a mere servant, bailiff or other person having no title be named as a defendant in the writ, and served with a copy, he should not appear; for he may be personally liable as a trespasser, and his capacity of servant, &c. will afford no defence, and he may be condemned in the costs of the action (r). He should hand over the copy writ to his employer, and leave him to defend or not as he may think fit. If judgment be signed against him for want of appearance no costs will be recoverable (s); except, perhaps, as damages in a subsequent action of trespass for mesne profits, &c. (t); nor will the judgment be any evidence in such subsequent action that the party served with the writ, and who suffered judgment by default, was in actual possession of the land, either as a tenant or trespasser, at the time of such service or judgment (u).

Any person not named as a defendant in the writ of summons may, by leave of the court or a judge, appear and defend on filing an affidavit showing that he is in possession of the land either by himself or his tenant (x). Any person appearing to defend an action for the recovery of land as landlord, in respect of property whereof he is in possession only by his tenant, shall state in his appearance that he appears as landlord (y). The application should be by summons (z).

Appearance by Persons not named.

Nice questions of title will not be entered into on such application to appear under these rules; but nevertheless the court, or judge or master, will exercise some discretion in granting or refusing the application (v). Where a person claims in opposition to the title of the tenant in possession, he can in no light be considered as his landlord, and should not be allowed to be a co-defendant with the tenant (b). Where it is shown that the tenant obtained possession from the claimant, a third person claiming adversely will not be permitted to defend as landlord of such tenant (c). So where the tenant obtained possession from a person through whom the plaintiff claims, and such tenant has attorned and paid rent to the plaintiff, even subsequent to the commencement of the ejectment, a third person claiming adversely, and wishing to shift the burden of proof, will not be permitted to appear and defend as landlord of the tenant in possession (d). But the word "landlord" extends to all persons claiming

Court will exercise Discretion in allowing such Appearance.

(g) *Cole Ejec.* 123.

(r) *Doe d. Cuff v. Stradling*, 2 Stark. 187; *Doe d. James v. Stanton*, 2 B. & A. 371.

(s) *Gray on Costs*, 196.

(t) *Cole Ejec.* 339.

(u) *Id.* 124, 642.

(x) *R. S. C.*, Ord. XII., r. 18.

(y) *Id.* r. 19.

(z) See *Croft v. Lumley*, 4 E. & B. 608; 24 L. J., Q. B. 78; *Whitworth v. Humphries*, 5 H. & N. 185; 29 L. J., Ex. 113.

(a) *Buller v. Meredith*, 11 Exch. 86, 94; *Whitworth v. Humphries*, *supra*.

(b) *Fairclain d. Fowler v. Shamutuk*, 3 Burr. 1295.

(c) *Doe d. Horton v. Rhye*, 2 Y. & J. 88.

(d) *Whitworth v. Humphries*, *supra*.

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title consistent with the possession of the occupier, whether he has actually received any rent or not (*e*). It seems that a mortgagee may defend as landlord of the mortgagor whom he has permitted to remain in possession (*f*). But a mortgagee, who has no interest in the result of an ejectment, ought not to be put forward merely to serve the purposes of the mortgagor or his tenant in possession (*g*). In an ejectment by a lessor against a lessee for a forfeiture for breaches of covenant, an elegit creditor of the lessee who has not obtained actual possession under the writ, nor receipt of any rent, will not be permitted to appear, he not being in possession by himself or his tenant within the meaning of the act (*h*). Two persons claiming separately will not be permitted to defend as landlords of the same tenant for the same land (*i*). But one person may, it would seem, defend as landlord of the whole premises, and another as assignee of a sublease of part (*k*).

A person not named as a defendant in the writ, but who is in possession by himself or his tenant, will be allowed to appear and defend without giving security for costs, notwithstanding he resides abroad (*l*).

Notice of Ap-
 pearance by
 Person not
 named in
 Writ.

Where a person not named as defendant in the writ of summons has obtained leave of the court or judge to appear and defend, he must enter an appearance according to the ordinary rule (*m*), "intituled in the action against the party or parties named in the writ as defendant or defendants, and shall forthwith give notice of such appearance to the plaintiff's solicitor, or to the plaintiff if he sues in person, and shall in all subsequent proceedings be named as a party defendant in the action" (*n*).

Defences as
 Landlord.

When a person appears as "landlord" of a particular tenant in possession, he is at liberty to set up any defence which such tenant might have set up had he appeared to the action, except the want of a notice to quit from the claimant to the tenant in possession, who has suffered judgment by default (*o*). Whatever estoppels from disputing the claimant's title would have bound the tenant in possession will bind him equally (*p*), whether by act in pais or by admissions of the tenant (*q*).

(*e*) *Lovelock d. Norris v. Lancaster*, 4 T. R. 122; *Doe d. Heblethwaite v. Roe*, cited 3 T. R. 783.

(*f*) *Doe d. Tilyard v. Cooper*, 8 T. R. 646.

(*g*) *Doe d. Pearson v. Roe*, 6 Bing. 613.

(*h*) *Croft v. Lumley*, 4 E. & B. 614; 24 L. J., Q. B. 78, 80; *Thompson v. Tomkinson*, 11 Exch. 442.

(*i*) *Doe d. Lloyd v. Roe*, 15 M. & W. 431.

(*k*) See *Chester v. Wortley*, 17 C. B. 410.

(*l*) *Butler v. Meredith*, 11 Exch. 85; 24 L. J., Ex. 239; overruling *Doe d. Hudson v. Jameson*, 4 M. & R. 570.

(*m*) R. S. C., Ord. XII., rr. 1—15.

(*n*) *Id.* r. 20.

(*o*) *Doe d. Davis v. Creed*, 5 Bing. 327.

(*p*) *Doe d. Knight v. Lady Smythe*, 4 M. & S. 347; *Doe d. Mannors v. Misem*, 2 Moo. & R. 56; *Doe d. Willis v. Birchmore*, 9 A. & E. 662.

(*q*) *Doe d. Moe v. Sutherland*, 4 A. & E. 784.

"Any person appearing to a writ of summons for the recovery of land shall be at liberty to limit his defence to a part only of the property mentioned in the writ, describing that part with reasonable certainty in his memorandum of appearance, or in a notice intituled in the cause, and signed by him or his solicitor, such notice to be served within four days after appearance; and an appearance where the defence is not so limited shall be deemed an appearance to defend for the whole" (r). If one of several defendants, who has a good defence as to part only, joined in defending for the whole, he will thereby render himself liable to the general costs of the suit, if the claimant recover any part (s). It is, therefore, most important for such a defendant to give a proper notice in due time. Any defendant who defends for part only *and fails*, is liable, with the other defendants, to all the plaintiff's costs (t).

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Defence for Part only of Land claimed.

A form of notice limiting a defence is given in the Appendix A. to the Rules of the Supreme Court (u).

Form of Notice for.

"In case no appearance shall be entered within the time limited for appearance, or if an appearance be entered but the defence be limited to part only, the plaintiff shall be at liberty to enter a judgment that the person whose title is asserted in the writ shall recover possession of the land, or of the part thereof to which the defence does not apply" (x), and affidavit of service of writ must be filed before judgment can be so entered (y).

Default of Appearance.

If the plaintiff has indorsed on his writ a claim for mesne profits, arrears of rent or damages for breach of contract, he may still enter judgment for possession as if that was the only subject-matter of his claim, and proceed for the rest of the claim as in ordinary cases (z). It was formerly the rule that, in such a case, no costs should be recovered under the judgment, but that they might be recovered in a subsequent action for mesne profits, &c. (a). And this would seem to be still the case, as the rule of court, unlike those relating to judgment for want of appearance in money claims, is silent as to costs. But under Order LV. of the Rules of the Supreme Court, a judge would have power to grant costs on a special application for that purpose.

Procedure upon Claim for Recovery of Land and also for Mesne Profits.

The venue in actions of ejectment was formerly local, but local venues are now abolished, the plaintiff being at liberty to propose any place at which the court sits for trial of the action, subject to alteration by order of a judge, which order may be discharged or varied by a divisional court (b).

Venue.

(r) R. S. C., Ord. XII., r. 21.

(s) *Doe d. Bishon v. Hughes*, 5 Tyr. 957; 4 Dowl. 412; Cole Ejec. 128.

(t) *Johnson v. Mills*, L. R., 3 C. P. 22; 37 L. J., C. P. 57.

(u) R. S. C., Ord. XII., r. 22, Appendix A., Part I., Form No. 7.

(x) R. S. C., Ord. XIII., r. 7.

(y) *Id.* r. 2.

(z) R. S. C., Ord. XIII., r. 8.

(a) *Doe v. Davies*, 1 Esp. 358; *Doe v. Huddart*, 2 C., M. & R. 316; 4 Dowl. 437; *Grace v. Morgan*, 2 Bing. N. C. 534.

(b) R. S. C., Ord. XXXVI., r. 1.

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The plaintiff cannot, unless by leave of the court or a judge, join any cause of action with an action for the recovery of land, except claims in respect of mesne profits or arrears of rent in respect of the premises claimed, or any part thereof, and damages for breach of any contract under which the same or any part thereof are held (c).

Joinder of
Claim for
Mesne Pro-
fits, &c.
Particulars.

The statement of claim should contain such particulars as will avoid the necessity of the defendants making any special application for particulars.

Defendant in
Possession not
to plead Title.

"No defendant who is in possession by himself or his tenant need plead his title, unless his defence depends upon an equitable estate or right, or he claims relief upon any equitable ground against any right or title asserted by the plaintiff." In other cases it is enough to state that he is in possession by himself or his tenant (d).

Pleading.

Specimens of pleadings in an action for the recovery of land by a landlord from his tenant may be found in the Appendix to the Rules of the Supreme Court (e).

Counter-
claim.

The defendant may set up any counter-claim, but the court or a judge may order the claim and counter-claim to be separately tried (f), and they will probably, in using their discretion, be guided by the analogy of the rule as to joinder of causes of action, which has already been referred to.

Interroga-
tories.

*Wallen v.
Forrestl.*

In *Wallen v. Forrestl* (g), a tenant holding over was not allowed, in an action of ejectment by the landlord, to interrogate him as to whether his title had expired.

Want of
Prosecution.

If a plaintiff who is bound to deliver a statement of claim fails to do so, the defendant may apply for judgment dismissing the action with costs for want of prosecution (h).

Default in
Pleading by
Defendant.

If a defendant is in default with his pleading, the plaintiff may enter a judgment, that the person whose title is asserted in the writ of summons shall recover possession of the land with his costs (i). If a claim for mesne profits, &c. be added in the writ, the plaintiff may have judgment for them, and an inquiry, if required, as to the amount as in other actions for pecuniary debts or damages (k).

Non-appear-
ance of a
Party at
Trial.

Formerly in the event of the defendants not appearing at the trial, the plaintiff was entitled to judgment in ejectment without proof (l), but had to prove his claim for mesne profits, &c. as in other undefended actions. Under the present practice there is only one rule applying to all actions, viz. "If when an action is called on for trial,

(c) R. S. C., Ord. XVII., r. 2. For instances in which joinder of other causes of action have been allowed, see *Tawell v. The Slate Co.*, L. R., 3 Ch. Div. 620; *Whetstone v. Davis*, L. R., 1 Ch. Div. 99; 45 L. J., Ch. 49; *Cook v. Enchmarsh*, L. R., 2 Ch. Div. 111; 45 L. J., Ch. 504; *Allen v. Kennet*, 24 W. R. 845; *Kitching v. Kitching*, 24 W. R. 901.

(d) R. S. C., Ord. XIX., r. 16.

(e) R. S. C., Appendix C., No. 24; and see post, Appendix E., Sect. 2 (b).

(f) R. S. C., Ord. XIX., r. 3.

(g) L. R., 7 Q. B. 239.

(h) R. S. C., Ord. XXIX., r. 1.

(i) Id. r. 7.

(k) Id. r. 8, and rr. 2-8.

(l) 15 & 16 Vict. c. 76, s. 183.

the plaintiff appears and the defendant does not appear, then the plaintiff may prove his claim, so far as the burden of proof lies upon him" (*m*). If "the defendant appears and the plaintiff does not appear, the defendant, if he has no counter-claim, shall be entitled to judgment dismissing the action; but if he has a counter-claim, then he may prove such claim so far as the burden of proof lies upon him" (*n*).

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Only one counsel will be allowed to address the jury on behalf of the claimants, whether they claim under the same or distinct titles (*o*); but, of course, one may open the case, and another sum up the evidence, as may be arranged between them. Only one counsel will be allowed to address the jury on behalf of the defendants except where they appear to the action and defend *separately* in respect of different parts of the property, or under distinct titles (*p*): but the counsel for each defendant who defends separately may cross-examine the plaintiff's witnesses, and may also produce and examine witnesses for his own client (*p*); and it seems that the counsel for one defendant may open the defence, and the counsel for another sum up the evidence, as may be arranged between them.

Number of
Counsel
heard.

The claimant is generally entitled to begin, because the onus of proof lies on him to show his title; but the defendant will be allowed to begin upon admitting the whole of the plaintiff's case (i. e. each and every link of his title), and relying upon a totally distinct title (*q*).

Right to
begin.

Proof of a sufficient title in any one or more of the claimants will support the action, either for the whole or for part of the property, according to the evidence (*r*). But where a title is shown to less than the whole, the evidence for the claimants must show to what particular part or share they are entitled: the onus of proof on this point lies on them (*s*), and the defendant is entitled to have a verdict entered for him as to such part, or the residue, to which no such title is shown (*t*).

Evidence for
Plaintiff,
Proof of
Title.

The claimants must either prove a title by estoppel (*u*), or a legal title to actual possession of the property claimed, or some part or share thereof; and it must appear that such title was vested in them, or some or one of them (*x*), on the day mentioned in the writ (*y*), and from thence until the writ was served (*z*).

What kind
of Title may
be proved.

(*m*) R. S. C., Ord. XXXVI., r. 18.

(*n*) *Id.* r. 19.

(*o*) *Doe d. Fox v. Bromley*, 6 D. & R. 292, 294.

(*p*) *Doe d. Hogg v. Tindall*, 3 C. & P. 565; *Moo. & M.* 314.

(*q*) *Doe d. Bather v. Brayne*, 5 C. B. 555.

(*r*) See, for example, *Doe d. Rowlandson v. Wainwright*, 5 A. & E. 520; *Ellis v. Ellis*, E., B. & E. 81; 27 L. J., Q. B. 316; *Lloyd v. Davin*, 15 C. B. 76, 79.

(*s*) *Doe d. Hellyer v. King*, 6 Exch. 791; 2 Low, M. & P. 493; *Doe d. Bowman v. Lewis*, 13 M. & W. 241; 2 D. & L. 667.

(*t*) *Atcock v. Wiltshaw*, 2 E. & E. 633; 29 L. J., Q. B. 143; *Owen v. Owen*, 3 H. & C. 88, 95; 33 L. J., Ex. 237.

(*u*) *Doe d. Bord v. Burton*, 16 Q. B. 807.

(*x*) *Supra* (*r*).

(*y*) *Colo Ejco*, 94, 288.

(*z*) *Doe d. Gardner v. Kennard*, 12 Q. B. 244; *Newby v. Jackson*, 1 B. & C. 454.

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"In case the title of the claimant shall appear to have existed as alleged in the writ, at the time of service thereof, but it shall also appear to have expired before the time of trial, the claimant shall notwithstanding be entitled to a verdict, according to the fact, that he was so entitled at the time of bringing the action and serving the writ, and to a judgment for his costs of suit" (a); but in such case he does not recover possession of the property.

The claimant's evidence must show a legal right to actual possession. The claimant must generally recover upon the strength of his own title, and not upon any weakness or defect in the defendant's title (b). But, as between landlord and tenant, the evidence is generally of a title by estoppel.

Commence-
ment of Title.

The claimant's title to actual possession must be shown to have accrued on or before the day on which possession is claimed in the writ. Therefore, where the defendant was tenant at will, it must appear that the will was determined on or before the day mentioned in the writ (c). It is, however, sufficient that the claimant's right of entry accrued on the very day on which possession is claimed in the writ, even in an action for a forfeiture (d). But the claimant's title must be shown to have continued down to and until the service of the writ (e). If such title has since expired, before the trial, the claimant will be entitled to a verdict to that effect, with costs (f). If the day be erroneously stated in the writ prior to that on which the claimant's title accrued, the judge at nisi prius may, if he thinks fit, allow the date to be amended, even in an action for a forfeiture (g). But this, of course, is in the discretion of the judge (h).

Evidence of
the Lease or
Agreement.

In ejectment between landlord and tenant, or their respective representatives, the claimant must always prove the lease or agreement in writing (if any), or the oral contract, under which the defendant, or the person through whom he claims, held possession.

The claimant must prove that the lessee had possession of the premises sought to be recovered, or some part thereof, under or by virtue of the lease or agreement in writing, or of the oral letting, as the case may be.

Encroach-
ments.

Encroachments on the land of persons other than the landlord made by the tenant during the term are, as we have seen (i), generally presumed, in the absence of evidence, that they were made for the tenant's own sole benefit, to have been added to the demised premises, and to form part thereof, for the benefit of the tenant during the term, and

(a) 15 & 16 Vict. c. 76, s. 181.

(b) See Cole on Ejec. 87.

(c) *Goodtitle d. Galloway v. Herbert*, 4 T. R. 680; *Doe d. Jacobs v. Phillips*, 10 Q. B. 130.

(d) See *Doe d. Graves v. Wells*, 10 A. & E. 427.

(e) See note (z), *supra*.

(f) 15 & 16 Vict. c. 76, s. 181, which would seem still to be in force.

(g) *Doe d. Edwards v. Leach*, 3 M. & G. 229; 9 Dowl. 877; *Doe d. Simpson v. Hall*, 5 M. & G. 795; 1 D. & L. 49.

(h) See *Doe d. Loscombe v. Clifford*, 2 C. & K. 448.

(i) Ante, 668.

afterwards for the landlord. They may be recovered together with and as part of the demised premises; or if all the premises originally demised have been delivered up to the landlord, they may be recovered separately (*k*): and they may be so recovered at any time within the period limited for the recovery of the demised premises, i.e. within twenty years (or after the first of January, 1879, twelve years (*l*)) after the expiration of the term. But this presumption of law does not arise where the encroachment was made by the tenant before the commencement of his tenancy (*m*).

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If the defendant be not the lessee, it must be proved that he came into possession under or after the lessee. Such evidence (in the absence of proof to the contrary) will show that he entered into possession as assignee of the term (*n*). Proof that the defendant has on his own account paid some of the rent reserved by the lease or agreement, would be strong evidence of his being such assignee.

Assignment
of the Term
to the De-
fendant.

If the claimant be not the lessor, his title to the reversion must be deduced and proved by the production of proper conveyances of the reversion. But if it be shown that the defendant has paid to the plaintiff some of the rent reserved by the lease or agreement, or that he has submitted to a distress made by the plaintiff for such rent, and so in effect admitted his title, that will be sufficient, as he will be estopped from denying the title of a person whom he has treated as his landlord (*o*).

Assignment
of the Rever-
sion to the
Claimant.

Where a forfeiture is relied on, it must appear that the reversion was assigned to and became vested in the claimant before such forfeiture (*p*); and that the proviso for re-entry extends to the claimant as such assignee (*q*). A power of re-entry reserved to the lessor, but not mentioning his heirs, or his executors or administrators, will not extend to them (*r*). If "assigns" be mentioned, but not heirs or executors, it seems that the assigns can take advantage of the condition only during the lessor's life, but not afterwards (*s*).

It must appear that on or before the day mentioned in the writ of ejectment the term or tenancy expired by effluxion of time, or that it was duly determined by notice, by an act causing a forfeiture, or otherwise, as the case may be (*t*). The forfeiture (if any) must have accrued on or before the day mentioned in the writ of ejectment, and whilst the claimant was the owner of the reversion.

The Right of
Entry.

(*k*) *Andrews v. Hailes*, 2 E. & B. 349.

(*l*) 37 & 38 Vict. c. 57.

(*m*) *Dizon v. Baty*, L. R., 1 Ex. 259; 14 W. R. 836.

(*n*) *Doe d. Morris v. Williams*, 6 B. & C. 41; *Doe d. Hindley v. Rickarby*, 6 Esp. 4; *Ross d. Mears v. Perrott*, 4 C. & P. 230.

(*o*) See ante, 200; and *Doe d. Marlow v. Wiggins*, 4 Q. B. 367; *Doe d. Prichett v. Mitchell*, 1 Brod. & B. 11; *Gravenor v.*

Woodhouse, 2 Bing. 71; *Cooke v. Lozley*, 5 T. R. 4.

(*p*) See in *Hunt v. Bishop*, 8 Exch. 675, 680; 9 Id. 635.

(*q*) *Cole Ejco*. 404, 405.

(*r*) *Hassell d. Hodgson v. Gouthwaite*, Willes, 500; *Doe d. Gregson v. Harrison*, 2 T. R. 425.

(*s*) Co. Lit. 215 b, n. (1).

(*t*) Ante, 272.

CH. XXII. s. 1.

*Recovery of
Premises in
High Court
(by Ordinary
Action).*

—
Mesne
Profits.

If the claimant seek to recover mesne profits he must prove—
1. His right to recover possession of the whole or part of the premises mentioned in the writ. No mesne profits are recoverable in an ejectment, except as between landlord and tenant. It is optional with the landlord whether he will seek to recover in the ejectment any mesne profits. Such option may be exercised at the trial without any previous notice in that behalf (*u*); but the requirements of sect. 214 of 15 & 16 Viet. c. 76, must be complied with (*x*). 2. The value of the mesne profits from the day of the expiration or determination of the defendant's interests in the same, down to the time of the verdict, or to some preceding day to be specially mentioned therein, must be proved as in an action for mesne profits.

It is generally advisable for a landlord to take a verdict for the mesne profits where the defendant appears at the trial, and has previously given bail "to pay the costs and damages, which shall be recovered by the claimants in the action," pursuant to 15 & 16 Viet. c. 76, s. 213 (*y*). But where the defendant does not appear at the trial, the claimant seldom offers proof of his title, &c. for the mere purpose of recovering mesne profits. He may, however, do so, and sometimes with advantage, especially where bail has been given as above mentioned.

Evidence for
Defendant.

The defendant may prove that his tenancy has not expired, or been duly determined by notice to quit or otherwise; or that a new tenancy has since been created, either expressly or impliedly by the payment and acceptance of rent due at a later period (*z*). If a forfeiture be relied on, the defendant may not only dispute the sufficiency of the claimant's evidence on that point, and also produce contradictory evidence, but he may also (if he can) prove a waiver of such forfeiture, with full knowledge thereof (*a*). But this evidence will not avail where there has been a continuing breach after such waiver (*b*). If the ejectment be for non-payment of rent the defendant may prove payment of such rent, or of all the arrears except less than one half-year's rent; or that there was a sufficient distress on the demised premises, or some part thereof, to countervail all the arrears due, and that such distress might have been found with reasonable diligence (*c*). But such proof will not avail if a strict demand of the rent according to the rules of the common law be proved (*d*); or such formal demand be

(*u*) *Smith v. Tett*, 9 Exch. 307.

(*x*) See that section at length, ante, 784.

(*y*) Ante, 761.

(*z*) *Doe d. Hollingworth v. Stennett*, 2 Esp. 717; *Bishop v. Howard*, 2 B. & C. 100.

(*a*) *Croft v. Lumley*, 5 E. & B. 648; 25 L. J., Q. B. 223; 6 H. L. Cas. 672.

(*b*) *Doe d. Baker v. Jones*, 5 Exch. 498; *Doe d. Muston v. Gladwin*, 6 Q. B. 953; *Doe d. Flower v. Peck*, 1 B. & Adol. 428; *Doe d. Ambler v. Woodbridge*, 9 B. & C. 376.

(*c*) As to when there is a sufficient distress on the premises, see *Doe d. Haverson v. Franks*, 2 C. & K. 678.

(*d*) *Acocks v. Phillips*, 5 H. & N. 183.

dispensed with by the terms of the proviso for re-entry contained in the lease (e). CH. XXII. s. 1.

Generally speaking, as we have seen in discussing the modes of estoppel (f), a tenant and any person claiming through or under him is estopped from disputing the landlord's title to demise; but he may show by evidence that it has since expired or been legally determined, or parted with by way of mortgage, sale or otherwise (g). When the lessor himself does not sue, the *derivative* title of the claimant may be disputed, so far as that can be done without impugning the lessor's right to demise according to the terms of the lease; unless, indeed, the defendant has admitted the claimant's title by payment of rent or otherwise, and such admission cannot be explained away by evidence showing fraud or mistake (h). Sometimes the defendant may prove a determination or suspension of the right of re-entry by an eviction from part of the demised premises (i).

Recovery of Premises in High Court (by Ordinary Action).

When Tenant can deny Landlord's Title.

If there be a term created by deed, and such term has not yet expired, the Statute of Limitations has no application. For however long a time rent may have been omitted to be paid, the landlord's right to re-enter subsists for the whole length of the term, however long. This is the effect of *Grant v. Ellis* (k), *Doe d. Davey v. Orenham* (l), and the House of Lords case of *Archbold v. Scully* (m).

Statute of Limitations.

A nonsuit now has the same effect as a verdict for the defendant; "but in case of mistake, surprise or accident, any judgment of nonsuit may be set aside on such terms, as to payment of costs and otherwise, as to the court or a judge shall seem just" (n).

Effect of Nonsuit.

A judgment for the plaintiff may be enforced by writ of possession (o) in the manner formerly used in actions of ejectment in the superior courts of common law (p), and the person prosecuting the judgment is entitled to sue out the writ of possession, without any order for the purpose, upon filing an affidavit showing due service of the judgment, and that the same has not been obeyed (q). There may probably still be either one writ for possession and costs, or separate writs, at the election of the claimant (r).

Judgment, how enforced.

Under the former practice, the judge had power by the statute 11 Geo. 4 & 1 Will. 4, c. 70, s. 38 (which was, it may be observed, left untouched by the Common Law Procedure Acts), to grant immediate possession. This section is, however, repealed by the Statute

At what Time Execution may issue.

(e) *Doe d. Harris v. Masters*, 2 B. & C. 490; 4 D. & R. 45.

(f) *Ante*, 200.

(g) *Longford v. Selmes*, 3 Kay & J. 220.

(h) See *Cole Ejec.* 219.

(i) *Wheeler v. Stevenson*, 6 H. & N. 155.

(k) 7 M. & W. 131.

(l) 9 M. & W. 113.

(m) 9 H. L. C. 360.

(n) R. S. C., Ord. XLI., r. 6; see, too, *Tichborne v. Mostyn*, L. R., 8 C. P. 29; 41 L. J., C. P. 113; 26 L. T. 554; 20 W. R. 661.

(o) R. S. C., Ord. XLII., r. 3.

(p) R. S. C., Ord. XLVIII., r. 1.

(q) *Id.*, r. 2. For the mode of enforcing writs of possession, see *Chit. Arch. Pr. II.* 1045.

(r) Common Law Procedure Act, 1852, s. 187.

CH. XXII. s. 1. Law Revision Act of 1873. There is no provision in the new Rules of the Supreme Court as to the time at which a writ of possession may issue, except that there is a general rule, that "As between the original parties to judgment, execution may issue at any time within six years from recovery of the judgment" (s); which would seem to imply, that execution by writ of possession may issue immediately after judgment is entered. Execution for mesne profits, &c., or costs, may always, unless it be specially ordered otherwise, issue immediately on the entry of judgment (t).

Staying Execution. When a landlord obtains a verdict in ejectment against a tenant who has found security for the costs and damages, pursuant to 15 & 16 Vict. c. 76, s. 213 (u), the judgment or execution cannot be stayed by order of the judge, except under the circumstances and in manner provided by sect. 215 (x).

SECT. 2.—*By Proceedings in the County Court.*

By the statutes giving jurisdiction to the County Courts there are two methods provided for the recovery of real property, which are sometimes distinguished as "recovery of possession" and "ejectment;" the limit of the former being where neither annual value nor rental exceeds 50*l.*, that of the latter where neither annual value nor rental exceeds 20*l.* The former of these is confined to the cases of wrongful holding over, and leaving rent unpaid. For these cases a special procedure is provided, analogous to that of the Common Law Procedure Act, 1852, sects. 213 and 210. The latter method, so far as the statute goes, is of general application; but a County Court rule confines it to the cases to which the former method is not applicable (y).

The special procedure was introduced in 1856, but it was not until 1867 that the general jurisdiction in "ejectment," as it was then termed, was given to County Courts.

(a) *Actions by Landlords for Recovery of Small Tenements after Term expired, or determined by Notice to quit.*

19 & 20 Vict. c. 108, s. 50. By the County Courts Act, 1856 (19 & 20 Vict. c. 108), s. 50, "when the term and interest of the tenant of any corporeal hereditament where neither the value of the premises nor the rent payable in respect thereof shall have exceeded 50*l.* by the year, and upon which no fine or premium shall have been paid, shall have expired, or shall have been determined either by the landlord or the tenant by a legal notice to quit, and such tenant, or any person holding or claiming by, through, or under him, shall neglect or refuse to deliver up possession accordingly, the landlord may enter a plaint, at his option either against such

(s) R. S. C., Ord. XLII., r. 18.

(t) Id. r. 15.

(u) Ante, 761.

(x) Ante, 765.

(y) C. C. Rules, 1875, Ord. XXXVIII., r. 25; and 797, post.

tenant or against such person so neglecting or refusing, in the County Court of the district in which the premises lie for the recovery of the same, and thereupon a summons shall issue to such tenant or such person so neglecting or refusing; and if the defendant shall not, at the time named in the summons, show good cause to the contrary, then, on proof of his still neglecting or refusing to deliver up possession of the premises, and of the yearly value and rent of the premises, and of the holding, and of the expiration or other determination of the tenancy with the time and manner thereof, and of the title of the plaintiff, if such title has accrued since the letting of the premises, and of the service of the summons if the defendant shall not appear thereto, the judge may order that possession of the premises mentioned in the plaint be given by the defendant to the plaintiff, either forthwith or on or before such day as the judge shall think fit to name; and if such order be not obeyed, the registrar, whether such order can be proved to have been served or not, shall, at the instance of the plaintiff, issue a warrant authorizing and requiring the high bailiff of the court to give possession of such premises to the plaintiff."

CH. XXII. s. 2.
*Recovery of
Premises in
County Court
(Holding over).*

Under this section neither the rent paid between the litigant parties (z) nor the annual value of the premises to let to a tenant from year to year at a fair rack-rent (without deducting any ground rent paid to a superior landlord) may exceed 50*l.* per annum (a). If any fine or premium was paid the remedy is by ejectment in a superior court; unless, indeed, neither the annual value nor the rent exceed 20*l.* (b).

Restriction on
Value.

A warrant obtained by a landlord proceeding against a lessee not in possession is not conclusive against the person actually in possession.

Conclusive-
ness of Pro-
ceedings.

By sect. 51, "in any plaint against a tenant (c), as in the last preceding section is specified, the plaintiff may add a claim for rent or mesne profits, or both, down to the day appointed for the hearing, or to any preceding day named in the plaint, so as the same shall not exceed 50*l.*, and any misdescription in the nature of such claim may be amended at the trial" (d).

Sect. 51.
Claim for
Rent or
Mesne Profits.

The time and mode of proceeding under the above act are now regulated by certain rules of practice and forms which came into operation in 1875. The previous rules then ceased to be used (e).

C. C. Rules
and Forms
(1875).

The action must be commenced by a plaint (f) entered in the County Court.

Plaint.

(z) *Brown v. Cocking*, L. R., 3 Q. B. 672; 37 L. J., Q. B. 260.

(e) *Elston v. Ross*, L. R., 4 Q. B. 4; *Re Holstone*, 38 L. J., Q. B. 6.

(b) Post, 796.

(e) Not against any other person so neglecting or refusing, &c.

(d) It has been held that this section

cannot be made use of when the action is against a subtenant; *Campbell v. Loader*, 3 H. & C. 520; 34 L. J., Ex. 50.

(e) Pollock and Nicol on County Courts (8th ed.). See Forms, post, Appendix E.

(f) This is prepared by the Registrar and entered in the book kept for that purpose in his office.

CH. XXII. s. 2. Court of the district wherein the tenements are situate; and thereupon a summons (g) shall issue. This must be served pursuant to section 54 (h). The decision of the judge as to the sufficiency of the service is conclusive (i). Neither party can require a jury to be summoned as in other actions, but the judge decides all questions of law and fact (k).

*Recovery of
Premises in
County Court
(Holding over).*

No Jury.

To maintain the action under the above section it is necessary that the plaintiff should prove:

Proof of
Tenancy.

That the ordinary relation of landlord and tenant of the property claimed has existed between the plaintiff and defendant; or between the plaintiff and some other person by, through, or under whom the defendant holds or claims (l). It is not necessary to show that the plaintiff was the original lessor; it is sufficient to prove that when the term expired, or was determined, he was the immediate reversioner of the tenements; or if such reversion then belonged to several persons, as joint tenants, coparceners or tenants in common, that the plaintiff was one of the persons so entitled (m). But if the title of the plaintiff accrued since the letting of the premises, such title must be deduced from the landlord and proved in the usual manner. Thus, under the 9 & 10 Vict. c. 95, where the plaintiff claimed as a mortgagee, and the defendant under a demise from the mortgagor *subsequent* to the mortgage, and the defendant had never attorned to the plaintiff or consented to hold under him: it was held, that the statute did not apply, and consequently that the County Court had no jurisdiction (n). Again, where the defendant had been let into possession under an agreement to purchase, one of the terms of which was that he should pay 8s. a week rent, to be afterwards deducted from the purchase-money, and it appeared that he had paid sums which, together with the set-off, equalled the amount of the purchase-money: it was held, that the ordinary relation of landlord and tenant did not exist between the parties, and therefore that the County Court had no jurisdiction (o).

Proof of
Tenancy of
Defendant.

The defendant must be proved to have been either the tenant to whom the demise was made, or a person "holding or claiming by, through, or under him" (p). Any person who obtains the possession from the tenant by the tenant's voluntary act directly or indirectly, either as an assignee or a subtenant, or by fraud and collusion with the tenant, is within the statute, and estopped from denying the landlord's title (q). Proof that the defendant came into possession

(g) See Form, post, Appendix E.,
Sect. 3 (c).

(h) Post, 791.

(i) *Robinson v. Lenaghan*, 2 Exch. 333.

(k) Pollock & Nicol C. C. Prac. 270
(8th ed.); but it is otherwise with respect
to actions of ejectment under 30 & 31
Vict. c. 142, s. 11; C. C. Rule, Ord. XVI.,
r. 3.

(l) Ante, 782; *Jones v. Owen*, 5 D. & L.
669; *Danks v. Rebbeck*, 2 L., M. & P. 452.

(m) 9 & 10 Vict. c. 95, s. 142.

(n) *Jones v. Owen*, 5 D. & L. 669.

(o) *Banks v. Rebbeck*, 2 L., M. & P. 452.

(p) Ante, 782.

(q) *In re Emery v. Barnett*, 4 C. B.,
N. S. 423; 27 L. J., C. P. 216.

after the original tenant entered and during the continuance of the demise, is *prima facie* evidence that he obtained possession as assignee of the term (*r*), or in some way claims by, through, or under the tenant within the meaning of the statute.

CH. XXII. s. 2.
Recovery of Premises in County Court (Holding over).

There must be no real dispute or question between the parties as to the right and title of the plaintiff, or of the defendant, to the tenements; otherwise the County Court will have no jurisdiction under this act (*s*), unless by the written consent of both parties, signed by them or their solicitors (*t*). Generally speaking, as we have seen, a tenant cannot dispute a landlord's title (*u*). And where and so far as that rule is applicable, no such dispute or question can legally arise between the parties (*x*). In some cases, however, a tenant may prove that since the demise his landlord's title has ceased, or been duly determined, or assigned over to some third person, who has made a fresh demise or conveyance to the defendant; or, if the plaintiff be not the original lessor, or the person from whom the defendant obtained possession of the demised premises, the latter may prove that he paid rent to the plaintiff, or submitted to a distress made by him for rent, by mistake and in ignorance of the real facts; and that the plaintiff really has no title. In such cases, upon proof of facts of the above nature, the County Court would have no jurisdiction to proceed further (*y*). But it is the duty of the judge to inquire into the facts and to hear the evidence, so far as is necessary to ascertain that a real question as to the title legally may and actually does exist between the parties; and that it is not a mere pretence raised by the defendant for the sole purpose of ousting the jurisdiction of the County Court. If it appear to him that a *bonâ fide* question as to title does exist, he should decline to proceed further, or strike out the cause for want of jurisdiction (*z*), in which case he may (if he thinks fit) award costs against the plaintiff (*a*). If it appear that no such question can legally be raised by the defendant, or that no such question does actually exist, and that the objection is a mere pretence of the defendant for the purpose above mentioned, the judge should overrule the objection and proceed to hear and determine the action (*b*). If he decide erroneously upon the question whether certain facts do raise a question

No Real Dispute as to the Title.

Duty of the Judge to ascertain whether there really is a Question as to the Title.

(*r*) See *Cole Ejec.* 224.

(*s*) *Pearson v. Glazebrook*, L. R., 3 Ex. 27; 37 L. J., Ex. 15. In this case the defendant claimed the freehold, subject only to the payment of a quit rent.

(*t*) 19 & 20 Vict. c. 108, s. 25; see the form of such consent, No. 78 in the Schedule to the C. C. Rules, 1875.

(*u*) *Ante*, 200.

(*x*) *Re Emery v. Barnett*, 4 C. B., N. S. 423; 27 L. J., C. P. 216; *Lloyd v. Jones*, 6 C. B. 81; *Barbour v. Barlow*, 8th July,

1856, per Bramwell, B., at Chambers.

(*y*) 9 & 10 Vict. c. 95, s. 58; *Marwood v. Waters*, 13 C. B. 820.

(*z*) *Pearson v. Glazebrook*, L. R., 3 Ex. 27; 37 L. J., Ex. 15; *Sewell v. Jones*, 1 L. M. & P. 525.

(*a*) 30 & 31 Vict. c. 142, s. 14.

(*b*) *Fearon v. Norvall*, 5 D. & J. 439; *Lilley v. Harvey*, Id. 648; *Owen v. Pearce*, Id. 654, n.; *Re Emery v. Barnett*, *supra*; *Lothem v. Spedding*, 17 Q. B. 440; *Lloyd v. Jones*, *supra*.

CH. XXII. s. 2. of title, the defendant may appeal to the High Court of Justice (c); or a rule or order (in lieu of a mandamus) may be applied for to the court (d), or to a judge pursuant to 19 & 20 Vict. c. 108, s. 43 (e); or a prohibition may be applied for (f). Formerly, if the court or a judge directed the applicant to declare in prohibition pursuant to 1 Will. 4, c. 21, the question of jurisdiction became one of pleading and evidence (g). But now "when an application shall be made to a superior court, or a judge thereof, for a writ of prohibition to be addressed to a judge of a County Court, the matter shall be finally disposed of by rule or order, and no declaration or further proceedings in prohibition shall be allowed" (h): and no renewed application can be made, except to the same court or judge under special circumstances (i).

Neither Annual Value nor Rent must exceed 50%.

The plaintiff must prove that "neither the value of the premises, nor the rent payable in respect thereof," has exceeded 50% by the year (k). Under the 9 & 10 Vict. c. 95, s. 122, if the rent reserved were under 50% per annum, and no fine paid, the court had jurisdiction, notwithstanding the annual value of the premises had increased, by buildings or otherwise, to a much greater amount than 50% (l). Now neither the rent nor the annual value may exceed 50%, and this must be proved at the trial, whether the defendant appear there or not.

There must have been no Fine or Premium,

He must show that "no fine or premium" was paid for the lease. This will sufficiently appear by the lease, in the absence of express proof to the contrary.

The Term must have expired or been determined by Notice to quit.

He must show that the term or tenancy has *expired or been determined* either by the landlord or the tenant by a legal notice to quit. The statute expressly requires proof at the trial of the holding, and of the expiration or other determination of the tenancy, with the time and manner thereof, whether the defendant appear at the trial or not. We have already fully considered the law as to notices to quit (m). When the landlord seeks to recover the premises by reason of a forfeiture committed by the tenant, and a condition or proviso for re-entry, the action is not maintainable under this section (n).

Defendant must neglect or refuse to deliver up Possession.

He must show that the defendant has neglected or refused, and still neglects or refuses, to deliver up possession of the premises. For the purpose of showing this, a demand of possession should be made,

(c) *Mountney v. Collier*, 1 E. & B. 630.

(d) *Pearson v. Glazebrook*, *supra*.

(e) *In re Emery v. Barnett*, *supra*.

(f) 13 & 14 Vict. c. 61, s. 22; 19 & 20 Vict. c. 108, ss. 40, 41, 42; *Jones v. Owen*, 5 D. & L. 669; *Banks v. Rebbeck*, 2 L., M. & P. 452; *Marwood v. Waters*, 13 C. B. 820; *Re Chew v. Holroyd*, 8 Exch. 249; *Lawford v. Partridge*, 1 H. & N. 621; 26 L. J., Ex. 147.

(g) *Thomson v. Ingham*, 14 Q. B. 710;

2 L., M. & P. 216.

(h) 19 & 20 Vict. c. 108, s. 42.

(i) *Id.* s. 44.

(k) *Ante*, 782.

(l) *In re Earl of Harrington v. Ramsey*, 8 Exch. 879; 2 E. & B. 669; *Fearon v. Norvall* (2), 5 D. & L. 446; but see *Crowley v. Vitty*, 7 Exch. 319.

(m) *Ante*, 306.

(n) *Doe d. Cundy v. Sharpley*, 15 M. & W. 558.

and, if possible, a refusal obtained in like manner as under the 15 & 16 Vict. c. 76, s. 213 (o). The act requires "proof of his still neglecting or refusing to deliver up possession of the premises." But proof that he retains possession of them after demand made, as above mentioned, will be *prima facie* evidence that he still refuses, or at all events neglects to deliver up possession (p).

CN. XXII. s. 2.
*Recovery of
Premises in
County Court
(Holding over).*

If the defendant do not appear at the trial, the service of the summons must be proved (q). The judge's decision as to the sufficiency of the service is conclusive (r).

Service of
Summons.

If the plaintiff seek to recover rent or mesne profits pursuant to sect. 51 (s), he must prove *the amount* in like manner as in an action of ejectment. But the other evidence as to the tenancy, &c. will generally be sufficient to prove the amount or value of the mesne profits.

Mesne
Profits.

When the landlord proceeds under this section, the defendant may produce contradictory evidence, so far as he is not estopped from so doing by the relation of landlord and tenant. Thus, he may show that the ordinary relation of landlord and tenant never existed as between him and the plaintiff, or as between any persons under whom they respectively claim (t). But, generally speaking, if the defendant's tenancy to the plaintiff be sufficiently proved, or if it appear that the defendant obtained possession through or under the plaintiff or his tenant, the defendant will not be permitted to dispute the plaintiff's title; and where that is the case, no dispute or question as to the title can arise, so as to exclude the jurisdiction of the County Court (u). Sometimes, however, he may show that since the demise the plaintiff's title has expired or ceased, or been determined, or assigned to some person from whom the defendant has obtained a fresh demise or conveyance (x); or that the defendant has a title to the premises not inconsistent with his tenancy to the plaintiff during the term. When anything of this sort is proved, and a *bona fide* question as to title sufficiently appears, the judge should, as we have seen, abstain from deciding in favour of either party, for want of jurisdiction (y). It was once held to be no defence that an action of ejectment was pending in one of the superior courts for the same property upon the same title (z).

Defendant
may prove
that there is
no Tenancy
between
Plaintiff and
Defendant.

Plaintiff's
Title ceased.

Title in De-
fendant.

If a verdict and judgment be found for the plaintiff, the judge will order that possession of the premises mentioned be given by the defendant to the plaintiff, either forthwith or on or before such a day as the judge shall think fit to name (a).

Verdict and
Judgment for
Plaintiff.

(o) Ante, 761.
(p) See Cole Ejec. 656.
(q) Ante, 783; as to the mode of service, vide sect. 54, post, 791.
(r) *Robinson v. Lenaghan*, 2 Exch. 333.
(s) Ante, 783.
(t) *Jones v. Owen*, 5 D. & L. 660; *Danks v. Rebbeck*, 2 L. M. & P. 452.

(u) *Barbour v. Barlow*, Cole Ejec. 655,
n. (a).
(x) Cole Ejec. 217, 657; ante, 200.
(y) 9 & 10 Vict. c. 95, s. 58.
(z) *Bissill v. Williamson*, 7 H. & N. 391;
31 L. J., Ex. 131. But see 799, post.
(a) See Form, post, Appendix E., Sect.
3 (c).

CH. XXII. s. 2.

*Recovery of
Premises in
County Court
(Holding over).*

Proceedings
not conclu-
sive.

*Campbell v.
Loader.*

Costs of Wit-
nesses.

Appeal.

Warrant for
Possession.

An order of a County Court judge under sect. 50 is not analogous to a judgment in ejectment, so as to entitle the landlord to maintain a subsequent action of trespass for mesne profits, &c. It creates no estoppel (b). Nor, where the order is obtained by the landlord proceeding against his tenant, but not against a person in possession of a sublease, is the order conclusive against the sublessee, who may, notwithstanding the order, sue the landlord in trespass, if the landlord had not in fact a right to possession (c).

The successful party is entitled to his costs. Even where the court decides that it has no jurisdiction, it *may* award costs against the plaintiff (d), who ought to have proceeded in the proper court.

If the yearly rent or value of the premises exceeds 20*l.*, the unsuccessful party may appeal pursuant to sect. 68 of the same act—the County Courts Act, 1856—either under the former practice by case stated, or by motion under the County Courts Act of 1875 (e).

If the order for the delivery of possession made at the hearing be not obeyed, the registrar, whether such order can be proved to have been served or not, shall at the instance of the plaintiff issue a warrant, authorizing and requiring the bailiff of the court to give possession of such premises to the plaintiff (f). The effect and operation of such warrant, and the protection thereby afforded to the bailiff, &c., is hereafter stated (g). The plaintiff is protected from any action of *trespass*, notwithstanding any informality or irregularity in the proceedings (h).

(b) *Actions by Landlords for Recovery of Small Tenements, for Nonpayment of Rent.*

19 & 20 Vict.
c. 108, s. 52.

Recovery of
Premises of
50*l.* value or
less where
Rent in
Arrear.

By the County Courts Act, 1856 (19 & 20 Vict. c. 108), s. 52, “when the rent of any corporeal hereditament, *where neither the value of the premises nor the rent payable in respect thereof exceeds 50*l.* by the year (i), shall for one half-year be in arrear, and the landlord shall have right by law to re-enter for the nonpayment thereof, he may, without any formal demand or re-entry, enter a plaint in the County Court of the district in which the premises lie for the recovery of the premises; and thereupon a summons shall issue to the tenant, the service whereof shall*

(b) *Campbell v. Loader*, 3 H. & C. 520; 34 L. J., Ex. 50.

(c) *Hodson v. Walker*, L. R., 7 Ex. 55; 41 L. J., Ex. 51; 25 L. T. 537; 20 W. R. 489, diss. Martin, B. See, however, *Fitzlers v. Alfrey*, L. R., 10 C. P. 29, where a landlord having evicted his tenant under a warrant as for a weekly tenancy, and having sued in a County Court for arrears of a weekly rent, was held concluded, in an action of trespass for the eviction, by the decision of the County Court judge,

that the tenancy was not weekly, but yearly.

(d) 30 & 31 Vict. 142, s. 14.

(e) Post, 794.

(f) Ante, 783; see Form, post, Appendix E., Sect. 3 (c), No. 4.

(g) Post, 791.

(h) Post, 792.

(i) Ante, 786. It is to be observed that this section does not say “and upon which no fine or premium shall have been paid,” as in sect. 50, ante, 782.

stand in lieu of a demand or re-entry, and if the tenant shall, 5 clear days before the return day of such summons, pay into court all the rent in arrear and costs, the said action shall cease; but if he shall not make such payment, and shall not at the time named in the summons show good cause why the premises should not be recovered, then, on proof of the yearly value and rent of the premises, and of the fact that one half-year's rent was in arrear before the plaint was entered, and that no sufficient distress was then to be found on the premises to counter-vail such arrear, and of the landlord's power to re-enter, and of the rent being still in arrear, and of the title of the plaintiff, if such title has accrued since the letting of the premises, and of the service of the summons, if the defendant shall not appear thereto, the judge may order that possession of the premises mentioned in the plaint be given by the defendant to the plaintiff on or before such day, not being less than 4 weeks from the day of hearing, as the judge shall think fit to name, unless within that period all the rent in arrear and costs be paid into court; and if such order be not obeyed, and such rent and costs be not so paid, the registrar shall, whether such order can be proved to have been served or not, at the instance of the plaintiff, issue a warrant authorizing and requiring the high bailiff of the court to give possession of such premises to the plaintiff, and the plaintiff shall from the time of the execution of such warrant hold the premises discharged of the tenancy, and the defendant and all persons claiming by, through or under him shall, so long as the order of the court remains unreversed, be barred from all relief in equity or otherwise."

CH. XXII. s. 2.

*Recovery of
Premises in
County Court
(Rent in Ar-
rear).*

What Land-
lord must
prove.

Order for
Possession.

Warrant for
Possession.

Before this enactment the County Court had no jurisdiction where possession was claimed by reason of a forfeiture and a right to re-enter during the term for nonpayment of rent, but only where the term had ended, or been determined by a regular notice to quit.

This section is very similar in substance and effect to the 15 & 16 Vict. c. 76, s. 210 (*k*), save that it is restricted and confined to small cases, i. e. where neither the annual value nor the rent exceeds 50*l*. Any fine or premium paid for the lease will not deprive the County Court of jurisdiction under this section, as it would under section 50 (*l*).

The mode of proceeding under this section is similar (*mutatis mutandis*) to that under section 50 (*m*). Procedure.

Before entering his plaint the plaintiff should clearly ascertain that he has "a right by law to re-enter for the nonpayment" of one half-year's rent in arrear. He can have no such right except by virtue of some condition or proviso for re-entry contained in the lease Preliminary Points—
Right to Re-enter.

(*k*) Ante, 295.

(*l*) Ante, 786.

(*m*) Ante, 782.

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*Recovery of
Premises in
County Court
(Rent in Ar-
rear).*

No sufficient
Distress.

or agreement (whether by deed, writing or oral agreement, express or implied) under which the defendant holds (o); nor until the time or period (if any) thereby allowed to save the forfeiture has elapsed (p); and he should further ascertain that there is no sufficient distress to be found on the premises to countervail such arrear (q). The distress need not be sufficient to countervail "all the arrears," if more than one half-year's rent be due; but it is otherwise under 15 & 16 Vict. c. 76, s. 210, which is differently worded in this respect.

Half-a-
Year's Rent
in Arrear.

Legal Right
to Re-enter.

The plaintiff will be put to exactly the same proof as in an action under sect. 50 (r), except that, in place of proving that the tenancy was determined by notice or expired, and that the tenant has refused to give up possession, he must give evidence of the fact that one half-year's rent was in arrear before the plaint was entered; and that before and at the time that the plaint was entered, the landlord *had power to re-enter for nonpayment of the said half-year's rent*. This will appear by the lease or agreement under which the defendant holds, or by the parol evidence of the tenancy, including the express condition or proviso for re-entry on nonpayment of rent. It must appear that the number of days (if any) allowed by such condition or proviso for payment of the rent to save the forfeiture elapsed before the plaint was entered (s).

And the same observations will apply to the case of the defendant as under sect. 50, subject to the same exception as herein mentioned with regard to the ground on which the possession is claimed by the landlord. The defendant may, however, put an end to all proceedings by paying into court the arrears of rent and costs, even after hearing, if it be done within the time given to him for the purpose by order made at such hearing (t).

Order for
Delivery of
Possession.

If the verdict be for the plaintiff, the judge, as under sect. 50, may order that possession of the premises mentioned in the plaint be *given by the defendant to the plaintiff* on or before such day, not being less than four weeks from the day of hearing, as the judge shall think fit to name, unless within that period all the rent in arrear and the costs be paid into court (t).

Warrant for
Possession.

The procedure in case of the order for possession being disobeyed will be the same as in cases under sect. 50 (u). The effect and operation of such warrant, and the protection thereby afforded to the bailiff, &c., are hereafter stated (x). The plaintiff is protected from any action of trespass, notwithstanding any irregularity or informality in the proceedings. Moreover "the plaintiff shall from the time of the

(o) Cole Ejec. 403, 416, 660.

(p) *Doe d. Dixon v. Roe*, 7 C. B. 134.

(q) As to the mode of proving this, see
Cole Ejec. 216.

(r) Ante, 782.

(s) *Doe d. Dixon v. Roe*, 7 C. B. 134.

(t) Ante, 789.

(u) Ante, 782.

(x) Post, 791.

execution of such warrant hold the premises *discharged of the tenancy*, and the defendant and all persons claiming by, through or under him shall, so long as the order of the court remains unreversed, be barred from all relief in equity or otherwise" (y).

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*Recovery of
Premises in
County Court
(Rent in Ar-
rear).*

There are certain provisions in the County Courts Acts which, as they apply equally to both the above forms of action for recovery of possession by landlords from their tenants, may be best noticed at one time in this place. They relate to the following matters:—

(i.) *Service of Summons.*

By 19 & 20 Vict. c. 108, s. 54, "a summons for the recovery of a tenement may be served like other summonses to appear to plaints in County Courts; and if the defendant cannot be found, and his place of dwelling shall either not be known, or admission thereto cannot be obtained for serving any such summons, a copy of the summons shall be posted on some conspicuous part of the premises sought to be recovered, and such posting shall be deemed good service on the defendant."

19 & 20 Vict.
c. 108, s. 54.
How Sum-
mons served.

(ii.) *Notice by Subtenant to his immediate Lessor of Summons for Recovery of Possession.*

By 19 & 20 Vict. c. 108, s. 53, "where any summons for the recovery of a tenement as is hereinbefore specified shall be served on or come to the knowledge of any subtenant of the plaintiff's immediate tenant, such subtenant being an occupier of the whole or of a part of the premises sought to be recovered, he shall *forthwith give notice thereof to his immediate landlord, under penalty of forfeiting three years' rack-rent* of the premises held by such subtenant to such landlord, to be recovered by such landlord by action *in the court from which summons shall have issued*; and such landlord on receipt of such notice, if not originally a defendant, may be added or substituted as a defendant to defend possession of the premises in question."

19 & 20 Vict.
c. 108, s. 53.
Notice of
Summons by
Tenant to his
immediate
Landlord.
Penalty.

This section is similar in substance and effect to the 15 & 16 Vict. c. 76, s. 209.

(iii.) *Warrant of Possession.*

By 19 & 20 Vict. c. 108, s. 55, "any warrant to a high bailiff to give possession of a tenement shall justify the bailiff named therein

19 & 20 Vict.
c. 108, s. 55.
Warrant for
Possession—
how executed.

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*Recovery of
 Premises in
 County Court
 (Rent in Ar-
 rear).*

Sect. 56.
 Date and
 Duration of
 Warrant.

in entering upon the premises named therein, with such assistants as he shall deem necessary, and in giving possession accordingly, but no entry upon any such warrant shall be made except between the hours of nine in the morning and four in the afternoon."

By sect. 56, "every such warrant shall, on whatever day it may be issued, bear date on the next day after the last day named by the judge in his order for the delivery of possession of the premises in question, and shall continue in force for three months from such date but no longer, but no order for delivery of possession need be drawn up or served."

(iv.) *Amendments.*

19 & 20 Vict.
 c. 108, s. 57.
Amendments.

By 19 & 20 Vict. c. 108, s. 57, "the judge of a County Court may at all times amend all defects and errors in any proceeding in such court, whether there is anything in writing to amend by or not, or whether the defect or error be that of the party applying to amend or not; and all such amendments may be made with or without costs, and upon such terms as to the judge may seem fit; and all such amendments as may be necessary for the purpose of determining in the existing suit the real question of controversy between the parties shall be so made, if duly applied for." But after final judgment has been given and no new trial moved for, and the unsuccessful party has given due notice of appeal, the judge has no right to correct his judgment on any point (z); nor is it competent for him, when once he has heard and disposed of an application for a new trial, to refuse the case at a subsequent court. He may be restrained from so doing by prohibition (a).

(v.) *Consequences of Irregularities and Informalities.*

19 & 20 Vict.
 c. 108, s. 60.
*Protection to
 Officers, &c.*

By 19 & 20 Vict. c. 108, s. 60, "no officer of a County Court in executing any warrant of a County Court, and no person at whose instance any such warrant shall be executed, shall be deemed a trespasser by reason of any irregularity or informality in any proceeding on the validity of which such warrant depends, or in the form of such warrant, or in the mode of executing it, but the party aggrieved may bring an action for any special damage which he may sustain by reason of such irregularity or informality against the party guilty thereof, and in such action he shall recover no costs; unless the damages awarded shall exceed *forty shillings*" (b).

The 9 & 10 Vict. c. 95, ss. 124, 125, containing provisions of a similar nature, are not repealed by 19 & 20 Vict. c. 108, s. 2.

(z) *Irving v. Askew*, L. R., 5 Q. B. 208.

(a) *Great Northern Rail. Co. v. Mossop*,
 17 C. B. 130; 25 L. J., C. P. 22.

(b) Now "exceeding 10l." if the action
 be brought in a superior court; 30 & 31
 Vict. c. 142, s. 5.

(vi.) *Appeal.*

By 19 & 20 Vict. c. 108, s. 68, "an appeal from the decision of a County Court *on the same grounds and subject to the same conditions* as are provided by the fourteenth section of the act of the thirteenth and fourteenth years of the reign of her present Majesty, chapter sixty-one, shall be allowed in all actions of replevin where the amount of rent or damage exceeds 20*l.*, and in all actions for the recovery of tenements where the yearly rent or value of the premises exceeds 20*l.*, and in proceedings in interpleader where the money claimed, or the value of the goods or chattels claimed, or of the proceeds thereof, exceeds 20*l.*, and in all actions and proceedings where the sum claimed exceeds 20*l.*"

The 14th section of the 13 & 14 Vict. c. 61 (referred to in the above enactment) is as follows:—"And be it enacted, that if either party in any cause of the amount to which jurisdiction is given to the County Courts by this act shall be dissatisfied with the determination or direction of the said court *in point of law or upon the admission or rejection of any evidence*, such party may appeal from the same to any of the superior courts of common law at Westminster: provided that such party shall, *within ten days* after such determination or direction, *give notice* of such appeal to the other party, or his attorney, and *also give security*, to be approved by the clerk of the court (c), for the costs of the appeal, whatever may be the event of the appeal, and for the amount of the judgment if he be the defendant, and the appeal be dismissed (d): provided, nevertheless, that such security, so far as regards the amount of the judgment, shall not be required in any case where the judge of the County Court shall have ordered the party appealing to pay the amount of such judgment into the hands of the clerk of the County Court (c) in which such action shall have been tried, and the same shall have been paid accordingly; and the said Court of Appeal may either order a new trial on such terms as it thinks fit, or may order judgment to be entered for either party, as the case may be, and may make order with respect to the costs of the said appeal, as such court may think proper; and such orders shall be final."

By 13 & 14 Vict. c. 61, s. 15, "such appeal shall be in the form of a case agreed on by both parties, or their attorneys, and if they cannot agree, the judge of the County Court, upon being applied to by them or their attorneys, shall settle the case and sign it, and

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*Recovery of
Premises in
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19 & 20 Vict.
c. 108, s. 68.

Appeal where
Yearly Rent
or Value
exceeds 20*l.*

13 & 14 Vict.
c. 61, s. 14.

Appeal in
other Cases.

Appeal in the
Form of a
Special Case.

(c) Now called the registrar; 19 & 20 Vict. c. 108, s. 8.

(d) As to how far the giving of such security is a condition precedent, without

compliance with which the court cannot entertain the appeal, see *Francis v. Doudeswell*, L. R., 9 C. P. 423, and the cases there cited.

CR. XXII. s. 2. such case shall be transmitted by the appellant to the rule department of the master's office of the court in which the appeal is to be brought.”

Recovery of Premises in County Court (Rent in Arrear).

By the County Courts Act, 1875 (38 & 39 Vict. c. 50), s. 6, the appeal may be by motion and rule nisi, which, when no court is sitting to hear such appeals, may be obtained at chambers.

This section applies to appeals under 19 & 20 Vict. c. 108, s. 69 (e).

19 & 20 Vict.
c. 108, s. 69.
Where no
Appeal by
Consent.

By 19 & 20 Vict. c. 108, s. 69, “no appeal shall lie from the decision of the County Court, if before such decision is pronounced both parties shall agree, in writing signed by themselves or their attorneys or agents, that the decision of the judge shall be final; and no such agreement shall require a stamp.”

(vii.) *Equitable Defences and Counter-claims and other Matters.*

Equitable
Defences and
Counter-
claims, &c.

With regard to equitable defences and counter-claims, as well as to the peculiarities in the County Court Rules relating to actions for the recovery of land, these matters will be found fully considered under the next head—that of “Ordinary Action in County Courts” (f).

(viii.) *Fees.*

By the Treasury Order of 26th October, 1875, made in pursuance of the County Court Acts of 1856, 1865, 1867 and 1875, &c., the following fees (amongst others) may be taken in the County Courts:

For every plaint—one shilling in the pound.

Where the claim or demand exceeds forty shillings, and the summons is to be served by bailiff, an additional fee of one shilling.

Where in any case the number of defendants shall exceed three, an additional fee of one shilling for each defendant above three.

For every hearing—two shillings in the pound. An additional hearing fee shall be taken for every new trial.

For issuing every warrant to deliver possession of tenements—eighteenpence in the pound.

In plaints for the *recovery of tenements* when the term has expired or been determined by notice, all poundage except as aforesaid (i. e. except where otherwise specified in this schedule) shall be estimated on the amount of the weekly, monthly, or yearly rent of the tenement, as such tenement shall have been let by the week or month, or for any longer period; and

(e) As to the practice on such appeals, see C. C. Rules, Nos. 186—197.

(f) Post, 795.

if no rent shall have been reserved, then on the amount of the half-yearly value of the tenement, to be fixed by the registrar.

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*Recovery of
Premises in
County Court
(Rent in Ar-
rear).*

Where a claim for rent or mesne profits, or both, is added to a plaint for the *recovery of a tenement*, an additional poundage shall be taken on the amount or amounts so claimed, but where thereby the total amount on which poundage would be taken shall exceed twenty pounds, the poundage shall be estimated on twenty pounds only.

In plaints for the *recovery of tenements* for nonpayment of rent, all poundage, except as aforesaid, shall be estimated on the amount of the half-yearly rent of the tenement.

Where a counter or other claim is made under Order X. of the County Court Rules, 1875, the same fees shall be taken as upon the entry and hearing of a plaint.

In the above cases, where the poundage would, but for this direction, be estimated on an amount exceeding twenty pounds, it shall be estimated at twenty pounds only.

In every case where the poundage cannot be estimated by any rule in this schedule, it shall be estimated on twenty pounds.

All fractions of a pound, for the purpose of calculating poundage, shall be treated as an entire pound.

No increase of fees shall be made by reason of there being more than one plaintiff or defendant, except as before directed, where the number of defendants exceed three.

(c) *Ordinary Action in County Courts.*

By sect. 11 of the County Courts Act, 1867 (*g*), "All actions of ejectment, where neither the value of the lands, tenements, or hereditaments, nor the rent payable in respect thereof, shall exceed the sum of 20*l.* by the year (*h*), may be brought and prosecuted in the County Court of the district in which the lands, tenements, or hereditaments are situate."

30 & 31 Vict.
c. 142, s. 11.
Ejectment in
County Court
where neither
annual Value
nor Rent
exceeds 20*l.*

By sect. 12, "The County Courts shall have jurisdiction to try any action in which the title to any corporeal or incorporeal hereditaments shall come in question, where neither the value of the lands, tenements, or hereditaments in dispute, nor the rent payable in respect thereof, shall exceed the sum of 20*l.* by the year (*h*), or in case of an easement or licence where neither the value nor reserved rent of the lands, tenements, or hereditaments in respect of which the easement or licence is claimed, or on, through, over or under which

Sect. 12.
County Court
may try other
Actions,
though Title
in Question, if
neither annual
Value nor
Rent exceeds
20*l.*

(*g*) 30 & 31 Vict. c. 142.

(*h*) Vide post, 796; ante, 786. Whether any fine or premium shall have been paid

or not; but any such fine or premium may tend to show that the annual value for the time being exceeds 20*l.*

CH. XXII. s. 2.
*Recovery of
 Premises in
 County Court
 (Ordinary Ac-
 tion).*

Trial in
 High Court
 upon a special
 Application.

such easement or licence is claimed, shall exceed the sum of 20*l.* by the year: provided that the defendant in any such action of ejectment, or his landlord, may, within one month from the day of service of the writ, apply to a judge at chambers for a summons to the plaintiff to show cause why such action should not be tried in one of the superior courts, on the ground that the title to lands or hereditaments of greater annual value than 20*l.* would be affected by the decision in such action; and on the hearing of such summons the judge, if satisfied that the title to other lands would be so affected, may order such action to be tried in one of the superior courts, and thereupon all proceedings in the County Court in such action shall be discontinued."

Sect. 13.
*Appeal in
 Ejectment,
 &c.*

By sect. 13, "An appeal from the decision of a County Court on the same grounds, and subject to the same conditions as are provided by the section 14 of the act [13 & 14 Vict. c. 61] (*i*), shall be allowed in all actions of ejectment, and in all actions in which the title to any corporeal or incorporeal hereditament shall have come in question, and, with the leave of the judge, an appeal shall be allowed in actions in which an appeal is not now allowed, if the judge shall think it reasonable and proper that such appeal should be allowed."

Appeal by
 motion.

There will also be a right to appeal by motion under the County Courts Act, 1875 (*k*).

Decisions
 under Sect. 11
 of 30 & 31
 Vict. c. 142.

The "rent payable" means as between the litigant parties, and not any rent that may be paid by a sublessee (*l*), though, if the latter rent exceeds 20*l.* that would be strong *prima facie* evidence that the annual value exceeds 20*l.* The "annual value" means the actual marketable value per annum; and of this the rent at which the property would let from year to year to a suitable tenant is a fair criterion (*m*). The annual value means the annual value of the property itself, and not of the interest therein of either of the parties; so that if a ground-rent be payable thereout to a superior landlord, such ground-rent must not be taken into consideration, or deducted in estimating the annual value of the property (*n*). It is to be observed, that neither the annual value nor the annual rent may exceed 20*l.*, otherwise the County Court will have no jurisdiction under this act.

County Court
 Rules of 1875.

The RULES, ORDERS, and FORMS, of proceedings in the County Courts which are now (1880) in force came into operation on the 2nd of November, 1875.

County Court
 Rules, Ord.
 XXXVII.
 r. 25.

By C. C. Rules, Ord. XXXVII. r. 25, "Where an action can be brought to recover possession under the provisions of the County

(*i*) *Ante*, 793.

(*k*) See *ante*, 794.

(*l*) *Brown v. Cocking*, L. R., 3 Q. B.

672; 37 L. J., Q. B. 260.

(*n*) *Elston v. Ross*, L. R., 4 Q. B. 4;
Re Holstone, 38 L. J., Q. B. 6.

Courts Act, 1856, no action shall be brought under the County Courts Act, 1867." This rule re-enacts rule 255 of the County Court Rules of 1868 (*n*).

CH. XXII. s. 2.
Recovery of
Premises in
County Court
(Ordinary Ac-
tion).

The effect of the above rule seems to be, that the *ordinary action of ejectment* cannot be maintained in the County Court by a landlord against a tenant, except when the following circumstances concur, viz.:—1. Neither the value of the property nor the rent payable in respect thereof shall exceed 20*l.* by the year (*o*). 2. It must not be a case of "holding over," after the term has expired, or been determined by a legal notice to quit, given by either party; unless, indeed, there was a fine or premium paid for the lease (*p*). 3. It must not be for nonpayment of rent (*q*), whether a fine or premium was paid for the lease or not.

In what ex-
cepted Cases
Ordinary Ac-
tion of Ejeec-
ment may be
brought in
County Court.

In these excepted cases, the landlord must follow the special procedure marked out by the County Courts Act, 1856, and the practitioner must refer to the New County Court Rules and Forms before mentioned (*r*), or to some County Court practice published in or since the year 1875.

To return to the ordinary action under the Act of 1867.—By Ord. V. r. 10 of the C. C. Rules, it is provided that "all persons in whom title is alleged must be joined as plaintiffs, and the person or persons alleged to be in possession or apparent possession must be defendants." Misjoinder of parties will not, however, defeat the action (Ord. XVII. r. 12).

Joinder of
Parties.

By Ord. VI. r. 1, "No cause of action shall, unless by leave of the judge, be joined with an action for the recovery of land, except claims in respect of mesne profits, or arrears of rent in respect of the premises claimed or any part thereof, or damages for breach of any contract under which the same or any part thereof are held." And by Rule 7 of the same order, "If at any time it appears, or is made to appear, to the court that the causes of action united, or claims joined, in any action cannot be conveniently tried and disposed of together, it may order separate trials, or may exclude any such cause of action or claim, and may order the particulars to be amended accordingly and may make such order as to costs as may be just."

Of Causes of
Action.

Joinder of
other Causes
of Action.

By Ord. VII. r. 5, "Where the action is brought under sect. 11 of the County Courts Act, 1867, to recover any lands, the plaintiff shall at the time of entering the plaint file a statement in writing

Description
of Property.

(*n*) A doubt has arisen (see the previous edition of this work) whether this rule is consistent with 30 & 31 Vict. c. 131, s. 11 (796, ante). If inconsistent, the rule would not be valid. See *Irving v. Askeu*, L. R., 5 Q. B. 208, where, however, the rule to which objection was taken was held valid. But it is conceived that the

rule is quite valid, inasmuch as it deals with practice only. See 19 & 20 Vict. c. 108, s. 32.

(*o*) Ante, 796.

(*p*) Ante, 786.

(*q*) Ante, 788.

(*r*) Ante, 796.

CH. XXII. s. 2. containing a full description of the property sought to be recovered and of the annual value thereof, and of the rent, if there be any, fixed or paid in respect thereof."

*Recovery of
Premises in
County Court
(Ordinary Ac-
tion).*

Delivery of
Summons to
Bailiff.

By Ord. VIII. r. 7, "The summons in an action brought under sect. 11 of the County Courts Act, 1867, to recover lands, shall be delivered to the bailiff forty (s) clear days at least before the return-day, and shall be served thirty-five clear days before the return-day thereof."

Service in case
of Vacant
Possession.

By Rule 20 of the same Order, "Where the action is to recover any lands or tenements the summons may, in case of vacant possession, or if the defendant cannot be found and his place of abode shall not be known or admission thereto cannot be obtained for serving the summons, be served by posting a copy of such summons upon the door of the dwelling-house or other conspicuous part of the property, and such affixing shall be deemed good service on the defendant."

Appearance
by Person not
summoned.

By Ord. IX. r. 3, "Any person not summoned as a defendant may, by leave of the registrar, appear and defend on filing an affidavit (with a copy for each plaintiff and defendant) twelve clear days before the return-day, that he is in possession, by himself or tenant, of the property or part thereof therein described; whereupon the registrar must enter the name, &c. of such person in the plaint book as an additional defendant, and send a notice, with a copy of the affidavit annexed, of such entry to the plaintiffs and original defendants ten clear days before the return-day."

Limitation of
Defence to
Part.

By Rule 4 of the same Order, "Where a defendant desires to limit his defence to a part only of the property sought to be recovered, he may give notice in writing, signed by himself or his solicitor, to the registrar, twelve clear days before the return-day, and send the same by post to the plaintiff or plaintiffs."

Equitable
Defence.

A defendant may rely on any equitable ground of defence against the plaintiff's claim, in which case he must, five clear days before the return-day, file a statement of the grounds he so relies on (t); or he may make any counter-claim against the plaintiff, in which case he must file a concise statement of the counter-claim seven clear days before the return-day (u). There is no rule, such as applies to joinder of causes of action by a plaintiff, forbidding any counter-claim whatever to be set up in an action for the recovery of land; but probably if such was not connected with the plaintiff's claim, it would always be ordered to be tried separately (x).

Discontinu-
ance of Action
by Plaintiff.

By Ord. XXXVII. r. 23, "Where the plaintiff is desirous either of abandoning the action altogether or in respect of some portion of the property, he may give notice to the registrar and to the defendant by

(s) It is necessary to give this time to enable a defendant to avail himself of sect. 12 of 30 & 31 Vict. c. 142, ante, 795.

(t) Ord. IX. r. 15.

(u) Ord. X. r. 1.

(x) Ord. VI. r. 7; Ord. X. rr. 2, 3.

post; and after the receipt of such notice, the defendant may apply for an order against the plaintiff for the costs incurred before the receipt of such notice and of attending the court on the return-day to obtain such order.”

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(Ordinary Ac-
tion).*

It was held, in *Bissill v. Williamson* (y), that the pendency of an ejectment in one of the superior courts was not a bar to the plaintiff's proceeding in the County Court, under 19 & 20 Vict. c. 108, for recovery of possession. But now, by Ord. XVI. r. 10, “where at the return-day it shall appear that an action for the same cause, at the suit of the same plaintiff, is pending in any other court of record, the court shall order the plaint to be struck out, unless the plaintiff shall undertake to discontinue the action in such other court, before a day to be named, to which such trial shall be adjourned, and unless before such adjourned trial such action shall have been discontinued, the plaint shall then be struck out.”

Discontinu-
ance of Action
for same
Cause in other
Court.

By Rule 24 of Ord. XXXVII., “Any defendant may, at any time before the return-day, confess the action, as to the whole or any part of the lands, by signing, in the presence of the registrar or one of his clerks or a solicitor of the Supreme Court, and attested by the person in whose presence it is signed, an admission of the title of the plaintiff to the lands or to the said part thereof, and of his right to the possession thereof; and the registrar shall, upon the receipt of such admission, forthwith give notice thereof by post to the plaintiff, and the judge may, on the return-day, upon proof of the signature of the defendant or defendants to such admission by affidavit or otherwise, in case the same is not attested by the registrar or clerk, and without any further proof of the plaintiff's title (if no defendant other than the defendant signing such admission defends for the said lands or the said part thereof) give judgment for the plaintiff for the recovery of possession and costs; provided, that if the plaintiff receive notice of such admission before the return-day, he shall not be entitled as against the defendant or defendants signing to any costs incurred subsequently to the receipt of such notice, except the costs of attending the court on the return-day, unless the judge shall otherwise order; provided also, that where the admission is not signed by all the defendants defending for the said lands or the said part thereof the trial shall proceed against these non-admitting defendants as if no admission had been signed.”

Confession of
Action by
Defendant.

A tenant served with a summons for the recovery of land, where the claim is inconsistent with the title of his landlord (z), should give notice to his landlord, to avoid the risk of being subject to the penalties imposed by sect. 209 of the Common Law Procedure Act, 1852.

(y) 31 L. J., Ex. 131; 7 H. & N. 391.
The power to make rules “for regulating the practice” of the County Courts is de-

rived from the County Courts Act, 1856 (19 & 20 Vict. c. 108), s. 32.

(z) *Buckley v. Buckley*, 1 T. R. 647.

CH. XXII. s. 2.
*Recovery of
 Premises in
 County Court
 (Ordinary Ac-
 tion).*

Jury.
 Judgment.

By Ord. XVI. r. 3, "Actions for the recovery of land or tenements may, at the instance of either party, be tried by a jury."

By Ord. XVIII. r. 8, "Where in an action brought under sect. 11 of the County Courts Act, 1867, to recover land the title of the plaintiff shall appear to have existed, as alleged in the summons, at the time of entry of the plaint, but to have expired before the return-day, the plaintiff shall be entitled to judgment according to the fact that he was so entitled, and for his costs of suit, unless the court shall otherwise order." By Rule 9 of the same order, where in a similar action "judgment is given for the plaintiff, execution may issue upon a day to be named in the judgment, and if no day be named then it may issue after the expiration of fourteen clear days from the day on which judgment shall have been given." By Rule 10, where "judgment has been obtained for the recovery of possession and costs, there may be either one warrant or separate warrants for the recovery of possession, and for the costs, at the election of the plaintiff." And by Rule 11, where "judgment is given for the defendants or any of them with costs, executions may issue for the costs against the plaintiffs upon a day to be named in the judgment, and if no day be named then it may issue after the expiration of fourteen clear days from the day on which judgment shall have been given."

By Ord. XIX. r. 29, "Where an order has been made in any action or proceeding for the delivery up to any person of lands or tenements the registrar shall, upon the application of the person entitled to such possession, issue to the bailiff either a warrant of possession or warrant of assistance, as the case may require."

Costs.

By Ord. XXXVI. r. 10, "Costs in actions for the recovery of tenements may, where the fees of court are paid on 5/ and upwards, be allowed to solicitors upon the scale applicable to actions on contract where the amount claimed exceeds 20/., if the judge shall so order."

Except in so far as is specially directed by the above rules, actions of ejectment in the County Courts will follow the ordinary rules in other actions in these courts.

As to the fees of court, see ante, 794.

SECT. 3.—*Proceedings before Justices.*(a) *Recovery of Small Tenements wrongfully held over.*

CH. XXII. s. 3.
*Recovery of
 Premises
 before Justices
 (Holding over).*

1 & 2 Vict.
 c. 74, s. 1.

Where Term
 not more than
 7 Years, or
 Rent not more
 than 20*l.*,
 Tenant hold-
 ing over may
 be served with
 Notice.

In order to save the landlords of small tenements the expense and delay of a proceeding by ejectment to recover possession, where a tenant refuses to quit at the determination of his interest in the premises, the statute 1 & 2 Vict. c. 74, sect. 1, enacts, that “when and so soon as the term or interest of the tenant of any house, land or other corporeal hereditaments held by him at will, or for *any term not exceeding seven years*, either without being liable to the payment of any rent, or at a *rent not exceeding the rate of twenty pounds a year*, and upon which *no fine* shall have been reserved or made payable, shall have ended, or shall have been duly determined by a legal notice to quit or otherwise, and such tenant, or (if such tenant do not actually occupy the premises, or only occupy a part thereof) any person by whom the same, or any part thereof, shall be then actually occupied, shall neglect or refuse to quit and deliver up possession of the premises, or of such part thereof respectively, it shall be lawful for the landlord of the said premises, or his agent, to cause the person so neglecting or refusing to quit and deliver up possession to be served (in the manner hereinafter mentioned) with a written notice in the form set forth in the schedule to this act (a), signed by the said landlord or his agent, of his intention to proceed to recover possession under the authority and according to the mode prescribed in this act; and if the tenant or occupier shall not thereupon appear at the time and place appointed, and show to the satisfaction of the justices hereinafter mentioned reasonable cause why possession should not be given under the provisions of this act, and shall still neglect or refuse to deliver up possession of the premises, or of such part thereof of which he is then in possession, to the said landlord or his agent, it shall be lawful for such landlord or agent to give to such justices proof of the holding and of the end or other determination of the tenancy, with the time or manner thereof; and where the title of the landlord has accrued since the letting of the premises, the right by which he claims the possession; and upon proof of service of the notice, and of the neglect or refusal of the tenant or occupier, as the case may be, it shall be lawful for the justices acting for the district, division or place within which the said premises, or any part thereof, shall be situate, in petty sessions assembled, or any two of them, to issue a warrant under their hands and seals to the constables and peace officers of the district (b), division or place within which the said premises, or any

Proof of
 Landlord's
 Claim before
 Justices.

Warrant of
 Justices.

(a) See Form, Appendix C., Sect. 12.
 And see *Delaney v. Fox*, 1 C. B., N. S. 166; 2 Id. 768; 26 L. J., C. P. 5, 248.

(b) *Jones v. Chapman*, 14 M. & W. 124; 2 D. & L. 907.

CH. XXII. s. 3.
*Recovery of
 Premises
 before Justices
 (Holding over).*

1 & 2 Vict.
 c. 74—*contd.*

part thereof, shall be situate, commanding them, within a period to be therein named, not less than **21** nor more than **30** clear days from the date of such warrant, to enter (by force if needful) into the premises, and give possession of the same to such landlord or agent: provided always, that entry upon any such warrant shall not be made on a Sunday, Good Friday or Christmas Day, or at any time except between the hours of nine in the morning and four in the afternoon: provided also, that nothing herein contained shall be deemed to protect any person, on whose application and to whom any such warrant shall be granted, from any action which may be brought against him by any such tenant or occupier, for or in respect of such entry and taking possession, where such person had not, at the time of granting the same, lawful right to the possession of the same premises: provided also, that nothing herein contained shall affect any rights to which any person may be entitled as outgoing tenant, by the custom of the country or otherwise."

Sect. 2.
 Service on
 Tenant of
 Notice of Ap-
 plication to
 Justices.

By sect. 2, "such notice of application intended to be made under this act, may be served either personally or by leaving the same with some person being in and apparently residing at the place of abode of the persons so holding over as aforesaid, and that the person serving the same shall read over the same to the person served, or with whom the same shall be left as aforesaid, and explain the purport and intent thereof; provided, that if the person so holding over cannot be found, and the place of abode of such person shall either not be known, or admission thereto cannot be obtained for serving such summons, the posting up of the said summons on some conspicuous part of the premises so held over shall be deemed to be good service upon such person."

Sect. 3.
 Person ob-
 taining War-
 rant without
 right to be
 deemed Tres-
 passer.

By sect. 3, "in every case in which the person to whom any such warrant shall be granted had not at the time of granting the same lawful right to the possession of the premises, the obtaining of any such warrant as aforesaid shall be deemed a trespass by him against the tenant or occupier of the premises, although no entry shall be made by virtue of the warrant; and in case any such tenant or occupier will become bound with two sureties as hereinafter provided, to be approved of by the said justices, in such sum as to them shall seem reasonable, regard being had to the value of the premises and to the probable costs of an action, to sue the person to whom such warrant was granted with effect and without delay, and to pay all the costs of the proceeding in such action, in case a verdict shall pass for the defendant, or the plaintiff shall discontinue or not prosecute his action, or become nonsuit therein, execution of the warrant shall be delayed until judgment shall have been given in such action of trespass; and if upon the trial of such action of trespass a verdict shall pass for the plaintiff, such verdict and judgment thereupon shall

Stay of War-
 rant upon
 Tenant en-
 gaging to sue
 for Trespass.

supersede the warrant so granted, and the plaintiff shall be entitled to double costs (*c*) in the said action of trespass" (*d*).

CH. XXII. s. 3.
*Recovery of
Premises before
Justices
(Holding over).*

The jurisdiction of justices under this act is not ousted by the defendant *bonâ fide* setting up the title of a third person (*e*). The justices should hear and determine any such question.

A similar summary remedy is given to the guardians of the poor of any union or parish with respect to lands vested in them or under their management or control (*f*), and to the valuer under inclosure acts, in respect of encroachments and recent inclosures of land subject to the provisions of those acts (*g*). Also against schoolmasters, &c. who wrongfully hold over, after removal from their office (*h*); also to the secretary of state for war (*i*).

Summary
Remedy
against
School-
masters, &c.

(b) *Recovery of Parish Property.*

The statute 59 Geo. 3, c. 12, s. 24, enacts, "that if any person, who shall have been permitted to occupy any parish or town house,

59 Geo. 3,
c. 12, s. 24.

(*c*) By 5 & 6 Vict. c. 97, a "reasonable indemnity is substituted for double costs."

(*d*) By sect. 4, "Every such bond as hereinafter mentioned shall be made to the said landlord or his agent, at the costs of such landlord or agent, and shall be approved of and signed by the said justices; and if the bond so taken be forfeited, or if upon the trial of the action for securing the trial of which such bond was given, the judge by whom it shall be tried shall not indorse upon the record in court that the condition of the bond hath been fulfilled, the party to whom the bond shall have been so made may bring an action, and recover thereon: provided always, that the court where such action as last aforesaid shall be brought may, by a rule of court, give such relief to the parties upon such bond as may be agreeable to justice, and such rule shall have the nature and effect of a defeazance to such bond." By sect. 5, "It shall not be lawful to bring any action or prosecution against the said justices by whom such warrant as aforesaid shall have been issued, or against any constable or peace officer by whom such warrant may be executed, for issuing such warrant or executing the same respectively, by reason that the person on whose application the same shall be granted had not lawful right to the possession of the premises." And by sect. 6, "Where the landlord at the time of applying for such warrant as aforesaid had lawful right to the possession of the premises, or of the part thereof so held over as aforesaid, neither the said landlord nor his agent, nor any other person acting in his behalf, shall be deemed to be a trespasser by reason merely of any irregularity or informality in the mode of proceeding for obtaining possession under

the authority of this act, but the party aggrieved may, if he think fit, bring an action on the case for such irregularity or informality, in which the damage alleged to be sustained thereby shall be specially laid, and may recover full satisfaction for such special damage, with costs of suit: provided, that if the special damage so laid be not proved, the defendant shall be entitled to a verdict, and that if proved, but assessed by the jury at any sum not exceeding five shillings, the plaintiff shall recover no more costs than damages, unless the judge before whom the trial shall have been held shall certify upon the back of the record that in his opinion full costs ought to be allowed." By sect. 7, "The term 'landlord' shall be understood as signifying the person entitled to the immediate reversion of the premises, or, if the property be held in joint tenancy, coparcenary, or tenancy in common, shall be understood as signifying any one of the persons entitled to such reversion; and the word 'agent' shall be taken to signify any person usually employed by the landlord in the letting of the premises or in the collection of the rents thereof, or specially authorized to act in the particular matter by writing under the hand of such landlord." By 21 & 22 Vict. c. 73, ss. 1, 2, every stipendiary magistrate may do alone acts authorized to be done by two justices, including acts required to be done at petty sessions. For the forms under the act, see Appendix C. sect. 12, post.

(*e*) *Rees v. Davies*, 4 C. B., N. S. 56.

(*f*) 5 & 6 Will. 4, c. 69, s. 5.

(*g*) 15 & 16 Vict. c. 79, s. 13; see *Chilcote v. Youldon*, 29 L. J., M. C. 197.

(*h*) 23 & 24 Vict. c. 136, s. 13.

(*i*) 22 Vict. c. 12, s. 5.

CH. XXII. s. 3.

*Recovery of
Premises before
Justices
(Parish Pro-
perty).*

Summons be-
fore Justices
of permitted
Occupier
refusing to
quit Parish
Property
within One
Month after
Notice in
Writing.

or any other tenement or dwelling belonging to or provided by or at the charge of any parish for the habitation of the poor thereof, or who shall have unlawfully intruded himself or herself into any such house, tenement or dwelling, or into any house, tenement or hereditament belonging to such parish, shall refuse or neglect to quit the same, and deliver up the possession thereof to the churchwardens and overseers of the poor of any such parish, within one month after notice and demand in writing for that purpose, signed by such churchwardens and overseers, or the major part of them, shall have been delivered to the person in possession, or in his or her absence affixed on some notorious part of the premises, it shall be lawful for any two of his Majesty's justices of the peace, upon complaint to them made, by one or more of the churchwardens and overseers of the poor of the parish in which any such house, tenement or dwelling shall be situated, to issue their summons to the person against whom such complaint shall be made to appear before such justices, at a time and place to be appointed by them, and to cause such summons to be delivered to the party against whom the complaint shall be made, or in his or her absence to be affixed on the premises, seven days at the least before the time appointed for hearing such complaint; and such justices are hereby empowered and required, upon the appearance of the defendant, or upon proof on oath that such summons hath been delivered or affixed as is hereby directed, to proceed to hear and determine the matter of such complaint, and if they shall find and adjudge the same to be true, then by warrant under their hands and seals to cause possession of the premises in question to be delivered to the churchwardens and overseers of the poor of the parish, or to some of them."

Warrant for
Possession.

59 Geo. 3,
c. 12, s. 25.

Summons of
Tennor hold-
ing over.

By sect. 25, "if any person, to whom any land appropriated, purchased, or taken under the authority of this act, for the employment of the poor of any parish, or to whom any other lands belonging to such parish, or to the churchwardens and overseers thereof, or to either of them, shall have been let for his or her own occupation, shall refuse to quit and deliver up the possession thereof to the churchwardens and overseers of the poor of such parishes, at the expiration of the term for which the same shall have been demised or let to him or her, or if any person or persons shall unlawfully enter upon, or take or hold possession of any such land, or any other land or hereditaments belonging to such parish, or to the churchwardens or overseers, or to either of them, it shall be lawful for such churchwardens and overseers of the poor or any of them, after such notice and demand of possession as is by this act directed in the case of parish houses, to exhibit a complaint against the person or persons in possession of such land before two of his Majesty's justices of the

peace, who are hereby authorized and required to proceed thereon, and to hear and determine the matter thereof; and if they shall find and adjudge the same to be true, to cause possession of such land to be delivered to the churchwardens and overseers of the poor, or some of them, in such and the like course and manner as are by this act directed with regard to parish houses.”

CH. XXII. s. 3.
*Recovery of
Premises before
Justices
(Parish Pro-
perty).*

Upon an information and complaint, under sect. 24, by parish officers, the justices are not precluded from inquiring into the matter and determining thereon, by reason of the defendant claiming title to the property on behalf of himself or the person by whom he was put into possession (*k*).

Where a person has been let into possession of a house belonging to the parish, by the parish officers, as an ordinary tenant, they cannot proceed against him to recover possession under the 24th section of this statute (*l*). Waste land of a parish, into the occupation of which a person has been let under licence of the majority of the parish freeholders, under an agreement to pay rent to churchwardens and overseers in aid of the poor rates, is parish land, which they may recover, under sect. 24 of the above act, after notice and demand of possession; and indeed it appears possible that they might in such a case expel the tenant without resorting to the statutory procedure (*m*).

(c) *Recovery of Cottage Allotments.*

By 2 & 3 Will. 4, c. 42, power is given in parishes inclosed under acts of parliament, in which allotments have been made for the benefit of the poor, for the trustees of the allotments and parish officers in vestry assembled, to let them in small portions to industrious cottagers.

2 & 3 Will. 4,
c. 42.

By sect. 5, “if the rent is in arrear for four weeks, or if, at the end of any year of occupation, it is the opinion of the vestry that the land has not been duly cultivated, the churchwardens or overseers, or any or either of them, with the consent of the vestry, may serve a notice to quit upon the occupier, who shall deliver up possession within one week after notice.”

Notice to Quit
where Rent in
Arrear for 4
Weeks.

By sect 6, “if any person to whom such portion of land as aforesaid shall have been let, for his or her own occupation, shall refuse to quit and deliver up possession thereof when thereto required, according to the terms of this act, or if any other person or persons shall unlawfully enter upon, or take or hold possession of any such land, it shall be lawful for the churchwardens and overseers of the poor, or any or either of them, to exhibit a complaint against the person so in posses-

(*k*) *Ex parte Vaughan*, L. R., 2 Q. B. 114; 38 L. J., M. C. 17; 7 B. & S. 902.
(*l*) *Reg. v. Middlesex JJ.*, 7 Dowl. 767;
(*m*) See per Byles, J., *Appleton v. Morrey*, 2 F. & F. 167.

Reg. v. Bolton, 1 Q. B. 66.

CH. XXII. s. 3. *Recovery of Premises before Justices (Cottage Allotments).* sion of such land before two of his Majesty's justices of the peace, who are hereby authorized and required to issue a summons, under their hands and seals, to the person against whom such complaint shall be made, to appear before them at a time and place appointed therein; and such justices are hereby required and empowered, upon the appearance of the defendant before them, or upon proof on oath that such summons has been duly served upon him, or left at his usual place of residence, or if there should have been any difficulty in finding such usual place of residence, then upon proof on oath of such difficulty, and that such summons has been affixed on the door of the parish church of the said parish in which such land is situated, and in any extra-parochial place on some public building or other conspicuous place therein, to proceed to hear and determine the matter of such complaint; and if they shall find and adjudge the same to be true, then, by warrant under their hands and seals, to cause possession of the land in question to be delivered to the churchwardens and overseers of the poor, or to some of them." By sect. 11, the powers and provisions of the act, so far as they are applicable, may be applied in cases where inclosures are made under 1 & 2 Will. 4, c. 42, 59, by which the powers of 59 Geo. 3, c. 12, for taking land for the benefit of the poor are extended, or where land shall in any other manner be found appropriated for the general benefit of the poor of any parish.

8 & 9 Vict.
c. 118.

Allotment
Gardens
under Inclo-
sure Acts.
Notice to
Tenant whose
Rent in
Arrear.

By the General Inclosure Act (8 & 9 Vict. c. 118), power is given to the inclosure commissioners to appropriate a portion of lands inclosed for the purpose of letting it in gardens, not exceeding one quarter of an acre each, to the poor; and by sect. 110, "if the rent reserved upon the letting of any garden by the allotment wardens shall at any time be in arrear for forty days, or if at any time during the tenancy, being not less than three calendar months after the commencement thereof, it shall appear to the allotment wardens that the occupier of such garden shall not have duly observed the terms and conditions of his tenancy, or shall have gone to reside more than one mile out of the parish, then and in every such case the allotment wardens shall serve a notice upon such occupier, or, in case he shall have gone to reside out of the parish, shall affix the same to the door of the church of the parish, determining the tenancy at the expiration of one month after such notice shall have been so served or affixed, and thereupon such tenancy shall be determined accordingly: provided always, that in every such case the allotment wardens or their incoming tenant shall pay to the occupier, whose tenancy shall have been so determined, a fair recompense in money for any crops (not being crops prohibited by the terms of such tenancy) which may be growing on such garden at the time of such determination, and for any manure left on such garden, or any benefit accruing from the

manuring of such garden to the wardens or their incoming tenant; and the justices, to whom application may be made for a warrant to give possession of such garden, shall settle the amount of such recompense, in case the parties differ about the same, and stay the execution of such warrant until the same shall have been paid or tendered, or (in case such occupier be absent) until the payment thereof shall have been secured to the satisfaction of such justices.”

CH. XXII. s. 3.
*Recovery of
Premises before
Justices
(Cottage
Allotments).*

By sect. 111, “in case, upon the determination of any such tenancy as aforesaid, the occupier of any such garden shall refuse to quit and deliver up possession thereof, or if any other person shall unlawfully enter upon, take or hold possession of any such garden, or of any part of such allotment, the allotment wardens may recover possession according to the mode prescribed by the statute 1 & 2 Vict. c. 74 (u), in such and the same manner as if the said wardens were landlords or a landlord, and as if such overholding occupier or other person were a tenant neglecting or refusing to quit and deliver up possession within the meaning of the last-mentioned act.”

Recovery of
Allotment
Garden.

Both the above acts, the act 2 & 3 Will. 4, c. 42, and the act 8 & 9 Vict. c. 118, were amended by the Poor Allotments Management Act, 1873 (36 Vict. c. 19). That statute provides that the allotment trustees and the vestry may appoint a committee for the purpose of exercising their powers. By sect. 11, “the notice to quit mentioned,” in 2 & 3 Will. 4, c. 42, “may be given by a committee under the hands of any three of its members for any cause deemed by it sufficient and proper, and shall operate and have effect in the same manner and to the same extent as a notice to quit given for any such cause as in that section mentioned.”

Poor Allot-
ments Man-
agement Act,
1873.

Notice by
Committee.

(d) *Recovery of Deserted Premises (o).*

By 11 Geo. 2, c. 19, s. 16, “if any tenant holding any lands, tenements or hereditaments, at a rack-rent, or, where the rent reserved shall be *full three-fourths of the yearly value* of the demised premises, who shall be in arrear for one year’s rent (extended by 57 Geo. 3, c. 52, to one half-year’s rent, although no express right of re-entry be reserved), shall desert the demised premises, and leave the same *uncultivated or unoccupied, so as no sufficient distress can be had to countervail the arrears of rent*, it shall and may be lawful to and for two or more justices of the peace of the county, riding, division or place (having no interest in the demised premises), at the request of the lessor or landlord, lessors or landlords, or his, her or their bailiff or receiver, to go upon and view the same, and to affix or cause to be affixed on the most

11 Geo. 2,
c. 19, s. 16.
Where One
Year’s Rent
in Arrear and
no sufficient
Distress Jus-
tices may
enter Deserted
Premises.

(u) Ante, 801.

(o) See Cole Ejec. Chap. LXXII.

CH. XXII. s. 3.

*Recovery
before Justices
(Deserted
Premises).*

Second View.

notorious part of the premises, notice in writing what day (at the distance of 14 days at least (*p*)) they will return to take second view thereof; and if upon such second view the tenant, or some person on his or her behalf, shall *not appear and pay the rent in arrear*, or there shall not be sufficient distress upon the premises, then the said justices may put the landlord or landlords, lessor or lessors, into the possession of the said demised premises; and the lease thereof to such tenants, *as to any demise therein contained only, shall from thenceforward become void.*"

Complaint
need not be
on Oath.

This statute, which gives a summary remedy to landlords, does not require the request or complaint to be made *upon oath*: therefore, where in trespass against two magistrates for turning a tenant out of possession under this act, a record of the proceedings, drawn up conformably to the statute, was given in evidence, it was held, that it was a complete defence to the action, though they did not appear to have acted on the oath of the landlord (*q*). In this and all other like cases the justices ought to make a record of the whole proceedings (*r*).

Sect. 17. Ap-
peal to Judges
of Assize, &c.

Sect. 17 provides, "that such proceedings of the said justices shall be examinable in a summary way by the next justice or justices of assize (*s*) of the respective counties in which such lands or premises lie; and if they lie in the city of London or county of Middlesex, by the judges of the Courts of Queen's Bench or Common Pleas [and if in the counties palatine of Chester, Lancaster or Durham, then before the judges thereof; and if in Wales, then before the courts of grand sessions respectively (*t*)]; who are hereby respectively *empowered to order restitution to be made to such tenants, together with his or her expenses and costs*, to be paid by the lessor or landlord, lessors or landlords, if they shall see cause for the same; and, in case they shall affirm the act of the said justices, to award costs not exceeding five pounds for the frivolous appeal." This section will still apply, but with such alterations as are required by the altered state of the courts, and the appeal in London or Middlesex will therefore apparently lie to any judge of the Queen's Bench or Common Pleas Division of the High Court of Justice (*u*).

57 Geo. 3,
c. 52.

It having been decided that the 11 Geo. 2, c. 19, s. 16, did not

(*p*) *I. e.*, fourteen clear days; *Creak v. The Justices of Brighton*, 1 F. & F. 110. See form of notice, 3 Burn's J. 194 (30th ed.).

(*q*) *Basten v. Carew*, 3 B. & C. 649.

(*r*) *Ashcroft v. Bourne*, 3 B. & Adol. 684; *Haylock v. Sparke*, 1 E. & B. 471; *Creak v. The Justices of Brighton*, 1 F. & F. 110; *Cole Ejec.* 678, 814.

(*s*) This appeal must be made to the judge or judges going the circuit, in their individual capacity; not as justices of

assize; *Reg. v. Sewell*, 8 Q. B. 161.

(*t*) Rendered obsolete by 1 Will. 4, c. 70, and the Judicature Act, 1873.

(*u*) This being an exclusive jurisdiction of the Queen's Bench and Common Pleas judges, will probably not lie to a judge of the Exchequer Division except when sitting at chambers or otherwise for the other two divisions; but as the appeal is to the judges, not their courts, it is doubtful whether it will not now lie to any judge of the High Court.

apply to cases where the landlord had not, by the terms of the lease, a right of entry (x), the statute 57 Geo. 3, c. 52, extended the powers thereby given to the case of tenants "who shall hold such lands and tenements or hereditaments under any demise or agreement either written or verbal, and although no right or power of re-entry be reserved or given to the landlord in case of nonpayment of rent. Since this enactment a right of entry is clearly unnecessary (y).

CH. XXII. s. 3.

*Recovery
before Justices
(Deserted
Premises).*

*Right of Re-
entry unne-
cessary.*

Where the premises are within the metropolitan police district, the 3 & 4 Vict. c. 84, enacts (sect. 13), that, after the passing of that act, "none of the police magistrates within the metropolitan police district shall be required to go upon any deserted lands, tenements or hereditaments, for the purpose of viewing the same, or affixing any notices thereon, or of putting the landlord or landlords, lessor or lessors, into the possession thereof," under the provisions of 11 Geo. 2, c. 19, and 57 Geo. 3, c. 52, "but that in every case within the metropolitan police district in which by the said acts, or either of them, two justices are authorized to put the landlord or lessor into the possession of such deserted premises, it shall be lawful for one of the police magistrates, upon the request of the lessor or landlord, or his or her bailiff or receiver, made in open court, and upon proof given to the satisfaction of such magistrate of the arrear of rent and desertion of the premises by the tenant as aforesaid, to issue his warrant, directed to one of the constables of the metropolitan police force, requiring him to go upon and view the premises, and to affix thereon the like notices as under the said acts, or either of them, are required to be affixed by two justices of the peace; and upon the return of the warrant, and upon proof being given to the satisfaction of the magistrate before whom the warrant shall be returned that it has been duly executed, and that neither the tenant, nor any person on his or her behalf, has appeared and paid the rent in arrear, and that there is not sufficient distress upon the premises. it shall be lawful for such magistrate to issue his warrant to a constable of the metropolitan police force, requiring him to put the landlord or lessor into the possession of the premises; and every constable to whom any such warrant shall be directed shall duly execute and return the same, subject to the provisions contained" in 2 & 3 Vict. c. 47, "as to the execution of warrants directed to constables of the metropolitan police force; and upon the execution of such second warrant, the lease of the premises to such tenant, as to any demise therein contained only, shall thenceforth be void."

3 & 4 Vict.
c. 84, s. 13.

*Within the
Metropolitan
Police Dis-
trict.*

*Warrant to
Constable.*

By 11 & 12 Vict. c. 43, s. 34, "it shall be lawful for the Lord Mayor of the city of London, or for any alderman of the said city,

11 & 12 Vict.
c. 43, s. 34.

(x) *Easter T.* 41 Geo. 3, MS.; *Ex parte Pilon*, 1 B. & A. 369.

(y) *Edwards v. Hodges*, 16 C. B. 477.

CH. XXII. s. 3. *Recovery before Justices (Deserted Premises).*
 City of London. for the time being, sitting at the Mansion House or Guildhall Justice Rooms in the said city, to do alone any act, at either of the said justice rooms, which by any law now in force, or by any law not containing an express enactment to the contrary hereafter to be made, is or shall be directed to be done by one or more justice." This applies to proceedings in the city of London under the before-mentioned acts (z). But although such mayor or alderman sitting as aforesaid has all the power of two justices, yet he has not the power of a metropolitan police magistrate acting under 3 & 4 Vict. c. 84, s. 13 (z), and therefore he cannot send a constable to view the premises, and to affix notices, &c., but he must proceed in like manner as two or more justices.

11 & 12 Vict.
 c. 43, s. 33.

Stipendiary
 Magistrates.

Cases within
 the Acts for
 Recovery be-
 fore Justices
 of deserted
 Premises.

A stipendiary magistrate in any city, town, liberty, borough or place (other than the city of London, or the metropolitan police district) should proceed in like manner as two or more justices (a).

The foregoing statutes do not contain any exception with respect to leases made in consideration of any fine or premium. Therefore, any such fine or premium is immaterial except so far as it tends to show that the rent reserved is not a rack-rent, or not full three-fourths of the yearly value of the demised premises (b). The statutes apply to all demises, whether written or oral, however long may be the term and however large may be the amount of rent reserved (c). It is no longer of any consequence that the lease or agreement contains no condition or proviso for re-entry for nonpayment of rent (d); and therefore this mode of proceeding may sometimes be adopted where no action for recovery of land could be supported, either in the High Court or in the County Court. But the following circumstances must concur, viz.:—1. The rent reserved must be a rack-rent, or full three-fourths of the yearly value of the demised premises. 2. One-half a year's rent at the least must be in arrear. 3. The premises must have been deserted and left uncultivated or unoccupied, so as no sufficient distress can be had to countervail the arrears of rent. No information or complaint on oath need be made before the justices; a mere request is sufficient (e). But upon an application to a metropolitan police magistrate, proof must be made to his satisfaction of the rent in arrear and desertion of the premises by the tenant (f). The justices are upon their own view to determine whether the premises are deserted or not (g): also, whether they have been left uncultivated or unoccupied so as no sufficient distress can be had to countervail the arrears of rent: also, whether the rent reserved is a rack-rent or full

(z) *Edwards v. Hodges*, 15 C. B. 477.

(a) 11 & 12 Vict. c. 43, s. 33.

(b) See *Colo Ejec.* 676.

(c) *Ex parte Pilton*, 1 B. & A. 369.

(d) 57 Geo. 3, c. 52; ante, 809; *Edwards v. Hodges*, 15 C. B. 477.

(e) *Basten v. Carew*, 3 B. & C. 649. See also *Re Perham*, 5 H. & N. 30; 11 & 12 Vict. c. 43, s. 10.

(f) 3 & 4 Vict. c. 84, s. 13; ante, 809.

(g) *Basten v. Carew*, supra.

three-fourths of the yearly value of the demised premises. Upon these points they may, if they think fit, receive the evidence or statements of any broker, surveyor, or other competent person, or of the landlord or his bailiff or receiver: but they ought to form their own judgment or conclusion (*h*). It has been decided, where a tenant ceased to reside on the premises for several months, and left them without any furniture or sufficient other property to answer the arrears of rent, that the landlord might properly proceed under the statute to recover the possession, although he knew where the tenant then was, and although the justices found a servant of the tenant on the premises when they first went to view the same (*i*). On the other hand, in a case where the wife and children of the tenant remained on the premises, but there was no furniture in the house, except three or four chairs, which were stated by the wife to belong to a neighbour: held, by the judges of assize on appeal (reversing the decision of the justices), that the premises had not been *deserted* within the meaning of the act (*k*). Where magistrates had given possession of a dwelling-house as *deserted* and unoccupied, and the judges of assize, on appeal, made an order for restitution with costs, and the tenant brought an action of trespass for the eviction against the magistrates, the constable, and the landlord; it was held, that the record of the proceedings before the magistrates was an answer to the action on behalf of all the defendants (*l*). The proper remedy is to appeal against the decision of the justices pursuant to 11 Geo. 2, c. 19, s. 17 (*m*).

CH. XXII. s. 3.
*Recovery
 before Justices
 (Deserted
 Premises).*

The order of the judges of assizes on appeal should be directed to the justices from whom the appeal comes, as the court have refused a mandamus to compel the justices of the peace to cause restitution to be made, in conformity with an order of the justices of assize on appeal, where the order was not being directed to any one (*n*). Formerly the court would not compel justices to act, who doubted their jurisdiction, though incorrectly (*o*).

If the magistrates have a record of their proceedings under this act drawn up, it will be an answer to any action of trespass brought against them or the landlord or constable who took possession, notwithstanding there may have been a successful appeal against the order (*p*).

(*h*) See *Cole Ejec.* 677.

(*i*) *Ex parte Pilton*, 1 B. & A. 369. See also *Taylorson v. Peters*, 7 A. & E. 110; decided under 8 Anne, c. 14, ss. 6, 7.

(*k*) *Ashcroft v. Bourne*, 3 B. & Adol. 684.

(*l*) *Ashcroft v. Bourne*, *supra*; *Basten v. Carew*, 3 B. & C. 649.

(*m*) *Ante*, 808; *Reg. v. Sewell*, 8 Q. B. 161.

(*n*) *Reg. v. Traill*, 12 A. & E. 761.

(*o*) *Ex parte Fulder*, 8 Dowl. 535; *Ex parte William Davy*, 2 Dowl. N. S. 24. But now see 11 & 12 Vict. c. 44, s. 5; *Reg. v. Cotton*, 15 Q. B. 574; *Coleridge, J.*; *Reg. v. Ingham*, 17 Q. B. 884.

(*p*) See *Ashcroft v. Bourne*, *supra*; *Reg. v. Sewell*, *supra*; per Abbott, C. J., in *Basten v. Carew*, *supra*.

CHAPTER XXIII.

CRIMINAL LAW AFFECTING LANDLORD OR TENANT.

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SECT. 1.—*Letting infected House or Lodgings.*

Public Health
Act, 1875.
Penalty on
letting
Houses in
which infected
Persons have
been lodging.

Penalty for
making False
Statements.

By sect. 128 of the Public Health Act (*a*), 1875 (38 & 39 Vict. c. 55), "any person who knowingly lets for hire any house, room, or part of a house in which any person has been suffering from any dangerous infectious disorder, without having such house, room, or part of a house, and all articles therein liable to retain infection, disinfected to the satisfaction of a legally-qualified medical practitioner, as testified by a certificate signed by him, such person shall be liable to a penalty not exceeding twenty pounds. For the purpose of this section the keeper of an inn shall be deemed to let part of a house to any person admitted as a guest into such inn." And by sect. 129, "any person letting for hire or showing for the purpose of letting for hire any house or part of a house, who, on being questioned by any person negotiating for the hire of such house or part of a house as to the fact of there being, or within six months previously having been, therein any person suffering from any dangerous infectious disorder, knowingly makes a false answer to such a question, shall be liable at the discretion of the court to a penalty not exceeding twenty pounds, or to imprisonment with or without hard labour for a period not exceeding one month."

SECT. 2.—*Larceny by Tenants or Lodgers.*

24 & 25 Vict.
c. 96, s. 74.
Stealing
Chattels or
Fixtures.

By 24 & 25 Vict. c. 96, s. 74, "whosoever shall *steal any chattel or fixture* let to be used by him or her in or with any house or lodging, whether the contract shall have been entered into by him or her or by her husband or by any person on behalf of him or her or her husband shall be guilty of felony, and being convicted thereof shall be liable,

(*a*) This act (sect. 2) does not apply to the metropolis. As to the metropolis, see Sanitary Act, 1866 (29 & 30 Vict. c. 90),

s. 30, which differs slightly from the corresponding section of the Public Health Act.

at the discretion of the court, to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping; and in case the value of such chattel or fixtures shall exceed the sum of 5*l.*, shall be liable, at the discretion of the court, to be kept in penal servitude for any term not exceeding seven years and not less than three years, or to be imprisoned for any term not exceeding two years, with or without hard labour, and with or without solitary confinement, and, if a male under the age of sixteen years, with or without whipping; and in every case of stealing any chattel in this section mentioned it shall be lawful to prefer an indictment in the common form as for larceny; and in every case of stealing any fixture in this section mentioned, to prefer an indictment in the same form as if the offender were not a tenant or lodger; and in either case to lay the property in the owner or person letting to hire."

CH. XXIII. s. 2

*Larceny by
Tenants or
Lodgers.*

If above 5*l.*
value.

Form of In-
dictment.

The law implies no obligation upon a lodging-house keeper to take care of the goods of his lodger. Where, therefore, certain property of a lodger who was about to quit had been stolen by a stranger, who in his absence was permitted by the occupier of the house to enter the rooms for the purpose of viewing them: it was held, that the lodging-house keeper was not responsible for the loss (*b*).

Lodging-
house Keeper
not respon-
sible for Goods
of Lodger
stolen.

SECT. 3.—*Injuries to Buildings by Tenants.*

By 24 & 25 Vict. c. 97, s. 13, "whosoever, being possessed of any dwelling-house or other building, or part of any dwelling-house or other building, held for any term of years, or other less term, or at will, or held over after the termination of any tenancy, shall unlawfully and maliciously pull down and demolish, or begin to pull down or demolish, the same or any part thereof, or shall unlawfully and maliciously pull down or sever from the freehold any fixture being fixed on or to such dwelling-house or building, or part of such dwelling-house or building, shall be guilty of a misdemeanor."

24 & 25 Vict.
c. 97, s. 13.

Pulling down
or demolish-
ing all or Part
of any
Building

or Fixture.

SECT. 4.—*Forcible Entry and Detainer (c).*

The offence of forcible entry and detainer is defined to be the violent taking or keeping possession of lands and tenements, with

Nature and
Punishment of
the Offence by
Indictment.

(*b*) *Holder v. Soulby*, 8 C. B., N. S. 254; (c) See *Cole Ejec. Chap. LXXIV.*; 29 L. J., C. P. 246; *Dansey v. Richardson*, 2 Burn's J. 590—614 (30th ed.).
3 E. & P. 144.

CH. XXIII. s. 4 menaces, force and arms, and without the authority of the law (*e*).
Forcible Entry and Detainer.

This was formerly permitted, under certain circumstances, where a person had been disseised or put out of possession (*f*); but being found very prejudicial to the public peace, it was thought necessary, by various statutes (*g*), to restrain all persons whatever from the use of such violent methods to do themselves justice. Although a man may arm himself and his friends for the defence of the possession of his house against such as threaten to make an unlawful entry, he cannot lawfully do the same in defence of his close (*h*). The indictment for forcible entry into *leasehold* premises is founded on 21 Jac. 1, c. 15; for a forcible detainer, on 8 Hen. 6, c. 9, or 21 Jac. 1, c. 15. An indictment lies also at common law for a forcible entry, although it is generally brought on the acts of parliament (*i*). No expulsion or detainer in this case need be proved, because no restitution can be awarded (*k*). The tenement in which the force was made must be described with convenient certainty; and the indictment must set forth, that the defendant actually entered, and ousted the party grieved, and continued his possession at the time of finding the indictment, otherwise he cannot have restitution, because it does not appear that he needs it (*l*). If, however, a man's wife, children, or servants continue in the house, or upon the land, he is not ousted of his possession; but his cattle being upon the ground do not preserve his possession (*m*). A repugnancy in setting forth the offence in an indictment upon any of the statutes is an incurable fault (*n*): an indictment for forcible entry was quashed, therefore, for not setting forth that the party was seised or disseised; or what estate he had in the tenement; for if he had only a term for years, then the entry must be laid into the freehold of A., in the possession of B. (*o*). Upon the finding by the grand jury of the indictment, the judge of assize has a discretion to refuse to award restitution (*p*).

Punishment
of the Offence
by Justices.

By 8 Hen. 6, c. 9, for a more speedy remedy, the party grieved may complain to any one justice, or to a mayor, sheriff or bailiff within their liberties. Concerning which power of the justice, it is enacted as follows:—After complaint made to such justice, by the party grieved, of a forcible entry made into lands, tenements or other possessions, or forcibly holding thereof, he shall, within a convenient time, at the costs of the party grieved (without any examining or

(*e*) 4 Blac. Com. 148.

(*f*) 1 Hawk. P. C. c. 64, s. 1; 1 Russ. on Crimes, 421 (4th ed.).

(*g*) 5 Ric. 2, st. 1, c. 8; 15 Ric. 2, c. 2; 8 Hen. 6, c. 9; 31 Eliz. c. 11; 21 Jac. 1, c. 15; 2 Chit. Stat. 154—157 (3rd ed.); 1 Russ. on Crimes, Ch. XXIX.; 2 Burn's J. 592—595 (30th ed.).

(*h*) *Rez v. Bishop of Bangor*, 1 Russ. on Crimes, 388 (*y*) (4th ed.).

(*i*) *Rez v. Baker*, 3 Burr. 1731.

(*k*) *Rez v. Wilson*, 8 T. R. 357.

(*l*) Hawk. P. C. c. 64, ss. 37, 41.

(*m*) Dalt. c. 132.

(*n*) 1 Hawk. P. C. c. 64, s. 39.

(*o*) 3 Salk. 169; 3 Burr. 1732; *Reg. v. Bowser*, 8 Dowl. 128.

(*p*) *Reg. v. Harland*, 8 A. & E. 826; 2 Moo. & R. 141.

standing upon the right or title of either party), take sufficient power CH. XXIII s. 4 of the county, and go to the place where the force is made (q). All Forcible Entry and Detainer. people of the county, as well the sheriff as others, shall be attendant on the justices, to arrest the offenders, on pain of imprisonment and fine to the Queen: and if the doors be shut, and they within the house shall deny the justice to enter, it seems he may break open the house to remove the force (r): if, after the entry made, the justice “shall find such force, he shall cause the offenders to be arrested;” and the offenders being arrested, they shall be put in the next gaol, there to abide convict by the record of the same justice, until they have made fine and ransom to the Queen (s). The justice ought to “make a record of such force by him viewed;” which record shall be a sufficient conviction of the offenders, and the parties shall not be allowed to traverse it. This record, being made out of the sessions, by a particular justice, may be kept by him; or he may make it indented, and certify the one part into the Queen’s Bench, or leave it with the clerk of the peace; and the other part he may keep himself. For this view of the force by the justice, being a judge of record, makes his record thereof, in the judgment of the law, as strong and effectual as if the offenders had confessed the force before him; and, as far as regards the restraining of traverse, more effectual than if the force had been found by a jury, upon the evidence of others. A conviction for a forcible detainer must show on the face of it an unlawful entry; as well as a forcible detainer: a conviction on the view merely of the justices, without any evidence of an unlawful entry, is bad, even though information and complaint of an unlawful expulsion be stated (t). An inquisition taken under the 8 Hen. 6, c. 9, should set forth the estate possessed by the party in the property (u). It is doubtful whether the holding over by a termor after the expiration of his term is constructively an unlawful entry (x). The court will not compel magistrates to hear a complaint and act summarily under the statutes (y).

Although regularly the justices only who were present at the inquiry, and when the indictment was found, ought to award restitution; yet if the record of the presentment or indictment be certified by the justice or justices into the Queen’s Bench, or the same presentment or indictment be removed or certified thither by certiorari, the justices of that court may award a writ of restitution to the sheriff, to restore possession to the party expelled; for the justices of the Queen’s Bench have a supreme authority in all cases of the crown (z). Also where,

Restitution by the Queen’s Bench.

(q) Dalt. c. 44; 1 Hawk. P. C. c. 66, 817.

s. 8.

(r) Dalt. c. 44.

(s) 15 Ric. 2, c. 2.

(t) *Rez v. Wilson*, 1 A. & E. 627; 3 Id.

(u) *Reg. v. Bowser*, 8 Dowl. 128.

(x) *Rez v. Oakley*, 4 B. & Adol. 307.

(y) *Ex parte Davy*, 2 Dowl. N. S. 24.

(z) Dalt. c. 44.

CR. XXIII. s. 4
*Forcible Entry
 and Detainer.*

upon removal of the proceedings into the Queen's Bench, the conviction shall be quashed, the court will order restitution to the party injured. Where a conviction of forcible entry was quashed for the uncertainty of "messuage or tenement," but the restitution was opposed, on an affidavit that the party's title (which was by lease) was expired since the conviction; the court said they had no discretionary power in this case, but were bound to award restitution on quashing the conviction (*a*).

Riot.

If a forcible entry or detainer shall be made by three persons or more, it is also a riot, and may be proceeded against as such, if no inquiry has before been made of the force (*b*).

What is a
 forcible
 Entry.

In general, it seems clear, that to denominate the entry forcible, it ought to be accompanied with some circumstances of actual *violence or terror*; and therefore that an entry, which has no other force than such as is implied by the law in every trespass whatsoever, is not within these statutes (*c*). With respect to *violence*, it seems to be agreed that an entry may be forcible, not only in respect of a violence actually done to the person of a man,—as by beating him if he refuse to relinquish his possession;—but also in respect of any other kind of violence in the manner of the entry,—as by breaking open the doors of a house, whether any person be in it or not, especially if it be a dwelling-house; and perhaps, also, by an act of outrage after the entry,—as by carrying away the party's goods. It seems, however, that an entry is not forcible, by the bare drawing up a latch, or pulling back the bolt of the door, there being no appearance therein of being done by a strong hand or multitude of people: and it has been held, that an entry into a house through a window, or by opening a door with a key, is not forcible (*d*). With respect to the circumstances of *terror*, it is to be observed, that wherever a man, either by his behaviour or speech at the time of his entry, gives those who are in possession just cause to fear that he will do them some bodily hurt, if they will not give way to him, his entry is esteemed forcible. This is the case whether he cause such a terror, by carrying with him an unusual number of attendants: or by arming himself in such a manner as plainly intimates a design to kill, maim or beat those who shall continue in possession; or threatening to do so, or using such expressions as plainly imply a purpose of using force (*e*). It seems that if a person enter into another man's house or ground with apparent violence, though it be but to cut or take away his corn, grass or other goods, or to fell or chop wood, or do any other like trespass,

(*a*) *Rex v. Jones*, 1 Stra. 474.

(*b*) Dalt. c. 44; 1 Russ. on Crimes, 380, 428 (4th ed.).

(*c*) *Rex v. Smyth*, 5 C. & P. 201; 1 Moo. & R. 155; 1 Russ. on Crimes, 426

(4th ed.); 2 Burn's J. 597 (30th ed.).

(*d*) 1 Hawk. P. C. c. 64, s. 26; 1 Russ. on Crimes, 427 (4th ed.).

(*e*) 1 Hawk. P. C. c. 64, s. 27.

and though he do not put the party out of his possession, it is a forcible entry. If the entry were peaceable, and after such entry made, parties cut or take away any other man's corn, grass, wood or other goods, without apparent violence or force, such acts are not punishable as forcible entries (*f*); but if he enter peaceably, and then by force or violence cut or take away any corn, grass or wood, or forcibly or wrongfully carry away any other goods there being, it seems to be a forcible entry punishable by the statutes. But no entry is forcible from any threatening to spoil another's goods, or to destroy his cattle, or to do him any other such like damage, which is not personal (*f*). It is a forcible entry, if a man, having an estate in land, by a defeasible title, continue with force in the possession thereof, after a claim made by one who had a right of entry thereto (*g*).

CR. XXIII. s. 4
*Forcible Entry
and Detainer.*

It is clear that a forcible entry may be committed by a single person, as well as by twenty (*h*); but those who accompany a man, when he makes a forcible entry, shall be judged to enter with him, whether they actually come upon the lands or not (*i*). He, however, who barely agrees to a forcible entry made to his own use, without his knowledge or privity, shall not be adjudged to make an entry within these statutes, because he noway concurred in or promoted the force (*k*).

By whom a
forcible Entry
may be made.

The same circumstances of violence and terror, which will make an entry forcible, will make a detainer forcible also: and a detainer may be forcible, whether the entry were forcible or not (*l*).

What is a
forcible De-
tainer.

(*f*) Dalt. c. 126.

(*g*) 1 Hawk. P. C. c. 64, s. 23.

(*h*) Id. s. 29.

(*i*) Id. s. 22.

(*k*) 1 Hawk. P. C. c. 64, s. 24.

(*l*) Id. s. 30; 1 Russ. on Crimes, 427
(4th ed.); 2 Burn's J. 598 (30th ed.).

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APPENDIX OF STATUTES, PRECEDENTS AND FORMS.

APPENDIX A.

STATUTES (a).

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SECT. 1.—8 & 9 VICT. c. 124.

An Act to facilitate the Granting of certain Leases.

[8th August, 1845.]

APP. A. s. 1.

8 & 9 Vict.
c. 124.

WHEREAS it is expedient to facilitate the leasing of lands and tenements: be it enacted, [&c.] that whenever any party to any deed, made according to the forms set forth in the first schedule to this act, or to any other deed which shall be expressed to be made in pursuance of this act, shall employ in such deed respectively any of the forms of words contained in column 1 of the second schedule hereto annexed, and distinguished by any number therein, such deed shall be taken to have the same effect, and be construed, as if such party had inserted in such deed the form of words contained in column 2 of the same schedule, and distinguished by the same number as is annexed to the form of words employed by such party, but it shall not be necessary in any such deed to insert any such number.

2. That every such deed, unless any exception be specially made therein, shall be held and construed to include all outhouses, buildings, barns, stables, yards, gardens, cellars, ancient and other lights, paths, passages, ways, waters, water-courses, liberties, privileges, easements, profits, commodities, emoluments, hereditaments, and appurtenances whatsoever to the lands and tenements therein comprised belonging or in anywise appertaining.

3. That in taxing any bill for preparing and executing any deed under this act, it shall be lawful for the taxing officer, and he is hereby required, in estimating the proper sum to be charged for such transaction, to consider not the length of such deed, but only the skill and labour employed, and responsibility incurred in the preparation thereof.

4. That any deed or part of a deed, which shall fail to take effect by virtue of this act, shall nevertheless be as valid and effectual, and shall bind the parties

re th
d
f the
nd Schedule
employ, the
De 1 to
the same Effect
as if Words of
Column 2 were
inserted.

Deed to include
all Houses, &c.

Remuneration
for Deed under
the Act not to
be by Len
only.

Deed failing to
take effect by
this Act to be
valid.

(a) For a reference to the numerous statutes cited in the text (the material sections of which are given at length), see the "Table of Statutes cited," which follows the "Table of Cases" at the beginning of the book. The statutes on

the subject of landlord and tenant, up to 1880, are collected with notes in Chitty's Statutes, vol. 3, tit. "Landlord and Tenant," and vol. 4, tits. "Leases" and "Leases (Ecclesiastical, College and Hospital)."

APP. A. s. 1 8 & 9 VICT. c. 124.	thereto, as far as the rules of law and equity will permit, as if this act had not been made.
Construction Clause.	5. That in the construction, and for the purposes of this act, and the schedules hereto annexed, unless there be something in the subject or context repugnant to such construction, the word "lands" shall extend to all tenements and hereditaments of freehold tenure, and to such customary lands as will pass by deed, or deed and surrender, and not by surrender alone, or any undivided part or share therein respectively; and every word importing the singular number only, shall extend and be applied to several persons or things, as well as one person or thing, and the converse; and every word importing the masculine gender only, shall extend and be applied to a female as well as a male; and the word "party" shall mean and include any body politic or corporate, or collegiate, as well as an individual.
Schedules, &c. part of Act.	6. That the schedules, and the directions and forms therein contained, shall be deemed and taken to be parts of this act.
Commencement of Act.	7. That this act shall commence and take effect from and after the first day of October [1845].
Extent of Act.	8. That this act shall not extend to Scotland.

THE FIRST SCHEDULE.

THIS INDENTURE, made the day of , one thousand eight hundred and forty [*or other year*], in pursuance of an act to facilitate the granting of certain leases, BETWEEN [*here insert the names of the parties, and recitals, if any*]: WITNESSETH, that the said [*lessor*] or [*lessors*] doth, or do, demise unto the said [*lessee*] or [*lessees*], his [*or their*] executors, administrators and assigns, ALL, &c. [*parcels*], FROM the day of for the term of thence ensuing: YIELDING therefor during the said term the rent of [*state the rent and mode of payment*]. (*b*)

IN WITNESS whereof the said parties hereto have hereunto set their hands and seals.

THE SECOND SCHEDULE.

Directions as to the Forms in this Schedule.

1. Parties who use any of the forms in the first column of this schedule, may substitute for the words "lessee" or "lessor," any name or names: and in every such case corresponding substitutions shall be taken to be made in the corresponding forms in the second column.

2. Such parties may substitute the feminine gender for the masculine, or the plural number for the singular, in the forms in the first column of this schedule; and corresponding changes shall be taken to be made in the corresponding forms in the second column.

3. Such parties may fill up the blank spaces left in the forms 4 and 5 in the first column of this schedule so employed by them, with any words or figures, and the words or figures so introduced shall be taken to be inserted in the corresponding blank spaces left in the forms embodied.

4. Such parties may introduce into or annex to any of the forms in the first column any express exceptions from, or express qualifications thereof respectively; and the like exceptions or qualifications shall be taken to be made from or in the corresponding forms in the second column.

5. Where the premises demised shall be of freehold tenure, the covenants 1 to 10 shall be taken to be made with, and the proviso 11 to apply to, the heirs and assigns of the lessor. And where the premises demised shall be of leasehold tenure, the covenants and proviso shall be taken to be made with and apply to the lessor, his executors, administrators and assigns.

Column 1.

1. That the said [*lessee*] covenants with the said [*lessor*] to pay rent.

Column 2.

1. And the said [*lessee*] doth hereby for himself, his heirs, executors, administrators and assigns, covenant with the said [*lessor*], that he, the said [*lessee*], his executors, administrators and assigns, will, during the said

(*b*) Also the covenants—THAT, &c., as in column 1 (*selecting those intended*).

Column 1.

Column 2.

ART. A. s. 1
8 & 9 VICT.
c. 124.

term, pay unto the said [*lessor*] the rent hereby reserved, in manner hereinbefore mentioned, without any deduction whatsoever.

2. And to pay taxes;

2. And also will pay all taxes, rates, duties and assessments whatsoever, whether parochial, parliamentary or otherwise, now charged or hereafter to be charged upon the said demised premises, or upon the said [*lessor*] on account thereof (excepting land tax, and excepting, in Ireland, tithe rent-charge, and such portion of the poor rate as the [*lessor*] is or may be liable to pay; and excepting also all taxes, rates, duties and assessments whatsoever, or any portion thereof, which the [*lessee*] is or may be by law exempted from (c)).

3. And to repair;

3. And also will, during the said term, well and sufficiently repair, maintain, pave, empty, cleanse, amend and keep the said demised premises, with the appurtenances, in good and substantial repair, together with all chimney-pieces, windows, doors, fastenings, water-closets, cisterns, partitions, fixed presses, shelves, pipes, pumps, pales, rails, locks and keys, and all other fixtures and things, which at any time during the said term shall be erected and made, when, where and so often as need shall be.

4. And to paint outside every year;

4. And also that the said [*lessee*], his executors, administrators and assigns, will, in every year in the said term, paint all the outside wood-work and iron-work belonging to the said premises, with two coats of proper oil colours, in a workmanlike manner.

5. And to paint and paper inside every year;

5. And also that the said [*lessee*], his executors, administrators and assigns, will, in every year, paint the inside wood, iron and other works, now or usually painted, with two coats of proper oil colours, in a workmanlike manner; and also re-paper with paper of a quality as at present, such parts of the premises as are now papered; and also wash, stop, whiten or colour such parts of the said premises as are now plastered.

6. And to insure from fire in the joint names of the said [*lessor*] and the said [*lessee*];

6. And also that the said [*lessee*], his executors, administrators and assigns, will forthwith insure the said premises hereby demised to the full value thereof, in some respectable insurance office, in the joint names of the said [*lessor*], his executors, administrators and assigns, and the said [*lessee*], his executors, administrators or assigns, and keep the same so insured during the said term: And will upon the request of the said [*lessor*] or his agent, show the receipt for the last premium paid for such insurance for every current year: And as often as the said premises hereby demised shall be burnt down or damaged by fire, all and every the sums or sum of money which shall be recovered or received by the said [*lessee*], his executors, administrators or assigns, for or in respect of such insurance, shall be laid out and expended by him in building or repairing the said demised premises, or such parts thereof as shall be burnt down or damaged by fire as aforesaid.

To show receipts;

And to rebuild in case of fire.

7. And it is hereby agreed that it shall be lawful for the said [*lessor*] and his agents, at all seasonable times during the said term, to enter the said demised premises, to take a schedule of the fixtures and things made and erected thereupon, and to examine the condition of the said premises; and further, that all wants of reparation, which upon such views shall be found, and for the amend-

7. And that the said [*lessor*] may enter and view state of repair, and that the said [*lessee*] will repair according to notice.

(c) It is difficult to say from what taxes, rates, &c. a tenant is by law exempt; ante, Chap. XV.

APP. A. s. 1.
8 & 9 VICT.
c. 124.

Column 1.

Column 2.

8. That the said [lessee] will not use premises as a shop.

9. And will not assign without leave.

10. And that he will leave premises in good repair.

11. Proviso for re-entry by the said lessor on non-payment of rent or non-performance of covenants.

12. The said [lessor] covenants with the said [lessee] for quiet enjoyment.

ment of which notice in writing shall be left at the premises, the said [lessee], his executors, administrators and assigns, will, within three calendar months next after every such notice, well and sufficiently repair and make good accordingly.

8. And also, that the said [lessee], his executors, administrators and assigns, will not convert, use or occupy the said premises, or any part thereof, into or as a shop, warehouse or other place, for carrying on any trade or business whatsoever, or suffer the said premises to be used for any such purpose or otherwise than as a private dwelling-house, without the consent in writing of the said [lessor].

9. And also, that the said [lessee] shall not nor will during the said term assign, transfer or set over, or otherwise by any act or deed procure the said premises, or any of them, to be assigned, transferred or set over unto any person or persons whomsoever, without the consent in writing of the said [lessor], his executors, administrators or assigns, first had and obtained.

10. And further, that the said [lessee] will, at the expiration or other sooner determination of the said term, peaceably surrender and yield up unto the said [lessor] the said premises hereby demised, with the appurtenances, together with all buildings, erections and fixtures, now or hereafter to be built or erected thereon, in good and substantial repair and condition in all respects, reasonable wear and tear, and damage by fire only excepted.

11. Provided always, and it is expressly agreed, that if the rent hereby reserved, or any part thereof, shall be unpaid for fifteen days after any of the days on which the same ought to have been paid (although no formal demand shall have been made thereof), or in case of the breach or non-performance of any of the covenants and agreements herein contained on the part of the said [lessee], his executors, administrators and assigns, then and in either of such cases it shall be lawful for the said [lessor] at any time thereafter, into and upon the said demised premises, or any part thereof, in the name of the whole to re-enter, and the same to have again, repossess and enjoy as of his or their former estate, anything hereinafter (d) contained to the contrary notwithstanding.

12. And the [lessor] doth hereby for himself, his heirs, executors, administrators and assigns, covenant with the said [lessee], his executors, administrators and assigns, that he and they paying the rent hereby reserved, and performing the covenants hereinbefore on his and their part contained, shall and may peaceably possess and enjoy the said demised premises for the term hereby granted, without any interruption or disturbance from the said [lessor], his executors, administrators or assigns, or any other person or persons lawfully claiming by, from or under him, them or any of them.

(d) This is inaccurate; but the mistake does not appear to be so serious as in *Doe*

d. Spencer v. Godwin, 4 M. & S. 265; *Cole Ejec.* 411.

SECT. 2.—11 & 12 VICT. c. 29.

APP. A. s. 2.
11 & 12 VICT.
c. 29.

An Act to enable Persons having a right to kill Hares in England and Wales to do so, by themselves or Persons authorized by them, without being required to take out a Game Certificate (c).
[22nd July, 1848.]

WHEREAS by an act passed in the forty-eighth year of the reign of King George the Third, intituled "An Act for repealing the Duties of Assessed Taxes, and granting new Duties in lieu thereof, and certain additional Duties to be consolidated therewith, and also for repealing the Stamp Duties on Game Certificates, and granting new Duties in lieu thereof, to be placed under the Management of the Commissioners for the Affairs of Taxes," and by an act passed in the fifty-second year of the reign of the said King George the Third, intituled "An Act for granting to His Majesty certain new and additional Duties of Assessed Taxes, and for consolidating the same with the former Duties of Assessed Taxes," and by an act passed in the third year of the reign of Her present Majesty, intituled "An Act for granting to Her Majesty Duties of Customs, Excise, and Assessed Taxes," certain duties of assessed taxes were granted to her Majesty the Queen upon, amongst other things, every person who shall use any dog, gun, net, or other engine for the purpose of taking or killing any game whatever, or shall assist in any manner in the taking or killing of any game: And whereas by divers laws now in force penalties are imposed on all persons taking or killing, or assisting in the taking or killing of, amongst other things, any game whatever, who shall not have obtained a certificate of the due payment of such duties: And whereas it has been found that much damage has been and is continually done by hares to the produce of inclosed lands, and that great losses have thereby accrued and do accrue to the occupiers of such land; and it is expedient that persons in the actual occupation of such inclosed lands or the owners thereof, who have the right of killing game thereon, should be allowed to take, kill and destroy hares thereon, without the payment of the said duties of assessed taxes, and without the incurring of any of the penalties above mentioned: be it therefore enacted, &c., that from and after the passing of this act it shall be lawful for any person, being in the actual occupation of any inclosed lands, or for any owner thereof who has the right of killing game thereon, by himself or by any person directed or authorized by him in writing, according to the form in the schedule to this act annexed, or to the like effect, so to do, to take, kill, or destroy any hare then being in or upon any such inclosed lands, without the payment of any such duties of assessed taxes as aforesaid, and without the obtaining of an annual game certificate.

48 Geo. 3, c. 55.

52 Geo. 3, c. 93.

3 & 4 Vict. c. 17.

Persons in the Occupation of inclosed Ground, and in certain cases Owners may kill Hares without a Game Certificate.

2. That no owner or occupier of land as aforesaid shall be authorized to grant or continue, under the provisions of this act, authority to more than one person, at one and the same time, to kill hares upon his land within any one parish; and that he shall deliver the said authority, or a copy thereof, or cause the same to be delivered, to the clerk of the magistrates acting for the Petty Sessions Division within which the said lands are situate, who shall forthwith register the same, and the date of such registration, in a book to be kept by him for such purpose, which book shall be at all reasonable times open to the inspection of the clerk of the commissioners acting in the execution of the acts for assessed taxes or of any of the collectors of assessed taxes within such district; and the said authority, so soon as it shall have been registered as aforesaid, shall be held good until after the first day of February in the year following that within which the same is granted, unless the same be previously revoked, and notice of such revocation be given to the clerk of the magistrates as aforesaid; and the said registered authority, or the unrevoked register thereof, shall be good and sufficient evidence of the right of the person to whom authority is given by the same to kill hares upon the lands mentioned within the same without having obtained an annual game certificate.

Authority to kill Hares to be limited to One Person at the same time in any One Parish; which authority shall be sent to the Clerk of the Petty Sessions, who shall register the same.

If authority revoked, notice to be given of the same.

3. That no person so directed or authorized to kill any hare as aforesaid shall, unless otherwise chargeable, be liable to any duties of assessed taxes as game-keeper.

Persons not to be liable to Tax on Game-keepers.

(c) This statute is printed more in illustration of the Ground Game Act, 1880, (p. 853, post,) than for any practical use it has. Section 4 of that act exempts the

occupier from the obligation to take out a certificate, while section 6 of the present act saves reservations of game.

APP. A. s. 2.
11 & 12 VICT.
c. 29.

To extend to
Coursing or
Hunting.

Not to autho-
rize the laying
of Poison.

Agreements re-
serving Game
to be still in
force.

Interpretation
of Act.

To extend to
England and
Wales only.

4. That from and after the passing of this act it shall be lawful for any person to pursue and kill or to join in the pursuit and killing of any hare by coursing with greyhounds, or by hunting with beagles or other hounds, without having obtained an annual game certificate.

5. That nothing herein contained shall extend or be taken or construed to extend to the making it lawful for any person, with intent to destroy or injure any hares or other game, to put or cause to be put any poison or poisonous ingredient on any ground, whether open or inclosed, where game usually resort, or in any highway, or for any person to use any firearms or gun of any description, by night, for the purpose of killing any game or hares.

6. That where any tenant of any land for life or lives, years, or otherwise, now is or hereafter shall be bound by any agreement not to take, kill or destroy any game upon any lands included in such agreement, then and in all such cases nothing herein contained shall extend or be taken or construed to extend to authorize or empower such tenant to take, kill or destroy any hare upon any such lands so included in such agreement, or to authorize any other person to kill or destroy any hare upon any such lands.

7. That in the interpretation of this act the singular number shall extend to several persons and things as well as to one person or thing; and any word importing the plural number shall apply to one person or thing as well as to several persons or things; and every word importing the masculine gender only shall extend to a female as well as a male; and that the word "agreement" shall include any covenant, proviso, promise, undertaking, condition, or reservation; and that the word "parish" shall include any hamlet, township, tithing or extra-parochial place; and for the purposes of this act the word "night" shall be considered and is hereby declared to commence at the expiration of the first hour after sunset, and to conclude at the beginning of the last hour before sunrise.

8. That this act shall extend to that part of the United Kingdom called England and Wales.

SCHEDULE.

I A. B. do authorize C. D. to kill hares on ["my lands," or "the lands occupied by me," *as the case may be*], within the _____ of _____
[*here insert the name of the parish or other place, as the case may be*]. Dated this _____ day of _____ [here insert the day, month and year].
Witness. _____ A. B.

SECT. 3.—12 & 13 VICT. c. 26.

An Act for granting Relief against Defects in Leases made under Powers of Leasing, in certain Cases. [26th June, 1849.]

WHEREAS, through mistake or inadvertence on the part of persons granting leases, and through ignorance on the part of lessees of the titles of persons from whom leases are accepted, leases granted by persons having valid powers of leasing are frequently invalid as against the successors in estate of such persons by reason of the non-observance or omission of some condition or restriction, or by reason of some other deviation from the terms of such powers: and whereas leases granted in the intended exercise of such powers are sometimes invalid as against the successors in estate of the persons granting the same, by reason that at the time of granting the same the person granting the lease could not lawfully grant such lease, although at a subsequent time, and during the continuance of his estate in the hereditaments comprised in such lease, he might have granted the same in the lawful exercise of such power: and whereas it is expedient that provision should be made for granting relief in the cases aforesaid, in manner after mentioned: be it enacted [&c.], that in construing this act words importing the singular number shall include the plural number, and words importing the plural number shall include the singular number, and words importing males shall extend to females, and the word "person" shall include corporations aggregate or sole, unless in any of the cases aforesaid there be something in the context repugnant to such construction.

Interpretation
of Terms.

Leases invalid
owing to Devia-
tion from Terms
of the Power to
be deemed Con-

2. That where in the intended exercise of any such power of leasing as aforesaid, whether derived under an act of parliament or under any instrument lawfully creating such power, a lease has been or shall hereafter be granted, which

is, by reason of the non-observance or omission of some condition or restriction, or by reason of any other deviation from the terms of such power, invalid as against the person entitled after the determination of the interest of the person granting such lease to the reversion, or against other the person who, subject to any lease lawfully granted under such power, would have been entitled to the hereditaments comprised in such lease, such lease, in case the same have been made bonâ fide, and the lessee named therein, his heirs, executors, administrators or assigns (as the case may require), have entered thereunder, shall be considered in equity as a contract for a grant, at the request of the lessee, his heirs, executors, administrators or assigns (as the case may require), of a valid lease under such power, to the like purport and effect as such invalid lease as aforesaid, save so far as any variation may be necessary in order to comply with the terms of such power; and all persons who would have been bound by a lease lawfully granted under such power shall be bound in equity by such contract: provided always, that no lessee under any such invalid lease as aforesaid, his heirs, executors, administrators or assigns, shall be entitled by virtue of any such equitable contract as aforesaid to obtain any variation of such lease, where the persons who would have been bound by such contract are willing to confirm such lease without variation (f).

[3. That the acceptance of rent under any such invalid lease as aforesaid shall, as against the person so accepting the same, be deemed a confirmation of such lease. Repealed by 13 Vict. c. 17, s. 1, post].

4. That where a lease granted in the intended exercise of any such power of leasing as aforesaid is invalid by reason that at the time of the granting thereof the person granting the same could not lawfully grant such lease, but the estate of such person in the hereditaments comprised in such lease shall have continued after the time when such or the like lease might have been granted by him in the lawful exercise of such power, then and in every such case such lease shall take effect, and be as valid as if the same had been granted at such last-mentioned time, and all the provisions herein contained shall apply to every such lease.

5. That when a valid power of leasing is vested in or may be exercised by a person granting a lease, and such lease (by reason of the determination of the estate or interest of such person or otherwise) cannot have effect and continuance according to the terms thereof, independently of such power, such lease shall, for the purposes of this act, be deemed to be granted in the intended exercise of such power, although such power be not referred to in such lease.

6. Provided always, and be it enacted, that nothing in this act contained shall extend or be construed to prejudice or take away any right of action or other right or remedy to which, but for the passing of this act, the lessee named in any such lease as aforesaid, his heirs, executors, administrators or assigns, would or might have been entitled, under or by virtue of any covenant for title or quiet enjoyment contained in such lease on the part of the person granting the same, or to prejudice or take away any right of re-entry or other right or remedy to which, but for the passing of this act, the person granting such lease, his heirs, executors, administrators or assigns, or other the person for the time being entitled to the reversion expectant on the determination of such lease, would or might have been entitled, for or by reason of any breach of the covenants, conditions or provisoes contained in such lease, and on the part of the lessee, his heirs, executors, administrators or assigns, to be observed and performed.

7. That this act shall not extend to any lease by an ecclesiastical corporation or spiritual person, or to any lease of the possessions of any college, hospital or charitable foundation, or to any lease where, before the passing of this act, the hereditaments comprised in such lease have been surrendered or relinquished, or recovered adversely by reason of the invalidity thereof, or there has been any judgment or decree in any action or suit concerning the validity of such lease, and shall not prejudice or affect any action or suit already commenced and now pending in any court of law or equity, but every such action and suit may be proceeded with, and such relief had therein, as if this act had not passed.

8. That this act shall not extend to Scotland.

ART. A. s. 3.
12 & 13 VICT.
c. 26.

tracts in Equity for such Leases as might have been granted under the Power.

Proviso where the Grantor or Reversioner is willing to confirm.

Acceptance of Rent.

Leases invalid at the granting thereof may become valid if the Grantor continue in the ownership until the time when he might lawfully grant such a lease.

What shall be deemed an intended Exercise of a Power.

Saving the Rights of the Lessees under Covenants for Title and for quiet Enjoyment, and the Lessor's Right of Re-entry for Breach of Covenant, &c.

Act not to extend to certain Leases.

Pending Suits not to be prejudiced.

Extent of Act.

APP. A. s. 4.

SECT. 4.—13 VICT. c. 17.

13 VICT. c. 17.

An Act to amend an Act of the last Session of Parliament for granting Relief against Defects in Leases made under Powers of Leasing. [31st May, 1850.]

12 & 13 Vict.
c. 26.12 & 13 Vict.
c. 110.12 & 13 Vict.
c. 26, s. 3, re-
pealed.

Where there is a
Note in writing
showing Intent
to confirm, ac-
ceptance of Rent
to be deemed a
Confirmation.

Where Rever-
sioner is able
and willing to
confirm, Lease
to accept con-
firmation.

WHEREAS an act was passed in the last session of parliament, "for granting Relief against Defects in Leases made under Powers of Leasing in certain Cases;" and by another act of the same session the operation of the said first-recited act was suspended until the first day of June, one thousand eight hundred and fifty-six; And whereas it is expedient that the said first-recited act should be amended: be it therefore enacted [&c.], that so much of the said first-recited act as enacts that the acceptance of rent under any such invalid lease as therein mentioned shall, as against the person accepting the same, be deemed a confirmation of such lease, shall be repealed.

2. That where, upon or before the acceptance of rent under any such invalid lease, as in the said first-recited act mentioned, any receipt, memorandum or note in writing, confirming such lease, is signed by the person accepting such rent, or some other person by him thereunto lawfully authorized, such acceptance shall, as against the person so accepting such rent, be deemed a confirmation of such lease.

3. That where during the continuance of the possession taken under any such invalid lease, as in the said first-recited act mentioned, the person for the time being entitled (subject to such possession as aforesaid) to the hereditaments comprised in such lease, or to the possession or the receipt of the rents and profits thereof, is able to confirm such lease without variation, the lessee, his heirs, executors or administrators (as the case may require), or any person who would have been bound by the lease if the same had been valid, shall, upon the request of the person so able to confirm the same, be bound to accept a confirmation accordingly; and such confirmation may be by memorandum or note in writing, signed by the persons confirming and accepting respectively, or by some other persons by them respectively thereunto lawfully authorized; and after confirmation and acceptance of confirmation such lease shall be valid, and shall be deemed to have had from the granting thereof the same effect as if the same had been originally valid.

SECT. 5.—14 & 15 VICT. c. 25.

An Act to improve the Law of Landlord and Tenant in relation to Emblements, to Growing Crops seized in Execution, and to Agricultural Tenants' Fixtures.

[24th July, 1851.]

WHEREAS it is expedient to amend the law to prevent or lessen the evils of the right to emblements, and the loss and injury arising therefrom, and also the law relating to growing crops seized under executions, and to agricultural fixtures: be it therefore declared and enacted [&c.].

On Determina-
tion of Leases or
Tenancies under
Tenant for Life,
&c. instead of
Emblements,
Tenant to hold
until Expiration
of current Year,
&c.

1. That where the lease or tenancy of any farm or lands held by a tenant at rack-rent shall determine by the death or cesser of the estate of any landlord entitled for his life, or for any other uncertain interest, instead of claims to emblements, the tenant shall continue to hold and occupy such farm or lands until the expiration of the then current year of his tenancy, and shall then quit, upon the terms of his lease or holding, in the same manner as if such lease or tenancy were then determined by effluxion of time or other lawful means during the continuance of his landlord's estate; and the succeeding landlord or owner shall be entitled to recover and receive of the tenant in the same manner as his predecessor or such tenant's lessor could have done if he had been living or had continued the landlord or lessor a fair proportion of the rent for the period which may have elapsed from the day of the death or cesser of the estate of such predecessor or lessor to the time of the tenant so quitting, and the succeeding landlord or owner and the tenant respectively shall, as between themselves and as against each other, be entitled to all the benefits and advantages, and be subject to the terms, conditions and restrictions to which the preceding landlord or lessor and such tenant respectively would have been entitled and subject in case the lease or tenancy had determined in manner aforesaid at the expiration of such current year: provided always, that

no notice to quit shall be necessary or required by or from either party to determine any such holding and occupation as aforesaid (g).

2. That in case all or any part of the growing crops of the tenant of any farm or lands shall be seized and sold by any sheriff or other officer by virtue of any writ of fieri facias or other writ of execution, such crops, so long as the same shall remain on the farms or lands, shall, in default of sufficient distress of the goods and chattels of the tenant, be liable to the rent which may accrue and become due to the landlord after any such seizure and sale, and to the remedies by distress for recovery of such rent, and that notwithstanding any bargain and sale or assignment which may have been made or executed of such growing crops by any such sheriff or other officer (h).

3. That if any tenant of a farm or lands shall, after the passing of this act, *with the consent in writing of the landlord* for the time being, at his own costs and expense, erect any farm-building, either detached or otherwise, or put up any other building, engine or machinery, either for agricultural purposes or for the purposes of trade and agriculture (which shall not have been erected or put up in pursuance of some obligation in that behalf), then all such buildings, engines and machinery shall be the property of the tenant, and shall be removable by him notwithstanding the same may consist of separate buildings, or that the same or any part thereof may be built in or permanently fixed to the soil, so as the tenant making any such removal do not in anywise injure the land or buildings belonging to the landlord, or otherwise do put the same in like plight and condition, or as good plight and condition, as the same were in before the erection of anything so removed: provided, nevertheless, that no tenant shall, under the provision last aforesaid, be entitled to remove any such matter or thing as aforesaid without first giving to the landlord or his agent one month's previous notice in writing of his intention so to do; and thereupon it shall be lawful for the landlord, or his agent on his authority, to elect to purchase the matters and things so proposed to be removed, or any of them, and the right to remove the same shall thereby cease, and the same shall belong to the landlord; and the value thereof shall be ascertained and determined by two referees, one to be chosen by each party, or by an umpire to be named by such referees, and shall be paid or allowed in account by the landlord who shall have so elected to purchase the same (i).

4. That if any occupying tenant of land shall quit, leaving unpaid any tithe rent-charge for or charged upon such land which he was by the terms of his tenancy or holding legally or equitably liable to pay (k), and the tithe owner shall give or have given notice of proceeding by distress upon the land for recovery thereof, it shall be lawful for the landlord, or the succeeding tenant or occupier, to pay such tithe rent-charge, and any expenses incident thereto, and to recover the amount or sum of money which he may so pay over against such first-named tenant or occupier, or his legal representatives, in the same manner as if the same were a debt by simple contract due from such first-named tenant or occupier to the landlord or tenant making such payment.

5. Nothing in this act shall extend to Scotland.

APP. A. s. 5.
14 & 15 VICT.
c. 25.

Growing Crops seized and sold under Execution to be liable for accruing Rent.

Tenant may remove Buildings and Fixtures erected by him on Farms, unless Landlord elect to take to them.

Tenant quitting leaving Tithe Rent-charge unpaid, Landlord, &c. may pay the same, and recover from the first-named Tenant as if it were a simple Contract Debt.

Act not to extend to Scotland.

SECT. 6.—15 & 16 VICT. c. 76.

An Act to amend the Process, Practice and Mode of Pleading in the Superior Courts, &c. [30th June, 1852.]

209. Every tenant to whom any writ in ejectment shall be delivered, or to whose knowledge it shall come, shall forthwith give notice thereof to his land-

Tenant to give Notice of Ejectment to Landlord.

(g) See ante, 722.

(h) As to previous law, see *Wharton v. Naylor*, 12 Q. B. 673; ante, 413.

(i) See ante, 605; and see *Agricultural Holdings Act, 1875*, s. 53, post, 851. The main difference between the provisions of the present act and those of the *Agricultural Holdings Act* in reference to fixtures is, that the latter act (except in the

case of a steam engine) dispenses with the consent of the landlord. It is impossible to see how the adoption of the *Agricultural Holdings Act* in reference to fixtures only can prejudice either party. See ante, 759.

(k) See ante, Ch. XV. Sect. 15, "Tithe Rent-Charge;" post, Appendix B., s. 15, note.

APP. A. s. 6. lord, or his bailiff or receiver, under penalty of forfeiting the value of three
 15 & 16 VICT. years' improved or rack rent of the premises demised or holden in the possession
 c. 76. of such tenant, to the person of whom he holds, to be recovered by action in any
 court of common law having jurisdiction for the amount.

SECT. 7.—32 & 33 VICT. c. 41 (1).

An Act for amending the Law with respect to the Rating of Occupiers for short Terms, and the making and collecting of the Poor's Rate. [26th July, 1869.]

WHEREAS it is expedient to amend the law relating to the collection of poor rates assessed upon occupiers of hereditaments held for short terms, and to the making and collecting of the poor rate: be it therefore enacted, [&c.] as follows:—

Occupiers of Tenements let for short Terms may deduct the Poor Rate paid by them from their Rents.

Amount of Rate payable by Occupier.

Owners may agree to pay the Rate, and be allowed a Commission.

Vestries may order the Owner to be rated instead of the Occupier.

1. The occupier of any rateable hereditament let to him for a term not exceeding three months shall be entitled to deduct the amount paid by him in respect of any poor rate assessed upon such hereditament from the rent due or accruing due to the owner, and every such payment shall be a valid discharge of the rent to the extent of the rate so paid.

2. No such occupier shall be compelled to pay to the overseers at one time or within four weeks a greater amount of the rate than would be due for one quarter of the year.

3. In case the rateable value of any hereditament does not exceed twenty pounds, if the hereditament is situate in the metropolis, or thirteen pounds if situate in any parish wholly or partly within the borough of Liverpool, or ten pounds if situate in any parish wholly or partly within the city of Manchester or the borough of Birmingham, or eight pounds if situate elsewhere, and the owner of such hereditament is willing to enter into an agreement in writing with the overseers to become liable to them for the poor rates assessed in respect of such hereditament, for any term not being less than one year from the date of such agreement, and to pay the poor rates whether the hereditament is occupied or not, the overseers may, subject nevertheless to the control of the vestry, agree with the owner to receive the rates from him, and to allow to him a commission not exceeding twenty-five per cent. on the amount thereof.

4. The vestry of any parish may from time to time order that the owners of all rateable hereditaments to which section three of this act extends, situate within such parish, shall be rated to the poor rate in respect of such rateable hereditaments, instead of the occupiers, on all rates made after the date of such order; and thereupon and so long as such order shall be in force the following enactments shall have effect:

1. The overseers shall rate the owners instead of the occupiers, and shall allow to them an abatement or deduction of fifteen per centum from the amount of the rate:

2. If the owner of one or more such rateable hereditaments shall give notice to the overseers in writing that he is willing to be rated for any term not being less than one year in respect of all such rateable hereditaments of which he is the owner, whether the same be occupied or not, the overseers shall rate such owner accordingly, and allow to him a further abatement or deduction not exceeding fifteen per centum from the amount of the rate during the time he is so rated:

3. The vestry may by resolution rescind any such order after a day to be fixed by them, such day being not less than six months after the passing of such resolution, but the order shall continue in force with respect to all rates made before the date on which the resolution takes effect:

Provided that this clause shall not be applicable to any rateable hereditament in which a dwelling house shall not be included.

8. When an owner who has become liable to pay the poor rate omits or neglects to pay, before the 5th day of June in any year, any rate or any instalment thereof which has become due previously to the preceding fifth day of January, and has been duly demanded by a demand-note delivered to him or left at his usual or last known place of abode, he shall not be entitled to deduct or receive any commission, abatement, or allowance to which he would, except for such omission or neglect, be entitled under this act, but shall be liable to pay, and shall pay, such rate or instalment in full.

6. The statute thirteenth and fourteenth Victoria, chapter ninety-nine, with respect to the rating of small tenements, and so much of any local statute as relates to the rating of owners instead of occupiers, are hereby repealed, so far as the same apply to any poor rate made after this act comes into operation.

7. Every payment of a rate by the occupier, notwithstanding the amount thereof, may be deducted from his rent as herein provided, and every payment of a rate by the owner, whether he is himself rated instead of the occupier, or has agreed with the occupier or with the overseers to pay such rate, and notwithstanding any allowance or deduction which the overseers are empowered to make from the rate, shall be deemed a payment of the full rate by the occupier for the purpose of any qualification or franchise which as regards rating depends upon the payment of the poor rate.

8. Where an owner who has undertaken, whether by agreement with the occupier or with the overseers, to pay the poor rates, or has otherwise become liable to pay the same, omits or neglects to pay any such rate, the occupier may pay the same and deduct the amount from the rent due or accruing due to the owner, and the receipt for such rate shall be a valid discharge of the rent to the extent of the rate so paid.

9. Every owner who agrees with the overseers to pay the poor rate, or who is rated or liable to be rated for any hereditament instead of the occupier, shall deliver to the overseers, from time to time, when required by them, in writing, a list containing the names of the actual occupiers of the hereditaments comprised in such agreement, or for which he is so rated or liable to be rated; and if any such owner wilfully omits to deliver such list when required to do so, or wilfully omits therefrom or misstates therein the name of any occupier, he shall for every such omission or misstatement be liable, on summary conviction, to a penalty not exceeding two pounds.

10. Section twenty-eight of "The Representation of the People Act, 1867," with respect to notice to be given of rates in arrear, shall apply to occupiers of premises capable of conferring the parliamentary franchise, although the owners of such premises have become liable for the rates assessed thereon under the provisions of this act.

11. Where the owner has become liable to the payment of the poor rates, the rates due from him, together with the costs and charges of levying and recovering the same, may be levied on the goods of the owner, and be recovered from him in the same way as poor rates may be recovered from the occupier.

12. Notwithstanding the owner of any such rateable hereditament as aforesaid has become liable for payment of the poor rates assessed thereon, the goods and chattels of the occupier shall be liable to be distrained and sold for payment of such rates as may accrue during his occupation of the premises, at any time whilst such rates remain unpaid by the owner, subject to the following provisions:

1. That no such distress shall be levied unless the rate has been demanded in writing by the overseers from the occupier, and the occupier has failed to pay the same within fourteen days after the service of such demand:
2. That no greater sum shall be raised by such distress than shall at the time of making the same be actually due from the occupier for rent of the premises on which the distress is made:
3. That any such occupier shall be entitled to deduct the amount of rates for which such distraint is made, and the expense of distraint, from the rent due or accruing due to the owner, and every such payment shall be a valid discharge of the rent to the extent of the rate and expenses paid.

13. Every owner of any hereditament for the rates of which he has become liable shall have the same right of appeal (subject to the same conditions and consequences) against the valuation lists and the poor rates as if he were the occupier thereof.

ART. A. s. 7.
32 & 33 VICT.
c. 41.

Owners omitting to pay Rates before the fifth day of June to forfeit Commission.

Repeal of 13 & 14 Vict. c. 90, &c., so far as the same apply to the Poor Rate.

(Constructive payment of the Rate.

Where Owners omit to pay Rates, the Occupiers paying the same may deduct the Amount from the Rent.

Owners to give Lists of Occupiers, and liable to Penalty for wilful Omission.

Notice to Occupiers of Rates in arrear.

Liability of Owner under Agreement.

Recovery of Rates unpaid by the Owner.

Owner may appeal against Valuation List and Rate.

APP. A. s. 7.
32 & 33 VICT.
c. 41.

The Overseers to
state the Period
for which Poor
Rate is made.

Proviso.

Overseers may
make Poor Rate
payable by In-
stalments.

Provision for
successive Occu-
piers, and for
Occupiers
coming into
unoccupied
Hereditaments.

When the Poor
Rate shall be
deemed to be
made.

Evidence of
making and
publication of
Rates.

Overseers to
insert Names of
all Occupiers in
the Rate.

Penalty for
Omission.

Saving of Fran-
chises.

Interpretation
of Terms.

14. The overseers of every parish when they make a poor rate shall set forth in the title of the rate the period for which the same is estimated, and if the same is payable by instalments, the amount of each instalment and the date at which each instalment is payable; provided that if the necessities of the parish shall require it, another rate may be made before such period shall have elapsed.

15. The overseers who make the poor rate for a period exceeding three months may declare that the same shall be paid by instalments at such times as they shall specify, and thereupon each instalment only shall be enforceable as and when it falls due, and the payment of any such instalment shall, as respects any qualification or franchise depending upon the payment of the poor rate, be deemed a payment of such rate in respect of the period to which such instalment applies.

16. If the occupier assessed in the rate when made shall cease to occupy before the rate shall have been wholly discharged, or if the hereditament being unoccupied at the time of the making of the rate become occupied during the period for which the rate is made, the overseers shall enter in the rate book the name of the person who succeeds or comes into the occupation, as the case may be, and the date when such occupation commences, so far as the same shall be known to them, and such occupier shall thenceforth be deemed to have been actually rated from the date so entered by the overseer, and shall be liable to pay so much of the rate as shall be proportionate to the time between the commencement of his occupation and the expiration of the period for which the rate was made, in like manner, and with the like remedy of appeal, as if he had been rated when the rate was made; and an outgoing occupier shall remain liable in like manner for so much and no more of the rate as is proportionate to the time of his occupation within the period for which the rate was made; and the twelfth section of the statute 17 Geo. 2, c. 38, shall be repealed.

17. A poor rate shall be deemed to be made on the day when it is allowed by the justices, and if the justices sever in their allowance then on the day of the last allowance.

18. The production of the book purporting to contain a poor rate, with the allowance of the rate by the justices, shall, if the rate is made in the form prescribed by law, be *prima facie* evidence of the due making and publication of such rate.

19. The overseers in making out the poor rate shall, in every case, whether the rate is collected from the owner or occupier, or the owner is liable to the payment of the rate instead of the occupier, enter in the occupiers' column of the rate book the name of the occupier of every rateable hereditament, and such occupier shall be deemed to be duly rated for any qualification or franchise as aforesaid; and if any overseer negligently or wilfully and without reasonable cause omits the name of the occupier of any rateable hereditament from the rate, or negligently or wilfully misstates any name therein, such overseer shall for every such omission or misstatement be liable on summary conviction to a penalty not exceeding two pounds; provided that any occupier whose name has been omitted shall, notwithstanding such omission and that no claim to be rated has been made by him, be entitled to every qualification and franchise depending upon rating, in the same manner as if his name had not been so omitted.

20. The word "overseer" shall include every authority that makes an assessment for the poor rate; the words "poor rate" shall mean the assessment for the relief of the poor, and for the other purposes chargeable thereon according to law, and in the metropolis shall extend to every rate made by the overseers, and chargeable upon the same property as the poor rate; the word "owner" shall mean any person receiving or claiming the rent of the hereditament for his own use, or receiving the same for the use of any corporation aggregate, or of any public company, or of any landlord or lessee who shall be a minor, a married woman, or insane, or for the use of any person for whom he is acting as agent; the word "parish" shall signify every place for which a separate overseer can be appointed; the word "vestry" shall include not only the vestry of a parish existing under the authority of some general or special act of parliament, or by special custom or otherwise, but also the meeting of the inhabitants of any township, vill, or place having a separate overseer, and for which a separate poor rate is made, held after notice given in like manner as is required by law in regard to the meetings of vestries; and the word "metropolis" shall

include only the metropolis as defined by "The Metropolis Management Act, 1855,"

21. This act shall not extend to Scotland or to Ireland.

22. This act may be cited as "The Poor Rate Assessment and Collection Act, 1869," and shall come into operation on the twenty-ninth of September, 1869: provided that the vestry of any parish may before that day order that the owners shall be rated instead of the occupiers under this act, but no such order shall take effect until after the said twenty-ninth day of September, 1869.

APP. A. s. 7.
32 & 33 VICT.
c. 41.

Application of
Act.
Short Title.
Commencement
of Act.

SECT. 8.—33 & 34 VICT. c. 97.

An Act for granting certain Stamp Duties in lieu of Duties of the same kind now payable under various Acts, and consolidating and amending Provisions relating thereto. [10th August, 1870.]

[The following sections are selected as relating to the subjects treated of in this work.]

1. This act may be cited as "The Stamp Act, 1870," and shall come into operation on the first day of January, 1871, which date is hereinafter referred to as the commencement of this act.

Short Title and
Commencement
of Act.

3. From and after the commencement of this act, and subject to the exemptions contained in the schedule to this act, and in any other acts for the time being in force, there shall be charged for the use of her Majesty, her heirs and successors, upon the several instruments specified in the schedule to this act, the several duties in the said schedule specified, and no other duties (m). [This in effect abolishes PROGRESSIVE DUTY.]

Grant of Duties
in Schedule.

Progressive
Duty abolished.

4. Any instrument which by any act heretofore passed, and not relating to stamp duties, is specifically charged with the duty of thirty-five shillings, shall, from and after the commencement of this act, be chargeable only with the duty of ten shillings in lieu of the said duty of thirty-five shillings.

As to Instru-
ments charged
with the Duty
of 35s.

6. (1.) All stamp duties which may from time to time be chargeable by law upon any instruments, are to be paid and denoted according to the general and special regulations in this act contained.

All Duties to be
paid according
to the regula-
tions of this
Act, and the
Schedule to be
read as part of
this Act.

(2.) The said schedule and everything therein contained is to be read and construed as part of this act. [See extracts from Schedule, post, 838.]

GENERAL REGULATIONS.

7. (1.) Every instrument written upon stamped material is to be written in such manner, and every instrument partly or wholly written before being stamped is to be so stamped, that the stamp may appear on the face of the instrument, and cannot be used for or applied to any other instrument written upon the same piece of material.

How Instru-
ments are to be
written and
stamped.

(2.) If more than one instrument be written upon the same piece of material, every one of such instruments is to be separately and distinctly stamped with the duty with which it is chargeable.

8. Except where express provision to the contrary is made by this or any other act,—

Instruments to
be separately
charged with
Duty in certain
Cases.

(1.) An instrument containing or relating to several distinct matters is to be separately and distinctly charged, as if it were a separate instrument, with duty in respect of each of such matters;

(2.) An instrument made for any consideration or considerations in respect whereof it is chargeable with ad valorem duty and also for any further or other valuable consideration or considerations (n), is to be charged with duty in respect of such last-mentioned consideration or considerations, as if it were a separate instrument made for such consideration or considerations only.

10. All the facts and circumstances affecting the liability of any instrument to ad valorem duty, or the amount of the ad valorem duty with which any instrument is chargeable, are to be fully and truly set forth in the instrument;

Facts and Cir-
cumstances
affecting Duty
to be set forth
in Instruments.

(m) By the Inland Revenue Repeal Act, 1870 (33 & 34 Vict. c. 99), above 100 acts and parts of acts relating to stamps are repealed.

(n) This does not apply to building leases because of the exception in sect. 8, and see sections 3 and 98 (2).

APP. A. s. 8. and every person who, with intent to defraud her Majesty, or her heirs or successors,
 33 & 34 VICT.
 c. 97.

(1.) Executes any instrument in which all the said facts and circumstances are not fully and truly set forth;

(2.) Being employed or concerned in or about the preparation of any instrument, neglects or omits fully and truly to set forth therein all the said facts and circumstances;

Penalty 10*l*.

As to denoting Stamp.

shall forfeit the sum of ten pounds.

14. Where the duty with which an instrument is chargeable depends in any manner upon the duty paid upon another instrument, the payment of such last-mentioned duty shall, if application be made to the commissioners for that purpose, and on production of both the instruments, be denoted in such a manner as the commissioners think fit, upon such first-mentioned instrument (o).

Terms upon which Instruments may be stamped after Execution.

15. (1.) Except where express provision to the contrary is made by this or any other act, any unstamped or insufficiently-stamped instrument may be stamped after the execution thereof, on payment of the unpaid duty and a penalty of ten pounds, and also by way of further penalty, where the unpaid duty exceeds ten pounds, of interest on such duty, at the rate of five pounds per centum per annum, from the day upon which the instrument was first executed up to the time when such interest is equal in amount to the unpaid duty.

And the payment of any penalty or penalties is to be denoted on the instrument by a particular stamp.

Proviso.

As to Instruments executed Abroad.

(2.) Provided as follows:

(a.) Any unstamped or insufficiently-stamped instrument which has been first executed at any place out of the United Kingdom, may be stamped, at any time within two months after it has been first received in the United Kingdom, on payment of the unpaid duty only:

(b.) The commissioners may, if they think fit, at any time within twelve months after the first execution of any instrument, remit the penalty or penalties, or any part thereof.

As to the Remission of Penalties.

Stamping Deeds, &c. in Court.

16. (1.) Upon the production of any instrument chargeable with any duty, as evidence in any Court of Civil Judicature in any part of the United Kingdom, the officer whose duty it is to read the instrument shall call the attention of the judge to any omission or insufficiency of the stamp thereon, and if the instrument is one which may legally be stamped after the execution thereof, it may, on payment to the officer of the amount of the unpaid duty and the penalty payable by law on stamping the same as aforesaid, and of a further sum of one pound, be received in evidence, saving all just exceptions on other grounds.

(2.) The officer receiving the said duty and penalty shall give a receipt for the same and make an entry in a book, kept for that purpose, of the payment and of the amount thereof, and shall communicate to the commissioners the name or title of the cause or proceeding in which and of the party from whom he received the said duty and penalty, and the date and description of the instrument, and shall pay over to the receiver-general of inland revenue, or to such other person as the commissioners may appoint, the money received by him for the said duty and penalty.

(3.) Upon production to the commissioners of any instrument in respect of which any duty or penalty has been paid as aforesaid, together with the receipt of the said officer, the payment of such duty and penalty shall be denoted on such instrument accordingly.

17. Save and except as aforesaid, no instrument executed in any part of the United Kingdom, or relating, whosoever executed, to any property situate, or to any matter or thing done, or to be done, in any part of the United Kingdom, shall, except in criminal proceedings, be pleaded or given in evidence or admitted to be good, useful, or available in law or equity unless it is duly stamped in accordance with the law in force at the time when it was first executed.

Decision as to Stamp.

Abstract and Evidence.

18. [Commissioners may decide whether an instrument is chargeable with any and what duty.]

20. [Commissioners may require an abstract and evidence, and may refuse to proceed until such abstract and evidence has been furnished accordingly.]

(o) A duplicate lease generally requires a denoting stamp, but not a counterpart. See sect. 93, post, 836.

33. Except where express provision is made to the contrary, all duties are to be denoted by impressed stamps only.

APP. A. s. 8.
33 & 34 VICT.
c. 97.

24. (1.) An instrument, the duty upon which is required, or permitted by law, to be denoted by an adhesive stamp, is not to be deemed duly stamped with an adhesive stamp unless the person required by law to cancel such adhesive stamp cancels the same by writing on or across the stamp his name or initials, or the name or initials of his firm, *together with the true date of his so writing*, so that the stamp may be effectually cancelled, and rendered incapable of being used for any other instrument, or unless it is otherwise proved that the stamp appearing on the instrument was affixed thereto at the proper time.

How Duties to be denoted.
General Directions as to the Cancellation of adhesive Stamps.

(2.) Every person who, being required by law to cancel an adhesive stamp, wilfully neglects or refuses duly and effectually to do so in manner aforesaid, shall forfeit the sum of ten pounds.

Penalty for neglect or refusal, 10*l*.

25. Any person who—

Penalty for Frauds in relation to adhesive Stamps,

(1.) Fraudulently removes or causes to be removed from any instrument any adhesive stamp, or affixes any adhesive stamp which has been so removed to any other instrument with intent that such stamp may be used again;

(2.) Sells or offers for sale, or utters any adhesive stamp which has been so removed, or utters any instrument having thereon any adhesive stamp which has to his knowledge been so removed as aforesaid;

(3.) Practices or is concerned in any fraudulent act, contrivance or device not specially provided for, with intent to defraud her Majesty, her heirs or successors of any duty;

shall forfeit over and above any other penalty to which he may be liable the sum of fifty pounds (*p*).

or to any Duty, 50*l*.

SPECIAL REGULATIONS.

As to Agreements (q).

36. The duty of sixpence upon an agreement may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the agreement is first executed.

Duty may be denoted by adhesive Stamp.

As to Appraisements (r).

38. (1.) Every appraiser, by whom an appraisement or valuation is made, shall, within fourteen days after the making thereof, write out the same, in words and figures, showing the full amount thereof upon duly-stamped material, and if he neglects or omits so to do, or in any other manner delivers out, or states the amount of, any such appraisement or valuation, shall forfeit the sum of fifty pounds.

Appraisements to be written out.

(2.) Any person who receives from any appraiser, or pays for the making of, any appraisement or valuation, unless the same be written out and stamped as aforesaid, shall forfeit the sum of twenty pounds.

Penalty on the Appraiser, 50*l*.

On other Offenders, 20*l*.

As to Bills of Sale (r).

57. A copy of a bill of sale is not to be filed in any court, unless the original duly stamped is produced to the proper officer.

Bills of Sale.

As to Conveyances on Sale (s).

70—77. [*These are too long to be here inserted.*]

Conveyances on Sale.

(*p*) By the Stamp Duties Management Act, 1870 (33 & 34 Vict. c. 98), s. 25, every person who by any writing in any manner defaces any adhesive stamp before it is used shall forfeit the sum of five pounds; provided, that any person may, with the express sanction of the commissioners, and in the manner and in conformity with the conditions which they may

prescribe, write upon an adhesive stamp before it is used for the purpose of the identification thereof.

(*q*) For the duty on agreements for leases, see post, 836; on other agreements, post, 838.

(*r*) For the duty thereon, see post, 838.

(*s*) For the duty thereon, see post, 839.

APP. A. s. 8.
33 & 34 VICT.
c. 97.

Certain Copies
and Extracts
may be stamped
without Penalty
within Fourteen
Days after
Attestation.

As to attested Copies and Extracts (u).

79. An attested or otherwise authenticated copy or extract of or from —

1.) An instrument chargeable with any duty;

“ An original will, testament or codicil;

The probate or probate copy of a will or codicil;

Letters of administration or a confirmation of a testament;

may be stamped at any time within fourteen days after the date of the attestation or authentication, on payment of the duty only without any penalty.

As to certified Copies and Extracts from Registers of Births, &c. (x).

By whom Duty
to be paid; may
be denoted by
adhesive Stamp.

80. The duty upon a certified copy or extract of or from any register of births, baptisms, marriages, deaths, or burials is to be paid by the person requiring the copy or extract, and may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the copy or extract is signed before he delivers the same out of his hands, custody or power.

As to Copyhold and Customary Estates (y).

Copyholds, &c.

81—86. [*These are too long to be inserted.*]

As to Duplicates and Counterparts (z).

When duly
stamped.

93. The duplicate or counterpart of an instrument chargeable with duty (except the counterpart of an instrument chargeable as a lease, *such counterpart not being executed by or on behalf of any lessor or grantor*) is not to be deemed duly stamped unless it is stamped as an original instrument, or unless it appears by some stamp impressed thereon that the full and proper duty has been paid upon the original instrument of which it is the duplicate or counterpart.

As to Leases, &c. (a).

Agreements for
not more than
35 Years to be
charged as
Leases.

96. (1.) An agreement for a lease or tack, or with respect to the letting of any lands, tenements or heritable subjects for any term not exceeding thirty-five years, is to be charged with the same duty as if it were an actual lease or tack made for the term and consideration mentioned in the agreement.

(2.) A lease or tack made subsequently to, and in conformity with, such an agreement duly stamped, is to be charged with the duty of sixpence only.

Leases, how to
be charged in
respect of Pro-
duce, &c.

97. (1.) Where the consideration, or any part of the consideration, for which any lease or tack is granted or agreed to be granted, does not consist of money, but consists of any produce or other goods, the value of such produce or goods is to be deemed a consideration in respect of which the lease or tack or agreement is chargeable with ad valorem duty, and where it is stipulated that the value of such produce or goods is to amount at least to, or is not to exceed a given sum, or where the lessee is specially charged with, or has the option of paying after, any permanent rate of conversion, the value of such produce or goods is, for the purpose of assessing the ad valorem duty, to be estimated at such given sum, or according to such permanent rate.

Effect of State-
ment of Value.

(2.) A lease or tack or agreement made either entirely or partially for any such consideration, if it contains a statement of the value of such consideration, and is stamped in accordance with such statement, is, so far as regards the subject-matter of such statement, to be deemed duly stamped, *unless or until it is otherwise shown that such statement is incorrect*, and that it is in fact not duly stamped.

Directions as to
Duty in certain
Cases.

98. (1.) A lease or tack or agreement for a lease or tack, or with respect to any letting, is not to be charged with any duty in respect of any penal rent, or increased rent in the nature of a penal rent, thereby reserved or agreed to be reserved or made payable, or by reason of being made in consideration of the

• (u) For the duty thereon, see post, 839.

(x) Id.

(y) For the duty thereon, see post, 840.

(z) Id.

(a) For duty, see post, 841. By 39 & 40 Vict. c. 16, s. 11, “an instrument whereby the rent reserved by any other

instrument chargeable with stamp duty as a lease or tack, and duly stamped accordingly, is increased, shall not be chargeable with stamp duty otherwise than as a lease or tack in consideration of the additional rent thereby made payable.”

surrender or abandonment of any existing lease, tack or agreement of or relating to the same subject-matter.

(2.) No lease made for any consideration or considerations in respect whereof it is chargeable with ad valorem duty, and in further consideration either of a covenant by the lessee to make, or of his having previously made, any substantial improvement of or addition to the property demised to him, or of any covenant relating to the matter of the lease, is to be charged with any duty in respect of such further consideration (b).

(3.) No lease for a life or lives not exceeding three, or for a term of years determinable with a life or lives not exceeding three, and no lease for a term absolute not exceeding twenty-one years, granted by an ecclesiastical corporation, aggregate or sole, is to be charged with any higher duty than thirty-five shillings.

(4.) and (5.) relate to *Trinity College, Dublin, and Scotch leases, &c.*

99. The duty upon an instrument chargeable with duty as a lease or tack for any definite term less than a year of—

(1.) Any dwelling-house or tenement, or part of a dwelling-house or tenement, at a rent not exceeding the rate of ten pounds per annum;

(2.) Any furnished dwelling-house or apartments;

or upon the duplicate or counterpart of any such instrument, may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the instrument is first executed.

100. (1.) Every person who executes, or prepares or is employed in preparing, any instrument upon which the duty may, under the provisions of the last preceding section, be denoted by an adhesive stamp, and which is not, at or before the execution thereof, duly stamped, shall forfeit the sum of five pounds.

(2.) Provided that nothing in this section contained shall render any person liable to the said penalty of five pounds in respect of any letters or correspondence.

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33 & 34 Vict.
c. 97.

Duty in certain Cases may be denoted by adhesive Stamp.

Penalty in certain Cases.

Proviso.

As to Mortgages, &c.

112. The exemption from stamp duty conferred by the act of 6 & 7 Will. 4, c. 32, for the regulation of Benefit Building Societies, shall not extend to any mortgage to be made after the passing of this act, except a mortgage by a member of a benefit building society for securing the repayment to the society of money not exceeding five hundred pounds.

Mortgages.
Exemption from Stamp Duty in favour of Benefit Building Societies restricted.

As to Receipts.

120. The term "receipt" means and includes any note, memorandum or writing whatsoever whereby any money amounting to two pounds or upwards, or any bill of exchange or promissory note for money amounting to two pounds or upwards, is acknowledged or expressed to have been received or deposited or paid, or whereby any debt or demand, or any part of a debt or demand, of the amount of two pounds or upwards, is acknowledged to have been settled, satisfied or discharged, or which signifies or imports any such acknowledgment, and whether the same is or is not signed with the name of any person.

121. The duty upon a receipt may be denoted by an adhesive stamp, which is to be cancelled by the person by whom the receipt is given before he delivers it out of his hands.

122. A receipt given without being stamped may be stamped with an impressed stamp upon the terms following; that is to say,

(1.) Within fourteen days after it has been given, on payment of the duty and a penalty of five pounds;

(2.) After fourteen days, but within one month, after it has been given, on payment of the duty and a penalty of ten pounds;

and shall not in any other case be stamped with an impressed stamp.

Interpretation of term "Receipt."

Duty may be denoted by adhesive Stamp.

Terms upon which Receipts may be stamped after Execution.

(b) In consequence of the decision in *Re Bolton's Lease*, L. R., 5 Ex. 82; 39 L. J., Ex. 51, it is enacted by 33 & 34 Vict. c. 44, that this enactment shall have a retrospective operation, so as to avoid the addi-

tional duty payable by virtue of the construction put by the court on 17 & 18 Vict. c. 83, s. 16 (repealed by 33 & 34 Vict. c. 99).

APP. A. s. 8. 33 & 34 VICT. c. 97. Penalty for Offences.	123. If any person—
	(1.) Gives any receipt liable to duty and not duly stamped;
	(2.) In any case where a receipt would be liable to duty refuses to give a receipt duly stamped;
	(3.) Upon a payment to the amount of two pounds or upwards gives a receipt for a sum not amounting to two pounds, or separates or divides the amount paid with intent to evade the duty;
	he shall forfeit the sum of ten pounds.

SCHEDULE (c).

Schedule of Stamp Duties.	AFFIDAVIT or statutory declaration made under the provisions of 5 & 6 Will. 4, c. 62	£	d.
		0	6

Exemptions.

- (1.) Affidavit made for the immediate purpose of being filed, read or used in any court, or before any judge, master, or officer of any court.
- (2.) Affidavit or declaration made upon a requisition of the commissioners of any public board of revenue, or any of the officers acting under them, or required by law, and made before any justice of the peace.

AGREEMENT for a lease or tack, or for any letting.
See LEASE or TACK, and Section 96. [Ante, p. 836.]

AGREEMENT, or any MEMORANDUM of an AGREEMENT, made in England or Ireland under hand only, or made in Scotland without any clause of registration, and not otherwise specifically charged with any duty, whether the same be only evidence of a contract, or obligatory upon the parties from its being a written instrument 0 0 6

Exemptions.

- (1.) Agreement or memorandum, the matter whereof is not of the value of 5*l.*
 - (2.) Agreement or memorandum for the hire of any labourer, artificer, manufacturer or menial servant.
 - (3.) Agreement, letter, or memorandum made for or relating to the sale of any goods, wares or merchandise.
- And see Section 36. [Ante, p. 835.]

APPRAISEMENT or VALUATION of any property, or of any interest therein, or of the annual value thereof, or of any dilapidations, or of any repairs wanted, or of the materials and labour used or to be used in any building, or of any artificer's work whatsoever.

Where the amount of the appraisement or valuation does not exceed 5 <i>l.</i>		0	0	3
Exceeds 5 <i>l.</i> and does not exceed 10 <i>l.</i>		0	0	6
„ 10 <i>l.</i> „ 20 <i>l.</i>		0	1	0
„ 20 <i>l.</i> „ 30 <i>l.</i>		0	1	6
„ 30 <i>l.</i> „ 40 <i>l.</i>		0	2	0
„ 40 <i>l.</i> „ 50 <i>l.</i>		0	2	6
„ 50 <i>l.</i> „ 100 <i>l.</i>		0	5	0
„ 100 <i>l.</i> „ 200 <i>l.</i>		0	10	0
„ 200 <i>l.</i> „ 500 <i>l.</i>		0	15	0
„ 500 <i>l.</i>		1	0	0

Exemptions.

- (1.) Appraisement or valuation made for, and for the information of, one party only, and not being in any manner obligatory as between parties either by agreement or operation of law.

(c) This schedule derives its force from such duties as are material to the sub-
sects. 3 and 6 of the act, ante, 833. Only
jects of this work are inserted here.

- (2.) [Appraisement for admiralty or vice-admiralty courts.]
 (3.) Appraisement or valuation of any property made for the purpose of ascertaining the legacy or succession duty [not probate duty] payable in respect thereof.
 And *see* Section 38. [Ante, p. 835.]

£ s. d. APP. A. s. 8.
 33 & 34 VICT.
 c. 97.

ASSIGNMENT or ASSIGNATION.

By way of security, or of any security. *See* MORTGAGE, &c.
 Upon a sale, or otherwise. *See* CONVEYANCE.

ATTESTED COPY. *See* COPY.

AWARD in England or Ireland, and Award or DECREET ARBITRAL in Scotland:

Where the amount or value of the matter in dispute does not exceed 5 <i>l</i>.	.	.	.	.	.	0	0	3
Exceeds 5 <i>l</i> . and does not exceed 10 <i>l</i>.	.	.	.	.	.	0	0	6
" 10 <i>l</i> .	"	20 <i>l</i>.	.	.	.	0	1	0
" 20 <i>l</i> .	"	30 <i>l</i>.	.	.	.	0	1	6
" 30 <i>l</i> .	"	40 <i>l</i>.	.	.	.	0	2	0
" 40 <i>l</i> .	"	50 <i>l</i>.	.	.	.	0	2	6
" 50 <i>l</i> .	"	100 <i>l</i>.	.	.	.	0	5	0
" 100 <i>l</i> .	"	200 <i>l</i>.	.	.	.	0	10	0
" 200 <i>l</i> .	"	500 <i>l</i>.	.	.	.	0	15	0
" 500 <i>l</i> .	"	750 <i>l</i>.	.	.	.	1	0	0
" 750 <i>l</i> .	"	1000 <i>l</i>.	.	.	.	1	5	0
And where it exceeds 1000 <i>l</i> . and in any other case not above provided for	.	.	.	.	.	1	15	0

BILL OF SALE.

Absolute. *See* CONVEYANCE ON SALE.
 By way of security. *See* MORTGAGE, &c.
 And *see* Section 57. [Ante, p. 835.]

CONVEYANCE or TRANSFER on sale,

Of any property (*except such stock or debenture stock or funded debt as aforesaid*),

Where the amount or value of the consideration for the sale does not exceed 5 <i>l</i>.	.	.	.	.	.	0	0	6
Exceeds 5 <i>l</i> . and does not exceed 10 <i>l</i>.	.	.	.	.	.	0	1	0
" 10 <i>l</i> .	"	15 <i>l</i>.	.	.	.	0	1	6
" 15 <i>l</i> .	"	20 <i>l</i>.	.	.	.	0	2	0
" 20 <i>l</i> .	"	25 <i>l</i>.	.	.	.	0	2	6
" 25 <i>l</i> .	"	50 <i>l</i>.	.	.	.	0	5	0
" 50 <i>l</i> .	"	75 <i>l</i>.	.	.	.	0	7	6
" 75 <i>l</i> .	"	100 <i>l</i>.	.	.	.	0	10	0
" 100 <i>l</i> .	"	125 <i>l</i>.	.	.	.	0	12	6
" 125 <i>l</i> .	"	150 <i>l</i>.	.	.	.	0	15	0
" 150 <i>l</i> .	"	175 <i>l</i>.	.	.	.	0	17	6
" 175 <i>l</i> .	"	200 <i>l</i>.	.	.	.	1	0	0
" 200 <i>l</i> .	"	225 <i>l</i>.	.	.	.	1	2	6
" 225 <i>l</i> .	"	250 <i>l</i>.	.	.	.	1	5	0
" 250 <i>l</i> .	"	275 <i>l</i>.	.	.	.	1	7	6
" 275 <i>l</i> .	"	300 <i>l</i>.	.	.	.	1	10	0
" 300 <i>l</i>.	.	.	.	.	.	.	.	.

For every 50*l*., and also for any fractional part of 50*l*., of such amount or value. 0 5 0

And *see* Sections 70, 71, 72, 73, 74, 75, 76 and 77.

CONVEYANCE or TRANSFER of any kind not hereinbefore described 0 10 0

And *see* Section 78.

COPY or EXTRACT (*attested or in any manner authenticated*) of or from—

An instrument chargeable with any duty.

An original will, testament or codicil.

The probate or probate copy of a will or codicil.

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- (4.) Any letters of administration or any confirmation of a testament.
(5.) Any public register (*except any register of births, baptism, marriages, deaths, or burials.*)
(6.) The books, rolls, or records of any court.

In the case of an instrument chargeable with any duty { The same duty as such instrument.
not amounting to one shilling
In any other case 0 1 0

Exemptions.

- (1.) Copy or extract of or from any law proceedings.
(2.) [*Relating to Scotland (not copied).*]
And see Section 79. [Ante, p. 836.]

COPY or EXTRACT (*certified*) of or from any register of births, baptisms, marriages, deaths, or burials 0 0 1

COPYHOLD AND CUSTOMARY ESTATES.

Instruments relating thereto.

Upon a sale thereof. See CONVEYANCE ON SALE.

Upon a mortgage thereof. See MORTGAGE, &c.

Upon a demise thereof. See LEASE OR TACK.

Upon any other occasion—

Surrender or grant made out of court, or the memorandum thereof.

And copy of court roll of any surrender or grant made in court 0 10 0
And see Sections 81, 82, 83, 84, 85 and 86.

COUNTERPART. See DUPLICATE.

COVENANT for securing the payment or repayment of money, or the transfer or retransfer of stock.

See MORTGAGE, &c.

COVENANT.—Any separate deed of covenant (*not being an instrument chargeable with ad valorem duty as a conveyance on sale or mortgage*) made on the sale or mortgage of any property, and relating solely to the conveyance or enjoyment of, or the title to, the property sold or mortgaged, or to the production of the muniments of title relating thereto, or to all or any of the matters aforesaid :

Where the ad valorem duty in respect of the consideration or mortgage money does not exceed 10s. { A duty equal to the amount of such ad valorem duty.
In any other case 0 10 0

CUSTOMARY ESTATES. See COPYHOLD.

DECLARATION (*Statutory*). See AFFIDAVIT.

DEED of any kind whatsoever not described in this Schedule 0 10 0
And see Section 4. [Ante, p. 833.]

DEFEAZANCE.—Deed or other instrument of defeazance of any conveyance, disposition, assignation or tack, apparently absolute, but intended only as a security for money or stock.

See MORTGAGE, &c., and Section 105.

DEPOSIT of title deeds. See MORTGAGE, &c., and Section 105.

DEPUTATION or APPOINTMENT of a gamekeeper 0 10 0

DUPLICATE or COUNTERPART of any instrument chargeable with any duty :

Where such duty does not amount to 5s. { The same duty as the original instrument.
In any other case 0 5 0
And see Section 93. [Ante, p. 836.]

INVENTORY. See SCHEDULE.

LEASE OR TACK—

(1.) For any definite term less than a year :

- (a.) Of any dwelling-house or tenement, or part of a dwelling-house or tenement, at a rent not exceeding the rate of 10*l.* per annum 0 0 1
- (b.) Of any furnished dwelling-house or apartments where the rent for such term exceeds 25*l.* 0 2 6
- (c.) Of any lands, tenements or heritable subjects except or otherwise than as aforesaid { The same duty as a lease for a year at the rent reserved for the definite term.

(2.) For any other definite term or for any indefinite term :

Of any lands, tenements or heritable subjects—

Where the consideration, or any part of the consideration, moving either to the lessor or to any other person, consists of any money, stock or security :

In respect of such consideration { The same duty as a conveyance on a sale for the same consideration.

Where the consideration, or any part of the consideration, is any rent :

In respect of such consideration :

If the rent, whether reserved as a yearly rent or otherwise, is at a rate or average rate :

	If the term is definite, and does not exceed 35 years, or is indefinite.	If the term, being definite, exceeds 35 years, but does not exceed 100 years.	If the term, being definite, exceeds 100 years.
	£ s. d.	£ s. d.	£ s. d.
Not exceeding 5 <i>l.</i> per annum	0 0 6	0 3 0	0 6 0
Exceeding—			
5 <i>l.</i> and not exceeding 10 <i>l.</i>	0 1 0	0 6 0	0 12 0
10 <i>l.</i> „ „ 15 <i>l.</i>	0 1 6	0 9 0	0 18 0
15 <i>l.</i> „ „ 20 <i>l.</i>	0 2 0	0 12 0	1 4 0
20 <i>l.</i> „ „ 25 <i>l.</i>	0 2 6	0 15 0	1 10 0
25 <i>l.</i> „ „ 50 <i>l.</i>	0 5 0	1 10 0	3 0 0
50 <i>l.</i> „ „ 75 <i>l.</i>	0 7 6	2 5 0	4 10 0
75 <i>l.</i> „ „ 100 <i>l.</i>	0 10 0	3 0 0	6 0 0
100 <i>l.</i>			
For every full sum of 50 <i>l.</i> , and also for any fractional part of 50 <i>l.</i> thereof	0 5 0	1 10 0	3 0 0
Of any other kind whatsoever not hereinbefore described			0 10 0

MEMORIAL to be registered pursuant to any act of parliament, made £ s. d.
or to be made, for the public registering of deeds and conveyances
in England or Ireland :

Where the instrument registered is chargeable with any duty { The same duty as the registered instrument.
not amounting to 2*s.* 6*d.*

In any other case 0 2 6

MORTGAGE, BOND, DEBENTURE, COVENANT, WARRANT OF ATTORNEY to confess and enter up judgment, and FOREIGN SECURITY of any kind :

(1.) Being the only or principal or primary security for—

- The payment or repayment of money not exceeding 25*l.* 0 0 8
- Exceeding 25*l.* and not exceeding 50*l.* 0 1 3
- „ 50*l.* „ „ 100*l.* 0 2 6
- „ 100*l.* „ „ 150*l.* 0 3 9

(d) Ante, 836 ; and see also 39 & 40 Vict. c. 16, s. 11, ib. note (a).

APP. A. s. 8.
33 & 34 VICT.
c. 97.

	£	s.	d.
Exceeding 150 <i>l.</i> and not exceeding 200 <i>l.</i>	0	5	0
" 200 <i>l.</i> " " 250 <i>l.</i>	0	6	3
" 250 <i>l.</i> " " 300 <i>l.</i>	0	7	6
" 300 <i>l.</i>			
For every 100 <i>l.</i> , and also for any fractional part of 100 <i>l.</i> , of such amount	0	2	6
(2.) Being a collateral, or auxiliary, or additional, or substituted security, or by way of further assurance for the above-mentioned purpose where the principal or primary security is duly stamped:			
For every 100 <i>l.</i> , and also for any fractional part of 100 <i>l.</i> , of the amount secured	0	0	6
(3.) TRANSFER, ASSIGNMENT, DISPOSITION or ASSIGNATION of any mortgage, bond, debenture, covenant or foreign security, or of any money or stock secured by any such instrument, or by any warrant of attorney to enter up judgment, or by any judgment:			
For every 100 <i>l.</i> , and also for any fractional part of 100 <i>l.</i> , of the amount transferred, assigned or disposed	0	0	6
And also where any further money is added to the money already secured	(The same duty as a principal security for such further money.)		
(4.) RECONVEYANCE, RELEASE, DISCHARGE, SURRENDER, RESURRENDER, WARRANT TO VACATE, or RENUNCIATION of any such security as aforesaid or of the benefit thereof, or of the money thereby secured:			
For every 100 <i>l.</i> , and also for any fractional part of 100 <i>l.</i> , of the total amount or value of the money at any time secured	0	0	6
And see Sections 105, 106, 107, 108, 109, 110, 111, 112, 113, 114 and 115.			
RECEIPT given for, or upon the payment of, money amounting to 2 <i>l.</i> or upwards	0	0	1

Exemptions (not copied).

And see Sections 120, 121, 122, 123. [Ante, p. 837.]

SCHEDULE, INVENTORY, or document of any kind whatsoever, referred to, in or by, and intended to be used or given in evidence as part of, or as material to, any other instrument charged with any duty, but which is separate and distinct from, and not indorsed on or annexed to, such other instrument:

Where such other instrument is chargeable with any duty not exceeding 10 <i>s.</i>	{ The same duty as such other instrument.
In any other case	
	0 10 0

Exemptions.

£ s. d.

(1.) [Not copied.]

(2.) Any public map, plan, survey, apportionment, allotment award, and other parochial or public document and writing, made under or in pursuance of any act of parliament, and deposited or kept for reference in any registry, or in any public office, or with the public books, papers or writings of any parish.

SETTLEMENT.—Any instrument, whether voluntary or upon any good or valuable consideration, other than a *bonâ fide* pecuniary consideration, whereby any definite and certain principal sum of money (whether charged or chargeable on lands or other hereditaments or heritable subjects, or not, or to be laid out in the purchase of lands or other hereditaments or heritable subjects or not) or any definite

and certain amount of stock, or any security, is settled or agreed to be settled in any manner whatsoever :	£	s.	d.	APP. A. s. 8.
For every 100 <i>l.</i> , and also for any fractional part of 100 <i>l.</i> , of the amount or value of the property settled or agreed to be settled	0	5	0	33 & 34 VICT. c. 97.

Exemption.

Instrument of appointment relating to any property in favour of persons specially named or described as the objects of a power of appointment, created by a previous settlement stamped with ad valorem duty in respect of the same property, or by will, where probate duty has been paid in respect of the same property as personal estate of the testator.

And see Sections 124, 125 and 126.

SURRENDER—

Of copyholds. See COPYHOLD.

Of any other kind whatsoever not chargeable with duty as a conveyance on sale or mortgage 0 10 0

VALUATION. See APPRAISEMENT.

GENERAL EXEMPTIONS FROM ALL STAMP DUTIES.

[*Not copied, except as follows:*]—

- (5.) Bonds given to sheriffs or other persons upon the replevy of any goods or chattels, and assignments of such bonds.

SECT. 9. —38 & 39 VICT. c. 92 (e).

An Act for amending the Law relating to Agricultural Holdings in England.
[13th August, 1875.]

BE it enacted by, &c.

Preliminary.

- | | |
|---|----------------------|
| 1. This Act may be cited as The Agricultural Holdings (England) Act, 1875. | Short Title. |
| 2. This Act shall commence from and immediately after the fourteenth day of February, one thousand eight hundred and seventy-six. | Commencement of Act. |
| 3. This Act shall not extend to Scotland or Ireland. | Extent of Act. |
| 4. In this Act— | Interpretation. |
| “Contract of tenancy” means a letting of land for a term of years, or for lives, or for lives and years, or from year to year, or at will : | |
| “Determination of tenancy” means the cesser of a contract of tenancy by reason of effluxion of time, or from any other cause : | |
| “Landlord” means the person for the time being entitled to possession of land subject to a contract of tenancy, or entitled to receipt of rent reserved by a contract of tenancy, whatever be the extent of his interest, and although the land or his interest therein is incumbered or charged by himself or his settlor, or otherwise, to any extent ; the party to a contract of tenancy under which land is actually occupied being alone deemed to be the landlord in relation to the actual occupier : | |
| “Tenant” means the holder of land under a contract of tenancy : | |
| “Landlord” or “tenant” includes the agent authorised in writing to act under this act generally, or for any special purpose, and the executors, administrators, assigns, husband, guardian, committee of the estate, or trustees in bankruptcy, of a landlord or tenant : | |
| “Holding” includes all land held by the same tenant of the same landlord for the same term under the same contract of tenancy : | |
| “Absolute owner” means the owner or person capable of disposing, by appointment or otherwise, of the fee simple or whole interest of or in freehold, copyhold, or leasehold land, although the land or his interest therein is mortgaged, incumbered, or charged to any extent : | |

(e) See this Act discussed ante, Ch. XXI., and for Forms applicable to proceedings under the Act, see post, Appendix F.

APP. A. s. 9.
38 & 39 VICT.
c. 92.

"County court," in relation to a holding, means the county court within the district whereof the holding or the larger part thereof is situate :

"Person" includes a body of persons and a corporation aggregate or sole.

The designations of landlord and tenant shall, for the purposes of this act, continue to apply to the parties to a contract of tenancy until the conclusion of any proceedings taken under this act on the determination of the tenancy.

Compensation.

Tenant's Title to
Compensation.

5. Where, after the commencement of this act, a tenant executes on his holding an improvement comprised in either of the three classes following :

FIRST CLASS.

Drainage of land. Erection or enlargement of buildings. Laying down of permanent pasture. Making and planting of osier beds. Making of water meadows or works of irrigation. Making of gardens. Making or improving of roads or bridges.	Making or improving of watercourses, ponds, wells, or reservoirs, or of works for supply of water for agricultural or domestic purposes. Making of fences. Planting of hops. Planting of orchards. Reclaiming of waste land. Warping of land.
--	--

SECOND CLASS.

Boning of land with undissolved bones. Chalking of land. Clay-burning.	Claying of land. Liming of land. Marling of land.
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THIRD CLASS.

Application to land of purchased artificial or other purchased manure.	Consumption on the holding by cattle, sheep, or pigs of cake or other feeding stuff not produced on the holding.
--	--

he shall be entitled, subject to the provisions of this act, to obtain on the determination of the tenancy, compensation in respect of the improvement.

Time in which
Improvement
exhausted.

6. An improvement shall not in any case be deemed, for the purposes of this act, to continue unexhausted beyond the respective times following after the year of tenancy in which the outlay thereon is made :

Where the improvement is of the first class, the end of twenty years :

Where it is of the second class, the end of seven years :

Where it is of the third class, the end of two years.

Amount of
Tenant's Com-
pensation in
First Class.

7. The amount of the tenant's compensation in respect of an improvement of the first class shall, subject to the provisions of this act, be the sum laid out by the tenant on the improvement, with a deduction of a proportionate part thereof for each year while the tenancy endures after the year of tenancy in which the outlay is made and while the improvement continues unexhausted ; but so that where the landlord was not at the time of the consent given to the execution of the improvement absolute owner of the holding for his own benefit, the amount of the compensation shall not exceed a capital sum fairly representing the addition which the improvement, as far as it continues unexhausted at the determination of the tenancy, then makes to the letting value of the holding.

Amount of
Tenant's Com-
pensation in
Second Class.

8. The amount of the tenant's compensation in respect of an improvement of the second class shall, subject to the provisions of this act, be the sum properly laid out by the tenant on the improvement, with a deduction of a proportionate part thereof for each year while the tenancy endures after the year of tenancy in which the outlay is made and while the improvement continues unexhausted.

9. The amount of the tenant's compensation in respect of an improvement of the third class shall, subject to the provisions of this act, be such proportion of the sum properly laid out by the tenant on the improvement as fairly represents the value thereof at the determination of the tenancy to an incoming tenant.

APR. A. s. 9.
38 & 39 VICT.
c. 92.

10. The tenant shall not be entitled to compensation in respect of an improvement of the first class, unless he has executed it with the previous consent in writing of the landlord.

Amount of
Tenant's Com-
pensation in
Third Class.

11. In the ascertainment of the amount of the tenant's compensation in respect of an improvement of the first class, there shall be taken into account, in reduction thereof, any sum reasonably necessary to be expended for the purpose of putting the same into tenantable repair or good condition.

Consent of
Landlord for
First Class.

Deduction in
First Class for
want of Repair,
&c.

12. The tenant shall not be entitled to compensation in respect of an improvement of the second class, unless not more than forty-two and not less than seven days before beginning to execute it, he has given to the landlord notice in writing of his intention to do so, nor where it is executed after the tenant has given or received notice to quit, unless it is executed with the previous consent in writing of the landlord.

Notice to Land-
lord for Second
Class.

13. The tenant shall not be entitled to compensation in respect of an improvement of the third class, where, after the execution thereof, there has been taken from the portion of the holding on which the same was executed, a crop of corn, potatoes, hay, or seed, or any other exhausting crop.

Exclusion of
Compensation in
Third Class after
exhausting
Crop.

14. The tenant shall not be entitled to compensation in respect of an improvement of the third class, consisting in the consumption of cake or other feeding stuff, where, under the custom of the country or an agreement, he is entitled to and claims payment from the landlord or incoming tenant in respect of the additional value given by that consumption to the manure left on the holding at the determination of the tenancy.

Exclusion of
Compensation
for Consumption
of Cake, &c., in
certain Cases.

15. In the ascertainment of the amount of compensation in respect of an improvement of the third class,—

Restrictions as
to Third Class.

(1.) There shall not be taken into account any larger outlay during the last year of the tenancy than the average amount of the tenant's outlay for like purposes during the three next preceding years of the tenancy, or other less number of years for which the tenancy had endured; and,

(2.) There shall be deducted the value of the manure that would have been produced by the consumption on the holding of any hay, straw, roots, or green crops sold off the holding within the last two years of the tenancy or other less time for which the tenancy has endured, except as far as a proper return of manure to the holding has been made in respect of such produce sold off.

16. The amount of the tenant's compensation shall be subject to the following deductions:

Deductions from
Compensation
for Taxes, Rent,
&c.

(1.) For taxes, rates, and tithe rent-charge due or becoming due in respect of the holding to which the tenant is liable as between him and the landlord;

(2.) For rent due or becoming due in respect of the holding;

(3.) For the landlord's compensation under this act.

17. In the ascertainment of the amount of the tenant's compensation there shall be taken into account in reduction thereof any benefit which the landlord has given or allowed to the tenant in consideration of the tenant executing the improvement.

Set-off of benefit
to Tenant.

18. Where a landlord commits a breach of covenant or other agreement connected with the contract of tenancy, and the tenant claims under this act compensation in respect of an improvement, then the tenant shall be entitled to obtain, on the determination of the tenancy, compensation in respect of the breach, subject and according to the provisions of this act.

Tenant's Com-
pensation for
breach of Cove-
nant.

19. Where a tenant commits or permits waste, or commits a breach of a covenant or other agreement connected with the contract of tenancy, and the tenant claims compensation under this act in respect of an improvement, then the landlord shall be entitled, by counter-claim, but not otherwise, to obtain, on the determination of the tenancy, compensation in respect of the waste or breach, subject and according to the provisions of this act.

Landlord's Title
to Compensation.

But nothing in this section shall enable a landlord to obtain under this act compensation in respect of waste or a breach committed or permitted in relation to a matter of husbandry more than four years before the determination of the tenancy.

APP. A. s. 9.
38 & 39 VICT.
c. 92.

Notice of in-
tended Claim.

Compensation
agreed or settled
by Reference.

Appointment of
Referee or
Referees and
Umpire.

Requisition for
appointment of
Umpire by In-
closure Commis-
sioners, &c.

Exercise of
powers of
County Court.

Procedure.

20. Notwithstanding anything in this act, a tenant shall not be entitled to compensation under this act unless one month at least before the determination of the tenancy he gives notice in writing to the landlord of his intention to make a claim for compensation under this act.

Where a tenant gives such a notice the landlord may, before the determination of the tenancy, or within fourteen days thereafter, give a counter-notice in writing to the tenant of his intention to make a claim for compensation under this act.

Every such notice and counter-notice shall state, as far as reasonably may be, the particulars of the intended claim.

21. The landlord and the tenant may agree on the amount and mode and time of payment of compensation to be paid to the tenant or to the landlord under this act.

If in any case they do not so agree the difference shall be settled by a reference.

22. Where there is a reference under this act, a referee, or two referees and an umpire, shall be appointed as follows:

- (1.) If the parties concur, there may be a single referee appointed by them jointly;
- (2.) If before award the single referee dies or becomes incapable of acting, or for seven days after notice from the parties, or either of them, requiring him to act, fails to act, the proceedings shall begin afresh, as if no referee had been appointed;
- (3.) If the parties do not concur in the appointment of a single referee, each of them shall appoint a referee;
- (4.) If before award one of two referees dies or becomes incapable of acting, or for seven days after notice from either party requiring him to act fails to act, the party appointing him shall appoint another referee;
- (5.) Notice of every appointment of a referee by either party shall be given to the other party;
- (6.) If for fourteen days after notice by one party to the other to appoint a referee, or another referee, the other party fails to do so, then, on the application of the party giving notice, the county court shall within fourteen days appoint a competent and impartial person to be a referee;
- (7.) Where two referees are appointed, then (subject to the provisions of this act) they shall before they enter on the reference appoint an umpire;
- (8.) If before award an umpire dies or becomes incapable of acting, the referees shall appoint another umpire;
- (9.) If for seven days after request from either party the referees fail to appoint an umpire, or another umpire, then, on the application of either party, the county court shall within fourteen days appoint a competent and impartial person to be the umpire;
- (10.) Every appointment, notice, and request under this section shall be in writing.

23. Provided, that where two referees are appointed, an umpire may be appointed as follows:

- (1.) If either party, on appointing a referee, requires, by notice in writing to the other, that the umpire shall be appointed by the Inclosure Commissioners for England and Wales, then the umpire, and any successor to him, shall be appointed, on the application of either party, by those commissioners;
- (2.) In every other case, if either party, on appointing a referee, requires, by notice in writing to the other, that the umpire shall be appointed by the county court, then, unless the other party dissents by notice in writing therefrom, the umpire, and any successor to him, shall, on the application of either party, be so appointed, and in case of such dissent, the umpire, and any successor to him, shall be appointed, on the application of either party, by the Inclosure Commissioners for England and Wales.

24. The powers of the county court under this act, relative to the appointment of a referee or umpire shall be exercisable by the judge of the court having jurisdiction, whether he is without or within his district, and may, by consent of the parties, be exercised by the registrar of the court.

25. The delivery to a referee of his appointment shall be deemed a submission to a reference by the party delivering it; and neither party shall have power to revoke a submission, or the appointment of a referee, without the consent of the other.

APP. A. s. 9.
38 & 39 VICT.
c. 92.

26. The referee or referees or umpire may call for the production of any sample, or voucher or other document, or other evidence which is in the possession or power of either party, or which either party can produce, and which to the referee or referees or umpire seems necessary for determination of the matters referred, and may take the examination of the parties and witnesses on oath, and may administer oaths and take affirmations; and if any person so sworn or affirming wilfully and corruptly gives false evidence he shall be guilty of perjury.

Mode of submission to reference.
Power for Referee, &c. to require Production of Documents, administer Oaths, &c.
Power to proceed in Absence.

27. The referee or referees or umpire may proceed in the absence of either party where the same appears to him or them expedient, after notice given to the parties.

28. The award shall be in writing, signed by the referee or referees or umpire.

Form of Award.
Time for award of Referee or Referees.

29. A single referee shall make his award ready for delivery within twenty-eight days after his appointment.

Two referees shall make their award ready for delivery within twenty-eight days after the appointment of the last appointed of them, or within such extended time (if any) as they from time to time jointly fix by writing under their hands, so that they make their award ready for delivery within a time not exceeding in the whole forty-nine days after the appointment of the last appointed of them.

30. Where two referees are appointed and act, if they fail to make their award ready for delivery within the time aforesaid, then, on the expiration of that time, their authority shall cease, and thereupon the matters referred to them shall stand referred to the umpire.

Reference to and award by Umpire.

The umpire shall make his award ready for delivery within twenty-eight days after notice in writing given to him by either party or referee of the reference to him, or within such extended time (if any) as the registrar of the county court from time to time appoints, on the application of the umpire or of either party, made before the expiration of the time appointed by or extended under this section.

31. The award shall find and state the time at which each improvement, in respect whereof compensation is awarded, is taken, for the purposes of the award, to be exhausted.

Duration of Improvement to be found.

32. The award shall not award a sum generally for compensation, but shall, as far as reasonably may be, specify—

Award to give Particulars.

The several improvements, acts, and things in respect whereof compensation is awarded;

The time at which each thereof was executed, committed, or permitted;

In the case of an improvement of the first class, where the landlord was not at the time of the consent given to the execution thereof absolute owner of the holding for his own benefit, the extent to which the improvement adds to the letting value of the holding;

The sum awarded in respect of each improvement, act, or thing; and

The sum laid out by the tenant on each improvement.

33. The costs of and attending the reference, including the remuneration of the referee or referees and umpire, where the umpire has been required to act, and including other proper expenses, shall be borne and paid by the parties in such proportion as to the referee or referees or umpire appears just, regard being had to the reasonableness or unreasonableness of the claim of either party in respect of amount, or otherwise, and to all the circumstances of the case.

Costs of Reference.

The award may direct the payment of the whole or any parts of the costs aforesaid by the one party to the other.

The costs aforesaid shall be subject to taxation by the registrar of the county court, on the application of either party, but that taxation shall be subject to review by the judge of the county court.

34. The award shall fix a day, not sooner than one month after the delivery of the award, for the payment of money awarded for compensation, costs, or otherwise.

Day for Payment.

35. A submission or award shall not be made a rule of any court, or be removable by any process into any court, and an award shall not be questioned otherwise than as provided by this act.

Submission not to be removable, &c.

APP. A. s. 9.
38 & 39 VICT.
c. 92.

Appeal to
County Court.

36. Where the sum claimed for compensation exceeds fifty pounds, either party may, within seven days after the delivery of the award, appeal against it to the judge of the county court on all or any of the following grounds:

1. That the award is invalid;
2. That compensation has been awarded for improvements, acts, or things, breaches of covenants or agreements, or for committing or permitting waste, in respect of which the party claiming was not entitled to compensation;
3. That compensation has not been awarded for improvements, acts, or things, breaches of covenants or agreements, or for committing or permitting waste, in respect of which the party claiming was entitled to compensation;

and the judge shall hear and determine the appeal, and may, in his discretion, remit the case to be reheard as to the whole or any part thereof by the referee or referees or umpire, with such directions as he may think fit.

If no appeal is so brought, the award shall be final.

The decision of the judge of the county court on appeal shall be final, save that the judge shall, at the request of either party, state a special case on a question of law, for the judgment of the High Court of Justice, and the decision of the High Court on the case, and respecting costs and any other matter connected therewith, shall be final, and the judge of the county court shall act thereon.

Recovery of
Compensation.

37. Where any money agreed or awarded or ordered on appeal to be paid for compensation, costs, or otherwise, is not paid within fourteen days after the time when it is agreed or awarded or ordered to be paid, it shall be recoverable, upon order made by the judge of the county court, as money ordered by a county court under its ordinary jurisdiction to be paid is recoverable.

Appointment of
Guardian.

38. Where a landlord or tenant is an infant without a guardian, or is of unsound mind, not so found by inquisition, the county court, on the application of any person interested, may appoint a guardian of the infant or person of unsound mind for the purposes of this act, and may change the guardian if and as occasion requires.

Provisions re-
specting Married
Women.

39. The county court may appoint a person to act as the next friend of a married woman for the purposes of this act, and may remove or change that next friend if and as occasion requires.

A married woman entitled for her separate use, and not restrained from anticipation, shall, for the purposes of this act, be in respect of land as if she was unmarried.

Where any other married woman is desirous of doing any act under this act, her husband's concurrence shall be requisite, and she shall be examined apart from him by the county court, or by the judge of the county court for the place where she for the time being is, touching her knowledge of the nature and effect of the intended act, and it shall be ascertained that she is acting freely and voluntarily.

Costs in County
Court.

40. The costs of proceedings in the county court under this act shall be in the discretion of the court.

The lord chancellor may from time to time prescribe a scale of costs for those proceedings, and of costs to be taxed by the registrar of the court.

Service of
Notice, &c.

41. Any notice, request, demand, or other instrument under this act may be served on the person to whom it is to be given, either personally or by leaving it for him at his last known place of abode in England, or by sending it through the post in a registered letter addressed to him there; and if so sent by post it shall be deemed to have been served at the time when the letter containing it would be delivered in ordinary course; and in order to prove service by letter it shall be sufficient to prove that the letter was properly addressed and posted, and that it contained the notice, request, demand, or other instrument to be served.

Charge of Tenant's Compensation.

Power for
Landlord, on
paying Compensa-
tion, to obtain
Charge.

42. A landlord, on paying to the tenant the amount of compensation due to him under this act, may obtain from the county court a charge on the holding in respect thereof.

The court shall have power, on proof of the payment, and on being satisfied of the observance in good faith by the parties of the conditions imposed by this

act, to make an order charging the holding with repayment of the amount paid, or any part thereof, with such interest, and by such instalments, and with such directions for giving effect to the charge, as the court thinks fit.

Arr. A. s. 9.
38 & 39 Vict.
c. 92.

But, where the landlord obtaining the charge is not absolute owner of the holding for his own benefit, no instalment or interest shall be made payable after the time when the improvement in respect whereof compensation is paid will, for the purposes of this act, be taken to be exhausted.

The instalments and interest shall be charged in favour of the landlord, his executors, administrators and assigns.

43. Any company now or hereafter incorporated by Parliament, and having power to advance money for the improvement of land, may take an assignment of any charge made by a county court under the provisions of this act, upon such terms and conditions as may be agreed upon between such company and the person entitled to such charge; and such company may assign any charge so acquired by them to any person or persons whomsoever.

Advance made
by a Company
for the im-
provement of
Land.

44. The sum charged by the order of a county court under this act shall be a charge on the holding for the landlord's interest therein, and for all interests therein subsequent to that of the landlord; but so that the charge shall not extend beyond the landlord's interest where the landlord is himself a tenant of the holding.

Duration of
Charge.

Crown and Duchy Lands.

45. This act shall extend and apply to land belonging to her Majesty the Queen, her heirs and successors, in right of the Crown.

Application of
Act to Crown
Lands.

With respect to such land, for the purposes of this act, the Commissioners of her Majesty's Woods, Forests, and Land Revenues, or one of them, or other the proper officer or body having charge of such land for the time being, or in case there is no such officer or body, then such person as her Majesty, her heirs or successors, may appoint in writing under the royal sign manual, shall represent her Majesty, her heirs and successors, and shall be deemed to be the landlord.

Any compensation payable under this act by the Commissioners of her Majesty's Woods, Forests, and Land Revenues, or either of them, in respect of an improvement of the first class, shall be deemed to be payable in respect of an improvement of land within section one of the Crown Lands Act, 1866, and the amount thereof shall be charged and repaid as in that section provided with respect to the costs, charges, and expenses therein mentioned.

Any compensation payable under this act by those commissioners, or either of them, in respect of an improvement of the second class, or of the third class, shall be deemed to be part of the expenses of the management of the land revenues of the Crown, and shall be payable by those commissioners out of such money and in such manner as the last-mentioned expenses are by law payable.

46. This act shall extend and apply to land belonging to her Majesty, her heirs and successors, in right of the Duchy of Lancaster.

Application of
Act to Land of
Duchy of Lan-
caster.

With respect to such land, for the purposes of this act, the chancellor for the time being of the duchy shall represent her Majesty, her heirs and successors, and shall be deemed to be the landlord.

The amount of any compensation payable under this act by the chancellor of the duchy in respect of an improvement of the first class shall be deemed to be an expense incurred in improvement of land belonging to her Majesty, her heirs or successors, in right of the duchy, within section twenty-five of the act of the fifty-seventh year of King George the third, chapter ninety-seven, and shall be raised and paid as in that section provided with respect to the expenses therein mentioned.

The amount of any compensation payable under this act by the chancellor of the duchy in respect of an improvement of the second class or of the third class shall be paid out of the annual revenues of the duchy.

The amount of any compensation payable under this act to the chancellor of the duchy shall be paid into the hands of the receiver-general of the revenues of the duchy, or of his sufficient deputy or deputies; and receipts shall be given by him or them for the same; and the same shall be applied as purchase-money for land sold under The Duchy of Lancaster Lands Act, 1855, is applicable under section two of that act.

47. This act shall extend and apply to land belonging to the Duchy of Cornwall.

Application of
Act to Land of
Duchy of Corn-
wall.

APP A. s. 9.
38 & 39 VICT.
c. 92.

With respect to such land, for the purposes of this act, such person as the Duke of Cornwall for the time being, or other the personage for the time being entitled to the revenues and possessions of the Duchy of Cornwall, from time to time, by sign manual, warrant, or otherwise, appoints, shall represent the Duke of Cornwall, or other the personage aforesaid, and be deemed to be the landlord, and may do any act or thing under this act which a landlord is authorised or required to do thereunder.

Any compensation payable under this act by the Duke of Cornwall, or other the personage aforesaid, in respect of an improvement of the first class, shall be deemed to be payable in respect of an improvement of land within section eight of The Duchy of Cornwall Management Act, 1863, and the amount thereof may be advanced and paid from the money mentioned in that section, subject to the provision therein made for repayment of sums advanced for improvements.

Ecclesiastical and Charity Lands.

Landlord, Arch-
bishop or
Bishop.

48. Where lands are assigned or secured as the endowment of a see, the powers by this act conferred on a landlord shall not be exercised by the archbishop or bishop, in respect of those lands, except with the previous approval in writing of the Estates Committee of the Ecclesiastical Commissioners for England.

Landlord, Incumbent of
Benefice.

49. Where a landlord is incumbent of an ecclesiastical benefice, the powers by this act conferred on a landlord shall not be exercised by him in respect of the glebe land or other land belonging to the benefice, except with the previous approval in writing of the governors of Queen Anne's Bounty (that is, the governors of the Bounty of Queen Anne for the augmentation of the maintenance of the poor clergy).

In every such case the governors of Queen Anne's Bounty may, if they think fit, on behalf of the incumbent, out of any money in their hands, pay to the tenant the amount of compensation due to him under this act; and thereupon they may, instead of the incumbent, obtain from the county court a charge on the holding, in respect thereof, in favour of themselves.

Every such charge shall be effectual, notwithstanding any change of the incumbent.

The governors of Queen Anne's Bounty, before granting their approval in any case under this section, shall give notice of the application for their approval to the patron of the benefice (that is, the person, officer, or authority who, in case the benefice were then vacant, would be entitled to present thereto).

Landlord,
Charity
Trustees, &c.

50. The powers by this act conferred on a landlord shall not be exercised by trustees for ecclesiastical or charitable purposes except with the previous approval in writing of the Charity Commissioners for England and Wales.

Notice to Quit.

Time of Notice
to Quit.

51. Where a half-year's notice, expiring with a year of tenancy, is by law necessary and sufficient for determination of a tenancy from year to year, a year's notice so expiring shall by virtue of this act be necessary and sufficient for the same; but nothing in this section shall extend to a case where the tenant is adjudged bankrupt, or has filed a petition for a composition or arrangement with his creditors.

Resumption for Improvements.

Resumption of
Possession for
Cottages, &c.

52. Where on a tenancy from year to year a notice to quit is given by the landlord with a view to the use of land for any of the following purposes,—

The erection of farm labourers' cottages or other houses, with or without gardens;

The providing of gardens for existing farm labourers' cottages or other houses;

The allotment for labourers of land for gardens or other purposes;

The planting of trees;

* The opening or working of any coal, ironstone, limestone, or other mineral, or of a stone quarry, clay, sand, or gravel pit, or the construction of any works or buildings to be used in connexion therewith;

The obtaining of brick earth, gravel, or sand;

The making of a watercourse or reservoir;

The making of any road, tramroad, siding, canal, or basin, or any wharf, pier, or other work connected therewith;

and the notice to quit so states, then it shall, by virtue of this act, be no objection to the notice that it relates to part only of the holding.

In every such case the provisions of this act respecting compensation shall apply as on determination of a tenancy in respect of an entire holding.

The tenant shall also be entitled to a proportionate reduction of rent in respect of the land comprised in the notice to quit, and in respect of any depreciation of the value to him of the residue of the holding, caused by the withdrawal of that land from the holding or by the use to be made thereof; and the amount of that reduction shall be ascertained by agreement or settled by a reference under this act, as in case of compensation (but without appeal).

The tenant shall further be entitled, at any time within twenty-eight days after service of the notice to quit, to serve on the landlord a notice in writing to the effect that he (the tenant) accepts the same as a notice to quit the entire holding, to take effect at the expiration of the then current year of tenancy; and the notice to quit shall have effect accordingly.

APP. A. s. 9.
38 & 39 VICT.
c. 92.

Fixtures.

53. Where after the commencement of this act a tenant affixes to his holding any engine, machinery, or other fixture for which he is not under this act or otherwise entitled to compensation, and which is not so affixed in pursuance of some obligation in that behalf or instead of some fixture belonging to the landlord, then such fixture shall be the property of and be removable by the tenant:

Tenant's Property in Fixtures, Machinery, &c.

Provided as follows:—

1. Before the removal of any fixture the tenant shall pay all rent owing by him, and shall perform or satisfy all other his obligations to the landlord in respect of the holding;
2. In the removal of any fixture the tenant shall not do any avoidable damage to any building or other part of the holding;
3. Immediately after the removal of any fixture the tenant shall make good all damage occasioned to any building or other part of the holding by the removal;
4. The tenant shall not remove any fixture without giving one month's previous notice in writing to the landlord of the intention of the tenant to remove it;
5. At any time before the expiration of the notice of removal, the landlord, by notice in writing given by him to the tenant, may elect to purchase any fixture comprised in the notice of removal, and any fixture thus elected to be purchased shall be left by the tenant, and shall become the property of the landlord, who shall pay the tenant the fair value thereof to an incoming tenant of the holding: and any difference as to the value shall be settled by a reference under this act, as in case of compensation (but without appeal):

But nothing in this section shall apply to a steam engine erected by the tenant if, before erecting it, the tenant has not given to the landlord notice in writing of his intention to do so, or if the landlord, by notice in writing given to the tenant, has objected to the erection thereof.

General Application of Act.

54. Nothing in this act shall prevent a landlord and tenant, or intending landlord and tenant, from entering into and carrying into effect any such agreement as they think fit, or shall interfere with the operation thereof.

No restriction on Contract.

55. A landlord and tenant, whether the landlord is absolute owner of the holding for his own benefit or not, may, in any agreement in writing relating to the holding, adopt by reference any of the provisions of this act respecting procedure or any other matter, without adopting all the provisions of this act; and any provision so adopted shall have effect in connexion with the agreement accordingly.

Adoption of Parts of Act by Agreement.

But where, at the time of the making of the agreement, the landlord is not absolute owner of the holding for his own benefit, no charge shall be made on the holding, under this act, by virtue of the agreement, greater than or different in nature or duration from the charge which might have been made thereon, under this act, in the absence of the agreement.

APP. A. s. 9.
38 & 39 VICT.
c. 92.

Application of
Act to future
Tenancies.

Application of
Act to existing
Tenancies.

Exception of
Non-agricul-
tural and small
Holdings.

Exception where
other Compens-
ation.

General saving
of Rights.

56. This act shall apply to every contract of tenancy beginning after the commencement of this act, unless, in any case, the landlord and tenant agree in writing, in the contract of tenancy, or otherwise, that this act, or any part or provision of this act, shall not apply to the contract; and, in that case, this act, or the part or provision thereof to which that agreement refers (as the case may be), shall not apply to the contract.

57. In any case of a contract of tenancy from year to year or at will, current at the commencement of this act, this act shall not apply to the contract, if within two months after the commencement of this act the landlord or the tenant gives notice in writing to the other to the effect that he (the person giving the notice) desires that the existing contract of tenancy between them shall remain unaffected by this act; but such a notice shall be revocable by writing; and in the absence of any such notice, or on revocation of every such notice, this act shall apply to the contract.

In every other case of a contract of tenancy current at the commencement of this act, this act shall not apply to the contract.

58. Nothing in this act shall apply to a holding that is not either wholly agricultural or wholly pastoral, or in part agricultural and as to the residuo pastoral, or that is of less extent than two acres.

59. A tenant shall not be entitled to claim compensation under this act and under any custom of the country or contract in respect of the same work or thing.

60. Except as in this act expressed, nothing in this act shall take away, abridge, or prejudicially affect any power, right, or remedy of a landlord, tenant, or other person, vested in or exercisable by him by virtue of any other act or law, or under any custom of the country, or otherwise, in respect of a contract of tenancy or other contract, or of any improvement, waste, emblements, tillages, away-going crops, fixtures, tax, rate, tithe-rentcharge, rent, or other thing.

[For County Court Order under the act, see post, Appendix F.]

SECT. 10.—39 & 40 VICT. c. 74.

An Act for amending so much of the Agricultural Holdings (England) Act, 1875, as relates to the Governors of the Bounty of Queen Anne for the Augmentation of the Maintenance of the Poor Clergy. [15th August, 1876.]

Be it enacted as follows:—

Short Title.

1. This act may be cited as "The Agricultural Holdings (England) Act (1875) Amendment Act, 1876."

Repeal of
Enactments in
Schedule.

2. The part of an act described in the schedule to this act is hereby repealed; but this repeal shall not affect anything done, or any right or liability accrued, under the repealed enactment, before the passing of this act.

Approval of
Improvements
by Patron of
Benefice.

3. Section forty-nine of The Agricultural Holdings (England) Act, 1875, shall be read and have effect as if there had been inserted therein after the word "writing" the following words, "of the patron of the benefice (that is, the person, officer, or authority who, in case the benefice were vacant, would be entitled to present thereto), or."

SCHEDULE.

Part of Act Repealed.

38 & 39 Vict. c. 92.

The Agricultural Holdings (Eng-)
land) Act, 1875 . . . } in part; namely—
The last paragraph of section forty-nine; (that is
to say)

The Governors of Queen Anne's Bounty, before granting their approval in any case under this section, shall give notice of the application for their approval to the patron of the benefice (that is, the person, officer, or authority who, in case the benefice were then vacant, would be entitled to present thereto).

SECT. 11.—43 & 44 VICT. c. 47.

APP. A. s. 11.

An Act for the better Protection of Occupiers of Land against Injury to their Crops from Ground Game.

[7th September, 1880.]

43 & 44 VICT.
c. 47.

Whereas it is expedient in the interests of good husbandry, and for the better security for the capital and labour invested by the occupiers of land in the cultivation of the soil, that further provision should be made to enable such occupiers to protect their crops from injury and loss by ground game: Be it enacted as follows:—

1. Every occupier of land shall have, as incident to and inseparable from his occupation of the land, the right to kill and take ground game thereon, concurrently with any other person who may be entitled to kill and take ground game on the same land: Provided that the right conferred on the occupier by this section shall be subject to the following limitations:

Occupier to have a right inseparable from his Occupation to kill Ground Game concurrently with any other Person entitled to kill the same on Land in his Occupation.

(1.) The occupier shall kill and take ground game only by himself or by persons duly authorised by him in writing:

(a) The occupier himself and one other person authorised in writing by such occupier shall be the only persons entitled under this act to kill ground game with firearms;

(b) No person shall be authorised by the occupier to kill or take ground game, except members of his household resident on the land in his occupation, persons in his ordinary service on such land, and any one other person bonâ fide employed by him for reward in the taking and destruction of ground game;

(c) Every person so authorised by the occupier, on demand by any person having a concurrent right to take and kill the ground game on the land or any person authorised by him in writing to make such demand, shall produce to the person so demanding the document by which he is authorised, and in default he shall not be deemed to be an authorised person.

(2.) A person shall not be deemed to be an occupier of land for the purposes of this act by reason of his having a right of common over such lands; or by reason of an occupation for the purpose of grazing or pasturage of sheep, cattle, or horses for not more than nine months.

(3.) In the case of moorlands, and uninclosed lands (not being arable lands), the occupier and the persons authorised by him shall exercise the rights conferred by this section only from the eleventh day of December in one year until the thirty-first day of March in the next year, both inclusive; but this provision shall not apply to detached portions of moorlands or uninclosed lands adjoining arable lands, where such detached portions of moorlands or uninclosed lands are less than twenty-five acres in extent.

2. Where the occupier of land is entitled otherwise than in pursuance of this act to kill and take ground game thereon, if he shall give to any other person a title to kill and take such ground game, he shall nevertheless retain and have, as incident to and inseparable from such occupation, the same right to kill and take ground game as is declared by section one of this act. Save as aforesaid, but subject as in section six hereafter mentioned, the occupier may exercise any other or more extensive right which he may possess in respect of ground game or other game, in the same manner and to the same extent as if this act had not passed.

Occupier entitled to kill Ground Game on Land in his Occupation not to divest himself wholly of such Right.

3. Every agreement, condition, or arrangement which purports to divest or alienate the right of the occupier as declared, given, and reserved to him by this act, or which gives to such occupier any advantage in consideration of his forbearing to exercise such right, or imposes upon him any disadvantage in consequence of his exercising such right, shall be void.

All Agreements in Contravention of Right of Occupier to destroy Ground Game void.

4. The occupier and the persons duly authorised by him as aforesaid shall not be required to obtain a licence to kill game for the purpose of killing and taking ground game on land in the occupation of such occupier, and the occupier shall have the same power of selling any ground game so killed by him, or the persons authorised by him, as if he had a licence to kill game: provided that nothing in this act contained shall exempt any person from the provisions of the Gun Licence Act, 1870.

Exemption from Game Licences.

5. Where at the date of the passing of this act the right to kill and take ground game on any land is vested by lease, contract of tenancy, or other contract bonâ fide made for valuable consideration in some person other than

33 & 34 Vict.
c. 57.

Saving Clause.

APP. A. s. 11.
43 & 44 VICT.
c. 47.

the occupier, the occupier shall not be entitled under this act, until the determination of that contract, to kill and take ground game on such land. And in Scotland when the right to kill and take ground game is vested by operation of law or otherwise in some person other than the occupier, the occupier shall not be entitled by virtue of this act to kill or take ground game during the currency of any lease or contract of tenancy under which he holds at the passing of this act, or during the currency of any contract made *bonâ fide* for valuable consideration before the passing of this act whereby any other person is entitled to take and kill ground game on the land.

For the purposes of this act, a tenancy from year to year, or a tenancy at will, shall be deemed to determine at the time when such tenancy would by law become determinable if notice or warning to determine the same were given at the date of the passing of this act.

Nothing in this act shall affect any special right of killing or taking ground game to which any person other than the landlord, lessor, or occupier may have become entitled before the passing of this act by virtue of any franchise, charter, or act of parliament.

Prohibition of
Night Shooting,
Spring Traps
above Ground,
or Poison.

6. No person having a right of killing ground game under this act or otherwise shall use any firearms for the purpose of killing ground game between the expiration of the first hour after sunset and the commencement of the last hour before sunrise; and no such person shall, for the purpose of killing ground game, employ spring traps except in rabbit holes, nor employ poison; and any person acting in contravention of this section shall, on summary conviction, be liable to a penalty not exceeding two pounds.

As to Non-
Occupier having
Right of killing
Game.

7. Where a person who is not in occupation of land has the sole right of killing game thereon (with the exception of such right of killing and taking ground game as is by this act conferred on the occupier as incident to and inseparable from his occupation), such person shall, for the purpose of any act authorising the institution of legal proceedings by the owner of an exclusive right to game, have the same authority to institute such proceedings as if he were such exclusive owner, without prejudice nevertheless to the right of the occupier conferred by this act.

Interpretation
Clause.

8. For the purposes of this act—

The words "ground game" mean hares and rabbits.

Exemption from
Penalties.

9. A person acting in accordance with this act shall not thereby be subject to any proceedings or penalties in pursuance of any law or statute.

Saving of
existing Pro-
hibitions.

10. Nothing in this act shall authorise the killing or taking of ground game on any days (*f*) or seasons (*g*), or by any methods, prohibited by any act of parliament in force at the time of the passing of this act.

Short Title.

11. This act may be cited for all purposes as The Ground Game Act, 1880.

(*f*) The reference is apparently to 1 & 2 Will. 4, c. 31, s. 3, by which the killing or taking of hares (not rabbits) on Sunday or Christmas-day is prohibited.

(*g*) The reference is apparently to the Act of the Irish Parliament, 27 Geo. 3, c. 35, by which the killing of hares be-

tween the 20th April and the 12th August, is prohibited, under a penalty of 1*l*. There is no close time for hares in England, nor for rabbits in any part of the United Kingdom (*except as provided by section 1, subsection 3 of the present act as to moorlands, &c.*).

APPENDIX B.

PRECEDENTS OF LEASES, &C.

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PRELIMINARY OBSERVATIONS.

"EVERY well-drawn lease," it is observed in the 8th edition of Prideaux on Conveyancing, vol. 2, p. 21, A.D. 1876, "contains a covenant by the lessee to pay the rent; to pay rates and taxes, with such exceptions, if any, as may be intended; to repair and deliver up the premises in repair at the end of the term; and to insure against fire, if it is intended that the lessee shall do so. It is also usual, in addition to the general covenant to repair, to provide that the lessee shall make any specific repairs which may be required by the landlord by notice; and when the subject of the lease is a house, to paint inside and outside at certain stated periods. If the subject of the demise is a farm there should be covenants as to cultivation. If it is not intended that the lessee shall insure, the covenant for repair should expressly except accidents by fire or other casualty, and, of course, if a portion of the repairs is to be done by the landlord, this should be expressly provided for. . . . The lessee's covenants are usually followed by a proviso or condition enabling the lessor to re-enter in case the rent remains unpaid for a certain time, or in case of a breach of any of the covenants." In the 3rd edition of Davidson's Precedents (A.D. 1876) no such general opinion is given as to what covenants are contained in "every well-drawn lease," but it said, at p. 53, n., that the result of the authorities, is, that in an ordinary agreement for a lease to contain "usual covenants," the only clauses which either party can insist on are a covenant by the lessee to pay rent and taxes, to keep and deliver up in repair, and to allow entry to view the state of repair, with a clause for re-entry on *non-payment of rent*, and "the usual qualified covenant" by the lessor for quiet enjoyment.

In drawing and revising, the present Editor has not made what is usual his first object, but has endeavoured to frame precedents as fairly as possible for both parties, adding alternative forms in the customary manner^(a). It is obvious that a lease will vary greatly according as it is settled on behalf of the landlord or on behalf of the tenant, and the Editor is bound to point out, that the precedents principally

(a) In this (the 12th edition) the precedents have been thoroughly revised, and many quite new forms are added, the Editor mainly relying in this respect upon

the substantial assistance very kindly afforded by his friend L. G. G. Robbins, Esq., of Lincoln's Inn.

in use wear the appearance of leases settled on behalf of the landlord.

For instance, the covenant for quiet enjoyment, as ordinarily framed in the "qualified" form (see ante, p. 645), is a protection to the landlord, and not to the tenant, who is better off if the covenant be omitted altogether. Quiet enjoyment.

Again, in the covenant not to assign, the possibility of the landlord requiring a premium for the licence, or withholding it arbitrarily, should always be guarded against: and it is important that this should be done by words of express agreement (*b*). Covenant not to assign.

Thirdly, in the majority of modern leases the proviso for re-entry is framed generally, so as to be applicable to the breach of *any covenant whatever*. Upon the proviso so framed, James, L. J., said, in *Hodgkinson v. Croze*, L. R., 10 Ch. at p. 626:—"It is a most odious stipulation, it is offensive; and it is oppressive beyond measure; and it has never, in my opinion, been submitted to by lessees except upon a general notion that lessors are men of honour and liberality, and will not incur the odium which they would incur in the eyes of their neighbours if they endeavoured to enforce their strict rights, by insisting on a forfeiture of a valuable estate, in which, perhaps, the whole of the lessee's fortune may have been embarked, because he has through inadvertence committed a breach of covenant which may not have done the lessor a shilling's worth of damage." Proviso for Re-entry.

A qualification appears in the Ecclesiastical Leasing Act, 1842 (ante, 23), to the effect that the proviso for re-entry is not to be exercised unless and until an action has been brought for the breach of covenant, and the damages and costs recovered in such action have remained unpaid for three months. This is, it is believed, but little used in practice. Re-entry after unsatisfied Judgment in Action.

The qualification that the proviso shall only be available in case of a breach causing a certain amount, say 100*l.* damage to the reversion, has long been incorporated in the precedents to this work, but seems to have found little or no favour. Re-entry for substantial Breach only.

A qualification gradually coming into use is that the landlord shall not re-enter without prior notice, fixing a time within which the tenant may perform the covenants and save the forfeiture. [See two forms in Davidson's Precedents, Vol. V. pp. 189, 392.] The only objection to this seems to be that it does not apply to breaches incapable of remedy. Re-entry after Notice.

Perhaps the qualification which best meets most cases is that which was incorporated in Lord Cairns' Bill (see post, p. 937), and which provides for compensation in money where a breach is incapable of remedy. Re-entry after failure to observe or compensate.

The question is a very difficult one. The objections which would be urged for the tenant are obvious. On the part of the landlord,

(*b*) *Scar v. House Property and Investment Co.*, 43 L. T. 531.

APP. B. s. 1. however, it would be urged that the measure of damages is merely the injury to the reversion (s), and that it might frequently be difficult, if not impossible (a), to obtain specific performance of an affirmative covenant or an injunction to restrain the breach of a negative one.

What seems to be required is that the proviso for re-entry should (1) be relegated to its proper function, that of enforcing covenants which cannot be enforced in any other manner; and (2) should be so drawn as not to become available in the hands of a lessor or his assignee seeking, not the observance of the covenants, but the improved value of the premises. This latter end might perhaps be secured—in cases where none of the qualifications above stated satisfy the parties,—by insuring the improved value to the tenant after deduction for all damages and costs upon a liberal scale.

An attempt has been made post (see sect. 56, post), to frame a proviso for re-entry of this character.

SECT. 1.—*Agreement for Lease of House specifying the Covenants and Conditions to be inserted.*

Date and Parties.

Stamp (b).

Testatum.

Parcels, &c.

Riddendum.

Lessee's Covenants.

To pay Rent; also Rates and Taxes

To Repair.

To paint Outside

And Inside.

To leave in Repair.

Power to Lessor to enter and view Repairs, and leave Notice of Defects.

Premises not to be used for Trade.

Not to assign [or sublet] without Licence.

AGREEMENT made the — day of —, 18—, BETWEEN A. B. of —, in the county of — [seq.] (hereinafter called the landlord), of the one part, and C. D. of —, in the [same] county [gentleman] (hereinafter called the tenant), of the other part; WITNESSETH, that the landlord agrees to grant and the tenant agrees to accept a lease of ALL [state parcels (c), and general words (d), and any exceptions or reservations (e)], from the — day of — ["now last past," or "next," or "in the year 18—"] for the term (b) of — years determinable as hereinafter mentioned]: At the yearly rent of £—, payable quarterly on the usual quarter days, without any deductions (except for property tax), the first of such quarterly payments to be made on the — day of — next: AND subject to covenants by the tenant [here state concisely the covenants as agreed on, ex. gr.], to pay the said rent in manner aforesaid; to pay all existing and future rates, taxes and assessments; to keep the said premises in good tenantable repair and condition (damage by fire and tempest only excepted); to paint all the outside wood and ironwork of or belonging to the said premises twice over in good oil colour and in a workmanlike manner in every [three] years of the said term, and the inside wood and ironwork in like manner in every [seven] years of the said term: and at the end or determination of the said term to leave the premises in good and tenantable repair, [reasonable use and wear thereof, and damage by fire and tempest in the meantime only excepted]. The landlord and his agents and surveyors to have liberty to enter and view the said premises [twice or oftener] in every year of the said term; the tenant to make good and repair all defects within three calendar months after receipt of notice in writing from the landlord (f): The tenant to keep the premises insured in the sum of £— at the least in the joint names of the landlord and tenant, and to produce the policies and receipts for premiums when required, and to expend all monies which may be received by virtue of any such insurance in rebuilding and reinstating the premises and to make good any deficiency: And not to convert the premises into a shop, or use the same for carrying on any trade or business (g): nor to assign [or sublet (h)] the premises or any part thereof (otherwise than by subletting

(s) *Mills v. East London Union, L. R.*, 3 C. P. 79, and 573, ante.

(a) See as to repair, 576, ante. *

(b) If the agreed term does not exceed 35 years, the agreement will require the same stamp as a lease.

(c) See post, 896.

(d) See post, 897.

(e) Ib.

(f) See sect. 2, note (r), p. 860.

(g) Or specify the particular trades, &c. objected to, as in Sect. 2, p. 861.

(h) Ante, Ch. XVII.

furnished for six calendar months, or for any less term) without first obtaining on each occasion the licence in writing of the landlord. Provided always, and it is hereby expressly agreed that such licence shall be given free of charge, and not unreasonably withheld. The said lease also to contain the usual qualified covenant on the part of the landlord for quiet enjoyment.

Also a power for re-entry on non-payment of any of the rent for [15] days (although no formal demand thereof shall have been made (l)); or in case the tenant, his executors, administrators or assigns shall become bankrupt, or on breach of any of the tenant's covenants [Provided, nevertheless, that this power shall not be enforceable in the case of such breach unless the tenant shall fail to observe or compensate for non-observance of any covenant within six calendar months after notice to observe the same]. Also a proviso enabling the tenant [or either party] to determine the lease at the end of the first seven or fourteen years of the term on six months' previous notice in writing, and on payment by the tenant (if such notice be given by him) of all arrears of rent, [and performing the tenant's covenants] to the end of such notice, and then quitting possession of the said premises. AND the tenant agrees to execute a counterpart of the said lease, and to pay [all or one moiety of] the expense of the said lease and counterpart (m). AND it is hereby agreed that these presents shall operate as an agreement only, and not as an actual demise (n); But that, until a lease shall be executed as aforesaid, the rent, covenants and conditions agreed to be therein reserved and contained shall be paid, observed and performed, and the several rights and remedies shall be enforced, in the same manner as if the same had been actually executed. As WITNESS the hands of the said parties.

Witness,

E. F., of —.

(Signed) A. B.

C. D.

APP. B. s. 1.

Covenant by Lessor for quiet enjoyment.

Proviso for Re-entry. (k)

Proviso for determining Term at end of first Seven or Fourteen years.

Agreement—accept such Lease.

And execute a Counterpart.

And to pay expenses (m).

This Contract not to operate as a Lease (n).

Intermediate Demise (o).

SECT. 2.—Concise Agreement for a Lease.

AGREEMENT between A. B. [name in full of intended landlord] of — and C. D. [name in full of intended tenant], made this — day of —, 18—, in which agreement the word "landlord" means the said A. B., his heirs and assigns, and the word "tenant" means the said C. D., his executors, administrators and assigns.

Parties and Premises.

Stamp (p).

The landlord shall grant and the tenant shall accept a lease of ALL [describe parcels] for 21 years, determinable at the end of the first 3, 7, or 14 years, at the option of the tenant, to be signified by not less than 6 calendar months' notice in writing to the landlord, at the yearly rent of £ — clear of all existing and future rates, taxes, and assessments.

The said net rent shall be paid half-yearly, on the — day of —, and on the — day of —, the first of such half-yearly payments to be made on the — day of — 18—.

Rent.

The lease shall contain the following covenants by the tenant:—

Covenants by Tenant.

To pay net rent as aforesaid;

To keep the premises with the fixtures [set forth in the schedule hereto] in good repair, damage by fire, tempest or external explosion excepted, AND to paint with two coats of good oils the inside woodwork and ironwork every 7 years, and the outside work and ironwork every 3 years, AND to allow the landlord to enter four times a year to view the state of repair, AND to yield up the premises with the said fixtures in good repair at the end of the term (reasonable wear and tear and such damage as aforesaid excepted).

To use the premises as a private dwelling-house only.

Not to assign or sublet the premises without the written consent of the landlord [Provided always, and it is hereby expressly agreed that such consent shall be granted free of charge, and not be unreasonably withheld] (q).

(k) For another form of proviso for re-entry, see Sect. 2, p. 860.

(l) Or say (the same being lawfully demanded on any of the said days or at any time afterwards, and not paid when demanded).

(m) Ante, 179.

(n) This would prevent the instrument from being construed to be an actual demise or lease (*Perring v. Brook*, 1 Moo.

& R. 510; 7 C. & P. 360).

(o) These words create an intermediate demise, for which a distress may be made; *Anderson v. Midland R. Co.*, 3 E. & E. 614; 30 L. J., Q. B. 94.

(p) See sect. 1, note (b), p. 858.

(q) See *Treloar v. Biggs*, L. R., 9 Ex. 151; and 628, ante. For other forms, see post, Sects. 38—40. Words of express agreement are necessary, see ante, p. 856.

APP. B. s. 1A.

Covenants by
Landlord.

The lease shall contain the following covenants by the landlord :—

The usual qualified covenant for quiet enjoyment ;

A covenant to insure and keep insured the premises against fire to the amount of £ — at the least, AND to rebuild within 6 months in case of fire (r).

The lease shall contain the following provisos :—

A proviso for re-entry by the landlord in any of the following cases—

On non-payment of rent within 28 days after demand in writing thereof ;

On the tenant becoming bankrupt ;

On [here add other events, if any, to which it is intended that an *absolute* proviso for re-entry shall apply].

On breach by the tenant of any covenant, in an action for breach of which judgment shall have been obtained, and the damages and costs to be recovered in such action shall have remained unpaid for three calendar months.

And it is further agreed that these presents shall operate as an agreement only, and not as an actual demise.

And it is further agreed that the landlord shall forthwith put the premises into complete tenantable repair, [or shall forthwith execute upon the premises the works, repairs, and decorations specified in the schedule hereto].

The SCHEDULE above referred to.

[Here specify the repairs, &c. to be executed.]

(Signed) A. B.
C. D.SECT. 3.—*Agreement for Sub-lease operating as a Demise (s). In case of Fire, Lessor to rebuild, and Rent to be suspended.*

Date and Parties.

Stamp (t).

Testatum.

Parcels.

General Words.

Fixtures.

Reddendum.

Covenants by Lessee.

To pay Rent.

And interest on arrears.

Rates and Taxes.

To paint, &c.

To repair.

Cesser of Rent in case of Fire until, &c.

AGREEMENT made the — day of —, 18—, BETWEEN A. B. of &c., of the one part, and C. D. of &c., of the other part ; WITNESSETH, that the said A. B. agrees to let, and the said C. D. agrees to take, ALL [describe parcels, ex. gr., that messuage or dwelling-house situate and being No. 22, Harp Lane, Great Tower Street, in the city of London], WITH the actual and reputed rights, members, easements and appurtenances (u) ; AND the use of the fixtures belonging to the said A. B. now or at any time hereafter during the said term in or upon the said premises [the principal articles whereof are mentioned in the schedule hereunder written] ; FOR the term of — years from the — day of — last past (v) ; At the clear yearly rent of £ —, payable, by equal quarterly payments, on the four usual quarter days, the first of such quarterly payments to be made on the — day of — next. AND the said C. D. hereby agrees to pay the said rent at the times and in manner hereinbefore mentioned [with interest at the rate of £5 per cent. on any of the rent when in arrear for more than one calendar month, calculated from the day it became due to the time of payment (x)] : ALSO, to pay land tax, sewers rates, and all other rates, taxes and impositions of every description in respect of the said premises during the said tenancy (landlord's property tax only excepted) ; ALSO, to paint, paper and whitewash the said premises when, where and as often as shall be reasonably necessary, and to keep the said premises in good tenantable repair, order and condition (damage by fire [tempest, explosion of gas or gunpowder, war or riot always] excepted) ; BUT if such premises or any part thereof shall be destroyed or damaged by fire, [tempest, explosion of gas or gunpowder, war or riot, in any of such cases] the said C. D. shall not be liable to pay any rent whatever (except arrears previously due) until the said A. B., his executors, administrators or assigns shall have caused such premises to be repaired or rebuilt, as the case may require ; and then only a fair and just proportion of the rent during such repairs or rebuilding, the amount

(r) This is unusual, the tenant insuring in most cases. But it seems to save trouble that the landlord should insure. The premium can, of course, be added to the rent if desired. See post, sect. 23, p. 891.

(s) This form was taken partly from *Furnell v. Groves*, 8 C. B., N. S. 497.

(t) A lease stamp is necessary ; ante, 836.

(u) Here state any exception or reser-

vations ; post, 897.

(v) Or say "from the — day of — [last or next], from year to year ;" or say, "from the — day of — 18 —, for one year certain, and so on from year to year." But in the latter case it will operate as a lease for two years at the least.

(x) See form of such covenant, post, 873.

thereof to be settled by mutual consent, or by an arbitrator to be mutually agreed on, or to be appointed pursuant to the Common Law Procedure Act, 1854, and to be paid one week next after the amount thereof shall be so settled as aforesaid (y): the costs of any such reference and award to be in the discretion of the arbitrator (z), who shall direct by whom and to whom the same shall be paid and shall in other respects have all the usual powers of an arbitrator, and whose award and decision shall be final. [The exceptions hereinbefore contained not to be applicable to any case in which there shall have been negligence or wilful default on the part of the said C. D., his assigns or agents, or any of his family]. THE said C. D. not to carry on or permit to be carried on upon the said premises or any part thereof [*here specify any trades or businesses that may be particularly objected to*, ex. gr., the trades of a butcher, slaughterman, tallow chandler, melter of tallow, soap-maker, tobacco-pipe maker, currier, smith, sugar-baker, fellmonger, dyer, distiller, farrier, blacksmith, common brewer, coppersmith, working brazier, pewterer, tin-plato worker, cooper, tripe-boiler, tripe seller, coal-shod or vendor of coals, boator of flux, auctioneer, victualler, seller of intoxicating liquor of any kind, whether to be consumed on or off the premises, or any of them, or] any [other] noisome, noxious, offensive or dangerous trade or business whatsoever; nor to do or suffer or omit any act or thing whatsoever whereby or in consequence whereof the lease under which the said premises are now held, bearing date the — day of —, 18—, and made or expressed to be made between E. F. therein described of the one part, and the said A. B. of the other part, may be forfeited or vacated or become void or voidable: AND the said C. D., at the end of the said tenancy, to leave, surrender and deliver up to the said A. B., his executors, administrators or assigns, all the said premises, together with all the fixtures which now are, or which at any time hereafter during the said tenancy may be fixed or set up by the said A. B., in good plight and condition (reasonable fair wear and tear thereof and damage by fire excepted), [*here specify anything specially agreed to be done by the tenant on the expiration of the tenancy*, ex. gr., the partitions dividing the attic story into four rooms, and the raised floor taken down by the said C. D., to be refixed and made good in a proper and workmanlike manner at or before the end of the tenancy]: Provided always [*here insert proviso for re-entry*, see p. 896a:] [*If the landlord is to do any repairs or alterations here specify them*, ex. gr.]: THE said A. B. shall, within [twenty-eight] days from the date of this agreement, make good and support the floor of the warehouse of the said premises, and repair and make good the frame and glass of the skylight, and fix the present partition of the same warehouse, or as the same may be agreed on (u), otherwise the said C. D. shall be entitled, within [seven] days after the expiration of the said [twenty-eight] days, to quit possession of the said demised premises, and determine and make void these presents by a notice in writing signed by him, and delivered to the said A. B., or left for him at [*state his place of residence*] aforesaid, without paying any rent or other compensation in respect thereof. AS WITNESS the hands of the said parties.

APP. B. s. 2.

Against noisome and offensive Trades.

Not to avoid original Lease.

To surrender at end of Term.

With Fixtures.

Other Things to be done by Tenant at end of Term.

Proviso for Re-entry.

Certain Repairs to be forthwith done by Landlord.

Otherwise, &c.

Witness,
J. K., of [&c.]

(Signed) A. B.
C. D.

The [FIRST] SCHEDULE referred to in the above written agreement.
[*Here specify the fixtures.*]

The [SECOND] SCHEDULE referred to in the above written agreement.
[*Here specify the repairs agreed to be done.*]

Witness,
J. K.

(Signed) A. B.
C. D.

(y) This will effectually prevent any action being brought before the amount has been so ascertained; *Acery v. Scott*, 8 Exch. 487; 5 H. L. Cas. 811. Without such a stipulation the landlord might sue for all the rent, and leave the tenant to pay into court a sufficient sum at his peril; *Bennett v. Ireland*, E., B. & E. 328; 28 L. J., Q. B. 48.

(z) With a view to costs, &c., the arbi-

trator should, at the commencement of the inquiry, ascertain how much the tenant offered to pay, and how much the landlord was willing to accept.

(u) If the repairs and alterations are numerous, say "do all the repairs, alteration and improvements mentioned in the schedule to these presents;" and at the end add a schedule, specifying the work to be done.

APP. B. s. 3.

Stamp (c).

SECT. 4.—*Concise Agreement for letting a Furnished House (b):*

AGREEMENT made the — day of — 18—, BETWEEN A. B. of &c. (hereinafter called the landlord), of the one part, and C. D. of &c. (hereinafter called the tenant), of the other part; The landlord agrees to let, and the tenant agrees to take, ALL that furnished dwelling-house [*describe it*], with the fixtures and appurtenances; TOGETHER with the furniture and effects mentioned in the schedule to these presents; FOR the term of — [weeks or calendar months], to be computed from the — day of — [instant or next]; AT the rents of £— [per week or calendar month] for the premises and of £— for the furniture respectively, such rents to be payable, [*state when payable as agreed, ex. gr., on Saturday in each week, or on the fifteenth day of each month, or at the end of the said tenancy, or payable from month to month in advance on the — day of each month, and to be suspended or reduced in case of damage by fire until such damage be repaired by the landlord*]: The tenant agrees at the end of his tenancy to leave the demised premises, including the said fixtures, appurtenances, furniture and effects in as good state, condition and repair as they now are, reasonable wear and tear and damage by fire or tempest excepted: The landlord agrees to pay all rates and taxes of every description (except the gas rate, which shall be paid by the tenant in accordance with his consumption of gas, and shall be apportioned if necessary), and to do all necessary repairs when required during the said tenancy; also to indemnify the tenant against all ground and other rent, charges and incumbrances (if any) affecting the said premises, and from all distresses, claims and demands in respect thereof (d). As WITNESS the hands of the said parties.

THE SCHEDULE above referred to. [*Here specify the furniture, &c. Be particular to mention every crack or other defect.*] The following windows were cracked at the date of the above agreement, viz. [*here specify each cracked window*].

(Signed) A. B.
C. D.

Witness,
E. F., of [&c.]

SECT. 5.—*Concise Agreement for letting Furnished Lodgings, with Attendance, &c.*

Stamp (c).

AGREEMENT made the — day of —, 18—, BETWEEN A. B. of &c. (hereinafter called the landlord), of the one part, and C. D. of &c. (hereinafter called the tenant), of the other part; The landlord hereby agrees to let, and the tenant agrees to take, ALL those the rooms or apartments following, (that is to say) [*describe the rooms, ex. gr., the front parlour, and the back bed-room on the second floor, and the small coal-cellar in the front area.*] being parts of the house and premises of the landlord, situate at — aforesaid, TOGETHER with all easements and appurtenances [including gas-light, which is to be supplied by the landlord]; AND also the furniture, goods, chattels and effects in the said rooms or apartments, [the principal articles whereof are mentioned in the schedule to these presents (e)]; AND also such attendance as hereinafter mentioned; To HOLD from the — day of —, from week to week [or from month to month], determinable by either party upon giving to the other [one week's or one calendar month's] previous notice in writing to quit, ending on [any Saturday, or on the — day of any month], half such notice to be sufficient if given during the first [week or month]; AT the rent of £— per week, payable on [Saturday] in each week during the said tenancy; [or at the rent of £— per calendar month, payable on the — day of each month during the said tenancy]; The tenant, at the end of his tenancy, to leave the said demised premises, together with the said furniture, goods, chattels and effects, in as good

(b) There is an implied warranty by landlord of fitness for occupation; *Wilson v. Finch-Hatton*, L. R., 2 Ex. D. 336; ante, 169.

(c) 2s. 6d. if rent more than 25l. See Stamp Act, 1870, s. 99 and sched., ante, 841.

(d) Here insert any special clauses with

regard to use of horses and carriages, garden produce, &c. [*e. g., "And it is hereby agreed that the tenant shall have all the produce of the garden as it becomes ripe, the gardener's wages being paid by the landlord."*]

(e) The schedule of furniture, &c. may be omitted, if preferred.

state, condition and repair as they now are, reasonable wear and tear and damage by fire or tempest excepted; The landlord agrees to pay all rates and taxes of every description: The landlord agrees to do all necessary repairs when required by the tenant; also to indemnify the tenant against all ground and other rent which is or may become due or payable to any superior landlord of the said premises during the said tenancy, and from all distresses, claims and demands in respect thereof: The landlord also agrees to find and provide the tenant with the attendance of a respectable female servant, and with all other necessary and proper attendance, including cooking and boot and shoe cleaning; also to find and provide him with proper and sufficient plate, linen, china, knives, silver or electro-plated forks and spoons, and other necessary household things, to enable him to reside comfortably in the said rooms or apartments during the said tenancy; The landlord not to do or suffer to be done anything in the said house of a noisy, noxious or offensive nature during the said tenancy: PROVIDED that if at any time during the said tenancy the tenant shall be annoyed, vexed or disturbed by anything of a noisy, noxious or offensive nature, contrary to the stipulations in that behalf above contained; or if the tenant shall find or discover anything that may at all lead him to suspect that there is any embarrassment on the part of the landlord (g), or any danger of a distress for rent, rates or taxes, or of an execution against the goods of the landlord, then and in any such case it shall be lawful for the tenant by notice in writing forthwith to determine the tenancy hereby created, and to quit possession of the said rooms or apartments without giving any previous notice to quit, anything hereinbefore contained to the contrary in anywise notwithstanding; and thereupon the tenant shall be liable to pay rent pro rata to the time of quitting; [Provided nevertheless that the tenant shall not hereby be deprived of any of the protection afforded by the Lodgers' Goods Protection Act, 1871]. As WITNESS the hands of the said parties.

APP. B. s. 4.

THE SCHEDULE above referred to. [Here specify the furniture, &c. Be particular to mention every crack or other defect, also to mention the cracked windows.]

SECT. 6.—*Agreement for Sub-lease of a Shop and Rooms unfurnished, but with the Pictures therein—Tenancy from year to year—Lessor to pay all Rates and Taxes—Provido that the Lessor shall not sue or distrain for the Rent until after he has paid his own Rent and produced the Receipt (h).*

AGREEMENT made this — day of —, 18—, BETWEEN A. B. of [&c.] (hereinafter called the landlord) of the one part, and C. D. of [&c.] (hereinafter called the tenant) of the other part; THE landlord hereby agrees to let, and the tenant agrees to take the shop and rooms following, that is to say, [two rooms on the ground floor, and the shop at the back thereof, and also two rooms on the second floor, and the back kitchen and small coal-cellar, with the use of the yard and other conveniences, and the appurtenances thereto belonging, and also the fixtures in the said shop and rooms,] being part of a house and premises situate and being [No. 67, Seymour Street, Euston Square aforesaid], now in the occupation of the landlord from the — day of — [instant, or last, or next], from year to year (i); AT the yearly rent of £— sterling, payable by equal quarterly payments, on the — day of —, the — day of —, the — day of —, and the — day of —, the first quarterly payment to be made on the — day of — next; AND the landlord hereby agrees to pay all rates, taxes, and assessments, which now are or shall at any time during the continuance of the said tenancy be assessed, imposed upon the said premises, or upon the occupier in respect thereof; AND it is further agreed

Date and Parties.

Parcels.

Fixtures.

Reddendum.

Lessor to pay all Rates and Taxes.

Repairs.

(g) This may as well be inserted, notwithstanding the provisions of the Lodgers' Goods Protection Act, 1871, as to which see ante, 414.

(h) This form is taken (with variations) from *Giles v. Spencer*, 3 C. B., N. S. 244, where it was held that the concluding proviso was effectual to prevent a distress

until the condition therein contained had been complied with.

(i) This tenancy may be determined by the usual notice to quit at the end of the first or any subsequent year thereof; but a demise "for one year certain, and so on from year to year," is a demise for two years at the least.

APP. B. s. 5.

Proviso against
Rent to superior
Landlord.

that when the tenant shall quit the said premises he shall leave them in as good state, condition and repair as they now are, reasonable wear and tear and damage by fire and tempest only excepted; PROVIDED ALWAYS, and it is lastly agreed by and between the said parties hereto, that no action, distress or other proceeding shall be commenced or prosecuted by or on behalf of the landlord, in respect of the non-payment of the rent hereby reserved, unless and until he shall have paid the rent due from him or them to the superior landlord or landlady of the said house and premises [No. 67, Seymour Street aforesaid], and shall have produced and shown to the tenant the receipt or receipts for such rent. As WITNESS the hands of the said parties.

Witness,

E. F., of [&c.]

(Signed) A. B.

C. D.

SECT. 7.—*Agreement for a Sub-lease for Twenty-one Years, determinable, &c.—Covenants as in Ground Lease—Lessee to have the Option of purchasing within Two Years on certain Terms (k).*

Parties.
Premises.

Term.
Stamp (m).

Rent.

Rates and
Taxes.
Covenants.

Lessor to com-
plete Premises
before (15thh)
September
next: otherwise,
&c.

Lease and Coun-
terpart and Ex-
pense thereof.
Option of Pur-
chase.

Date.

HEAD of proposed lease from A. B. to C. D. of No. 24, — Gardens, Maida Hill, Paddington, in the county of Middlesex, with the actual and reputed rights, members, easements and appurtenances (except [*here state any exception or reservation to the landlord (l)*]): Term twenty-one years from the 29th September, 18—, determinable by [*either party*] at the end of the first seven or fourteen years, upon twelve calendar months' previous notice in writing, and upon payment by lessee, his executors, administrators or assigns (if such notice be given by him or them) of all rent and arrears of rent to the expiration of the notice, and then giving up possession. Rent 200*l.* per annum [*for the first seven years, and 220*l.* per annum afterwards during the remainder of the term*], payable by equal quarterly payments on the usual days, the first payment to be made on the 25th day of December next [*and to be suspended in case of damage by fire, or explosion not caused or contributed to by the lessee, or tempest, &c.*]. Lessee to pay the land-tax (if any), sewers rates and all other rates, taxes and impositions whatsoever (except property tax). Covenants by lessee to perform and observe all the covenants and conditions in the lease from [*the Bishop of London and his trustees to the said A. B.*] dated the — day of —, 18—, so far as they are applicable to the premises hereby agreed to be demised, except the covenant to pay the rent reserved in and by such lease [*here state any other exception*]. The lessor, at his own expense, to furnish and complete the premises in a proper and workmanlike manner, and to put them into good tenantable repair, order and condition in every respect fit for an incoming tenant, before the [*15th day of September next (n)*], otherwise the lessee to have the option of cancelling this agreement on or after that day and before the [*29th day of September aforesaid*], upon giving notice in writing under his hand to the lessor, or leaving such notice for him at his last known place of abode, or at No. 24, — Gardens aforesaid. The lease and a counterpart thereof to be prepared by the lessor's solicitor at the lessee's expense, and to contain a clause giving the lessee, his executors, administrators and assigns, the option of purchasing within two years from 29th September, 18—, the then residue of the lessor's term, for the sum of 3,300*l.* sterling, and 20*l.* per annum rent payable by equal [*half-yearly*] payments on the — day of — and the — day of —, with power to distrain for the same and to dispose of such distress as for rent-service. Upon any such purchase no proof of the lessor's title is to be required. Such lease and counterpart to be executed and possession of the premises given on or before the 29th day of September, 18—.

Dated this — day of —, 18—.

Witness,

E. F., of [&c.]

(Signed) A. B.

C. D.

(k) This form is taken (with variations)

from *Tidesley v. Clarkson*, 31 L. J., Ch. 362; 30 Beav. 419.

(l) Post, 897.

(m) Same as on lease for same term.

(n) See *Tidey v. Mollett*, 16 C. B., N. S. 298; 33 L. J., C. P. 235.

SECT. 8.—*Concise outline of Terms for letting a Farm, with reference to a previous Lease (p).*

APP. B. s. 8.

TERMS for the lease of a farm at —, containing [here describe the land, &c.]; term twelve years and a half from Lady-day last; rent 350*l.*, to be paid quarterly; landlord to pay the tithe rent-charge and drainage taxes; tenant to pay all other rates, taxes and assessments whatsoever (except property tax); landlord to put buildings, gates and posts in repair, and tenant afterwards to keep them in repair, being allowed rough timber; tenant to pay for the muck and straw upon the farm by valuation: All the other covenants and conditions to be the same as in the lease under which J. H. B. now holds the said farm, including a power of re-entry by the landlord on non-payment of rent or breach of covenant by the tenant: Landlord to allow tenant 25*l.* of the first half-year's rent: [“The Agricultural Holdings Act, 1875,” not to apply in any way, or such part only of the Agricultural Holdings Act as gives the tenant property in fixtures to apply to this contract of tenancy] (r): [Tenant to pay all expenses of this agreement and of the lease and counterpart] (s). These terms shall operate as an agreement only and not as an actual demise; but until a lease shall be executed, the rents, covenants and conditions hereby agreed to be reserved and contained by and in such lease (including the proviso as to “The Agricultural Holdings Act, 1875”) shall be paid and observed, and the several rights and remedies shall be enforced in the same manner as if the same had been actually executed. We agree to the above conditions this — day of —, 18—.

Stamp (q).

(Signed) ROBERT BROWN (t),
Agent to William Smith, esquire.
JOHN JONES.

SECT. 9.—*Agreement for letting a Farm from Year to Year.*

AGREEMENT made the — day of —, 18—, BETWEEN A. B. of, &c. (hereinafter called the landlord) of the one part, and C. D. of, &c. (hereinafter called the tenant) of the other part. The landlord agrees to let and the tenant agrees to take the dwelling-house, farm and farm buildings, cottages and appurtenances situate [here describe the premises] (u), for the term of one year commencing at Michaelmas next, and afterwards from year to year, but determinable at the end of the first or of any other year by either party giving to the other one year's written notice to quit at the yearly rent of £— clear of all tithe, rent-charge and other deductions (except land tax and landlord's property tax), payable quarterly on the usual quarter days in each year, the first payment to be made on the 25th of December next; and at the additional rent of £— for every acre, and so in proportion for any greater or less quantity than an acre of sward or permanent pasture or meadow land which, during the said tenancy, shall be cropped, tilled or cultivated contrary to the agreement hereinafter contained without the consent in writing of the landlord or his agent, and such additional rent to be paid quarterly on the days aforesaid, the first payment thereof in each case to become due and to be made on such of those quarter days as shall happen next after such cropping or cultivation as aforesaid, and to continue payable on each succeeding quarter day during the tenancy.

Parties.
Stamp (q).
Demise.
Parcels.
Term.

Rents.

And it is further agreed as follows:—

All game, wild fowl, rabbits and fish (subject only to the concurrent rights of the tenant under the Ground Game Act, 1880) are excepted and reserved to the landlord with the exclusive right of hunting, coursing, shooting, fishing and sporting (subject only as aforesaid); and also all timber and other trees, pollards and saplings, and all mines and minerals with full liberty of access to the landlord's agents and all persons authorized by him to cut, lop, quarry, work, and carry away the same respectively. The landlord paying to the tenant

Exceptions and
Reservations.

(p) This form is taken (with variations) from *Collen v. Wright*, 7 E. & B. 301; 8 Id. 647; where it was held, that the defendant, by his signature in the above form, impliedly promised that he had sufficient authority to sign; and see ante, 67.

(q) Same as on lease; ante, 87.

I.T.

(r) Ante, Chap. XXI.

(s) See ante, 179.

(t) Supra (p).

(u) It will often be found convenient to give the particulars of the premises in a schedule.

APP. B. s. 9.	reasonable compensation for damage done to his growing crops in so doing; and also full liberty of access as aforesaid to the premises to view the state of repair of the buildings, gates and fences, and the management and cultivation of the land, and for any other reasonable purpose.
Agreements by Tenant.	And the tenant agrees as follows:—
To pay Rent and Taxes.	To pay the said yearly rent of £— and (if the same shall become payable) the said additional rent on the days and in manner aforesaid, and to pay all tithe rent-charge and all existing and future taxes, rates, assessments and outgoings whatsoever (except as aforesaid); and personally to reside in the said dwelling-house, and not to assign, underlet or part with possession of the premises or any part thereof except the cottages (which may be let to weekly tenants) without the consent in writing of the landlord or his agent; and to keep, and at the end or sooner determination of the tenancy to leave, in thorough repair and order the said dwelling-house and cottages with all fixtures and additions thereto respectively, and all buildings for the time being on the said premises (except the main timbers, tiled roofs and outside walls of the said dwelling-house, cottages and buildings), and also the thatched roofs, roads, doors, gates, stiles, fences, walls, rails, bars, culverts, gutters, ditches, drains, pumps, ponds, wells, banks, dams, floodgates, and bridges, and to do at all times what may be necessary to allow the surface-water to flow off; and to paint all the outside wood and iron work in and upon the premises hitherto or usually painted with two coats of the best oil paint when necessary, and at least in every fourth year of the tenancy, and to tar and varnish all other wood and iron work hitherto or usually tarred or varnished.
To reside and not to assign or underlet.	
To repair.	
Insurance.	[If the tenant is to insure, insert, To insure the said messuage and cottages and all buildings for the time being on the said premises, &c., see <i>post</i> , sect. 41, p. 899.]
Cultivation and Management. Crops.	To cultivate the farm according to the best system of husbandry [and particularly the arable land on the four course system, and not to have white straw crops in any two successive years]. To clean the land and keep it clean; not to cross crop the land; not to grow for seed, taros, mustard, rape or turnips or any unusual or exhausting crop except for his own use, and then not upon the whole to a greater extent than one acre without the written consent of the landlord or his agent, and [here insert any special stipulations as to cropping].
To consume hay, &c. on the Premises.	To consume or use upon the premises all artificial as well as meadow hay, clover, root. and green crops, straw, haulm and chaff, and the muck, dung and manure into which the same shall be converted into manure, and not to clean off the farm or sell the same respectively under a penalty of 20s. for every cart load so drawn off or sold at any time.
To purchase Lime, &c.	To purchase and lay out on the farm every year such lime, muck and other manure as shall be requisite for the proper cultivation thereof.
To permit Landlord to view Premises.	[Here insert any other stipulations as to cultivation and management.] To permit the landlord and all persons authorized by him at all reasonable times during the tenancy to have access to the premises to view the state of repair of the buildings, gates and fences, and the cultivation and management of the farm, and for any other reasonable purpose.
To preserve Game.	To preserve all game [except hares], and the eggs and young of game [rabbits], wild fowl and fish for the landlord and all persons authorized by him, subject only to the exercise by the tenant of his concurrent rights as aforesaid.
To prevent Trespass.	To permit the landlord to bring actions or take any legal proceedings against trespassers or poachers in the tenant's name, to lay information and give evidence (he being indemnified by the landlord), and to sign and serve if required notices to trespassers and others to keep off the farm.
Not to cut Timber, &c.	Not to cause or suffer roads, footpaths or ways to be made over any part of the premises. Not to cut, lop or prune any timber or other trees or saplings. To preserve and protect the fruit trees and to replace with young trees of the best quality any that may perish through decay or accident, and to have as well those now growing as any hereafter to be planted in good order and condition. To cut the underwood in regular seasons, none to be cut of less than twelve seasons' growth. To keep in order, make and plash the hedges, none to be cut of less than six years' growth. To plant quicksets or hornbeam in the gaps or decayed places in the hedges, to weed and cleanse and protect the same from cattle. To scour and cleanse the ditches as often as necessary, and to cut and destroy at least once in every year the weeds and rubbish growing on all the banks, hedges, ditches and wastes.

Not to take or suffer to be taken any earth, clay, soil, peat, marl, stone, minerals or gravel from the surface of the land without the consent in writing of the landlord or his agent. APP. B. s. 9.

Not to plough or break up any sward or permanent pasture or meadow land. Not to break up Pasture.

Not to depasture any agistment stock of any kind upon the said farm in the last year of the tenancy under a penalty of 10% for every head of live stock that shall be so depastured thereon. Not to depasture.

[Here insert any other prohibitions.]

And the landlord agrees in manner following:—

To permit the tenant paying the several rents or sums hereinbefore reserved or made payable, and performing and observing the several agreements on his part herein contained, peaceably to possess and enjoy the said premises during the tenancy without any interruption or disturbance by the landlord or any person claiming under him. Agreements by Landlord. Quiet enjoyment.

To pay all land tax and landlord's property tax [and tithe rents-charge], payable in respect of the said premises. To pay Land Tax, &c.

To keep in good and substantial repair and order the main timbers, tiled roofs and outside walls of the said dwelling-house, cottages and all buildings for the time being on the said premises, the tenant giving timely notice that such repair has become necessary. To repair main Timbers, &c.

To supply to the tenant on demand for all repairs to be executed by him, bricks, tiles, slates, lime and rough timber (or at the landlord's option timber in scantling and feather-edged boards) to be used by the tenant in a proper and tradesmanlike manner; and the cartage of the same to a distance not exceeding six miles from the said premises to be performed by the tenant gratis. To supply Materials for Repairs.

And it is further agreed as follows:—

No customs of the country shall have any operation upon this contract of tenancy; but the rights of the parties shall depend only upon the terms of this agreement and the Agricultural Holdings Act, 1875 [which shall apply to this contract except as respects that part of clause 5 which relates to Improvements of the Second Class, which shall not apply to this contract]. Exclusion of Custom and of Agricultural Holdings Act.

If and whenever the said yearly rent of £ — or the additional rent or any part thereof respectively shall be in arrear for — days, whether legally demanded or not, or if and whenever there shall be a breach of any of the tenant's agreements herein contained, or if the tenant shall become bankrupt or insolvent or make any composition with his creditors, or suffer execution thereon and in any of the said cases it shall be lawful for the landlord to enter upon any part of the premises in the name of the whole, and thereupon the tenancy shall determine. Power of Re-entry.

In case the landlord shall distrain for rent it shall be lawful for him to sell by auction or otherwise all hay, straw and other fodder, crops, corn or roots taken under such distress, and the same may be consumed (if the landlord so wishes) on any part of the said farm, and the cattle or stock of any purchaser of the said hay, straw and other fodder, crops, corn or roots, may be put to consume the same on the said farm for so long a period as the landlord may deem necessary without any liability on the part of such purchaser, and without his being deemed a trespasser. Sale of Crops on distress.

[The landlord (or incoming tenant) at the end of the tenancy shall take at a valuation all the Lent corn and other straw, chaff and fodder, and artificial as well as meadow hay of the last year's crop, which shall not have been consumed before the end of the tenancy at consuming prices, and also all wheat straw of the crop which shall not have been consumed at the end of the tenancy at full price, with a deduction of —s. per load upon the said wheat straw. But all the said straw, fodder, chaff, hay and wheat straw shall be delivered up to the landlord (or incoming tenant) dry and in good condition placed under cover in the homestall or thatched and secured from the weather, and the wheat straw to be in addition trussed and tied by the tenant, he being paid for the trussing, tying and thatching.] The tenant is to quit the farm, house, cottages and premises at Michaelmas day and to have the use of the barns and rick-yards if necessary, or as much thereof as may be necessary, but no more; to thrash and market his crop of corn of the last year and stabling for horses to carry out his corn if required, and accommodation for one man to tend the horses up to the 25th of December after the end of the tenancy *[If the landlord or incoming tenant is not to take the corn, &c. insert any stipulations which are to regulate the rights of parties at the end of the tenancy,*

APP. B. s. 9. *e. g.*, and also up to the — day of — then next ensuing, or such shorter period as shall be necessary; the use of the — Close for the purpose of consuming thereon by his cattle and stock all the straw chaff and fodder and artificial, as well as meadow hay, which shall not have been previously consumed].

Arbitration Clause. If and whenever any disagreement or misunderstanding shall arise as to the intent and meaning of this contract, such disagreement or misunderstanding shall be submitted to two referees and their umpire, but such valuers or their umpire shall have power to arbitrate and award on those matters which are hereinbefore particularly mentioned for valuation, and such as are provided for valuation in so much of the Agricultural Holdings Act, 1875, as is agreed to be incorporated herein, and on no other matters, claims, or demands whatsoever. All valuations and references arising out of this contract shall be made and constructed as provided for in the said Agricultural Holdings Act.

Interpretation Clause. The word "landlord" shall include his heirs and assigns, and the word "tenant" shall include his executors, administrators, and assigns. AS WITNESS, &c.

SECT. 10.—*Agreement for letting a Cottage from Year to Year.*

Date and Parties. AGREEMENT made the — day of —, 18—, BETWEEN A. B. of &c. (hereinafter called the landlord) of the one part, and C. D. of &c. (hereinafter called the tenant) of the other part.

Parcels. 1. The landlord hereby agrees to let and the tenant hereby agrees to take all that cottage situate in the parish of — in the county of —, formerly in the occupation of — together with the garden and appurtenances thereto belonging, which premises are described in the schedule hereto [for the term of one year from the — day of —, 18—, and afterwards from year to year at the yearly rent of £ — payable quarterly on the usual quarter-days in each year, the first payment to be made on the — day of — next, and the last payment to be made in advance one calendar month before the expiration of the tenancy. The said rent to be paid clear of all deductions except for land-tax and property-tax].

Tenant agrees to pay Rent and Taxes. 2. The tenant agrees to pay the said rent on the days and in manner aforesaid and also all existing or future taxes, rates, assessments and outgoings of every description (except as aforesaid) for the time being payable by the tenant in respect of the premises.

To repair. 3. The tenant to whitewash the cottage when required and to keep all cesspools and drains well cleansed and to keep the premises (including fixtures but except the roof and outside walls) in good and tenantable repair reasonable wear and tear excepted.

To cultivate Garden and Orchard. 4. The tenant to cultivate the garden [and orchard] in a proper manner [and to prune and preserve all fruit-trees and to replace any that may perish through decay or accident, and to leave as well those now growing as any hereafter to be planted in good order and condition].

Not to assign, &c. 5. The tenant not to assign or sublet the premises or any part thereof, nor to take or retain any lodgers or allow any married son or daughter to reside with him in the said cottage without the landlord's consent.

To deliver up. 6. The tenant on the expiration or sooner determination of the tenancy to deliver up the premises in such good and tenantable repair, order and condition as aforesaid.

To permit Landlord to enter. 7. The landlord and his agents to have access to the premises at all reasonable times to view the state and condition of the same.

Determination of Tenancy. 8. The tenancy shall be determined at any quarter-day upon three months' previous notice in writing by either party.

Power of Re-entry. 9. Provided always, that if and whenever any part of the said rent shall be in arrear for — days, whether legally demanded or not, or if and whenever there shall be a breach of any of the tenant's agreements the landlord may enter upon any part of the premises in the name of the whole, and thereupon the tenancy shall determine.

AS WITNESS, &c.

[The SCHEDULE above referred to.]

SECT. 11.—*Agreement for letting a Cottage, &c. on Tenancy at Will, or from Week to Week, or from Month to Month.* APP. B. s. 11.

AGREEMENT made the — day of —, 18—, BETWEEN A. B. of, &c. of the one part, and C. D. of, &c. of the other part; the said A. B. DOth demise unto the said C. D., his executors, administrators and assigns, ALL [describe parcels] together with the [outbuildings, yard, garden, land and] appurtenances to the said cottage belonging or therewith usually held and enjoyed [EXCEPT and always reserved; here state any exception(s):] FROM the — day of — [instant, or last or next], “so long as both parties shall please, upon a strict tenancy at will and not otherwise,” or say “upon a weekly tenancy determinable by either party on any *Saturday*, upon one week’s previous notice to quit in writing,” or say “upon a monthly tenancy, determinable by either party, on the — day of any month, upon one calendar month’s previous notice to quit in writing,” provided that three days’ less notice than the above shall be sufficient, if given during the first [week or month] of the tenancy: YIELDING therefor during the said tenancy the rent of — shillings and — pence per week, on — day in each week [or the rent of — pounds — shillings and — pence per month on the — day of each month], the first of such payments to be made on the — day of —. AND the said lessee agrees with the said lessor to pay rent; and to pay rates and taxes (t); that the said lessee will not use premises as a shop; and will not assign without leave [nor sublet the said premises or any part thereof without such leave;] and that he will leave premises in good repair. The said lessor may re-enter on non-payment of rent or non-observance of agreements. AS WITNESS, &c.

Date and Parties.
Stamp.
Testatum.
Parcels.

1. On a strict Tenancy at Will.
2. From Week to Week.
3. From Month to Month.

Reddendum.

Agreements by Lessee.

SECT. 12.—*Agreement for Lease of Land for Building Purposes.*

AGREEMENT made the — day of —, 18—, BETWEEN A. B. of, &c. (hereinafter called the lessor), of the one part, and C. D. of, &c. (hereinafter called the lessee), of the other part.

THE lessor agrees to demise and let, and the lessee agrees to take, ALL that piece or parcel of building land situate, &c. [parcels], which piece of land hereby agreed to be demised is delineated with the abutments on the plan drawn in the margin of these presents, and therein coloured red; EXCEPTING and reserving unto the lessor, &c. [reservations] (x), TOGETHER with all rights, members, and appurtenances belonging or appertaining to the premises for the term of ninety-nine years from the — day of —, 18—, AT and under the several yearly rents following, that is to say, for the first year of the said term a peppercorn rent, if demanded; for the second year thereof the rent of £—; for the third year thereof the rent of £—; and for the fourth, and for each and every subsequent year during the said term, the full yearly rent of £—, all such several rents to be paid quarterly on the usual quarter days, the first payment of rent to be made on the — day of —, 18—, and such several rents to be clear of land tax, sewers, main drainage, [and Metropolitan] rates, tithe rents-charge, and all existing or future taxes, rates, charges, assessments, and deductions whatsoever, whether parliamentary, parochial, or otherwise, to which the premises, or the lessor or lessee in respect of the premises, are or is, or hereafter shall be liable, except only the landlord’s property tax in respect of the said rents. AND such several rents (if required by the lessee) shall be apportioned and divided for or in respect of the messuages or buildings and land to be comprised in the leases (if more than one) to be granted pursuant to these presents, in such manner as the lessee and his nominees, and the lessor or his surveyor or agent for the time being, shall mutually agree upon, but so that the apportioned rent shall in no case exceed one-sixth of the rack rent of the houses comprised in such leases respectively. AND every such lease, and a counterpart thereof,

Parties.
Stamp (u).

Parcels.

Term.

Rents.

Apportionment of Rents.

Leases to be granted.

(s) See post, Sect. 33.

(t) Omit this covenant, and such of those which follow, as are not actually agreed on.

(u) Stamp, 6*l.*, the term exceeding thirty-five years; see ante, p. 836.

(x) See post, 897.

Arr. B. s. 12. shall be prepared by the solicitors of the lessor at the costs and charges in all respects of the lessee (y), and shall contain covenants to pay rents and all future and existing rates, taxes, assessments, and deductions whatsoever, except landlord's property tax, and to repair, and insure, to show receipts, and rebuild, in case of fire; and that the lessor shall have full liberty to enter and view the state of repair and condition of the premises comprised in such lease; and also a proviso for re-entry on non-payment of rent, &c. [see ante, Sect. 1, p. 858, substituting "lessee or his nominee," for "tenant"] by the lessor (z); and all covenants and conditions which may be necessary in conformity with the terms of these presents, or which may be reasonably required by the lessor or his solicitor. AND IT IS HEREBY AGREED AND DECLARED between and by the parties hereto, that leases of the land and premises hereby agreed to be demised, may be required to be granted under these presents, upon the terms and in the events hereinafter mentioned (that is to say), that as soon as the lessee shall, to the satisfaction of the lessor or his surveyor for the time being, have erected, roofed, and covered in, or caused to be erected, roofed, and covered in, on the said land, any messuages or dwelling-houses, at the cost of £— at the least for each messuage or dwelling-house, with its appurtenances, and according to such plans, elevations, and specifications as shall be previously approved by the surveyor for the time being of the lessor, then he the lessor shall and will, when thereunto requested, grant unto the lessee or his nominee or nominees a lease or leases of such messuages or dwelling-houses which shall have been so erected, roofed and covered in, and otherwise partially completed as aforesaid, at an apportioned annual rent to be fixed as hereinbefore mentioned. PROVIDED ALWAYS, &c. [here insert any special stipulations with regard to the sites, frontage, or laying out, &c. of the intended houses and appurtenant land] AND IT IS HEREBY AGREED AND DECLARED that every lease to be granted under these presents shall contain a plan of the premises therein respectively comprised, to be prepared by the surveyor for the time being of the lessors. AND the lessee hereby agrees that he will accept every such lease as shall be granted under these presents, without requiring or investigating the lessor's title, and will execute a counterpart thereof, and pay the costs of every such lease and counterpart, and also the costs, charges, and expenses of the surveyor for the time being of the lessor, which shall have been incurred with respect to the premises comprised in such lease. AND that he will, within — months from the date of these presents, at his own cost, sufficiently fence off the land hereby agreed to be demised, so as to protect the adjoining land from trespass and damage, and will, previously to requiring any lease to be granted under these presents, fence off the land from time to time required to be leased from the adjoining land, with a substantial wood paling, or with a brick wall of at least nine inches thick, to the satisfaction of the lessor or his surveyor or agent for the time being. AND that he will, within the period of five years from the — day of —, 18—, lay out and expend the sum of £— at the least, by an expenditure of not less than £— during the first two years ending the — day of —, 18—, and the further sum of £— at the least during the three next succeeding years ending the — day of —, 18—, such sums of money to be laid out and expended in the erection and completion on the said land hereby agreed to be demised of good and substantial messuages or dwelling-houses at the cost of £— at the least for each messuage or dwelling-house with its appurtenances. And all such messuages or dwelling-houses to be built of solid brick or stone, with roofs of best slate or ornamental tiles, with suitable gardens, outbuilding and offices, drains and sewers attached thereto, and with good, well-seasoned and proper materials of all kinds, all such erections and works to be according to plans, elevations and specifications to be previously approved by the surveyor for the time being of the lessor, and to be completed under the inspection and to the satisfaction of such surveyor. And it is hereby agreed and declared that the lessee shall be at liberty to make and

On completion of intended Houses.

Special Stipulations. Conditions of Leases.

Lessor's Title not to be required.

Lessee to pay Costs of Leases, &c.

To Fence off Land.

To expend £— within 5 Years.

(y) For form of lease in conformity with this agreement see post, Sect. 15, p. 876. The form of lease is however often prepared at the same time as the agreement, and appended as a schedule thereto; in such a case say, "And shall be in the form appended

by way of schedule to these presents, or as near thereto as circumstances will admit."

(z) A qualification of the power of re-entry is essential for the protection of the lessee where buildings have been erected at his expense, or premium paid.

open and lay out such roads, ways, streets and squares in, through, over, or upon the said piece or parcel of land hereby agreed to be demised as he shall think proper or most advantageous, the plans of all such proposed roads, ways, streets and squares being first submitted to and approved by the surveyor for the time being of the lessor. And it is hereby expressly agreed and declared that the lessee shall at his own cost complete or cause to be completed all such roads, ways, streets and squares, and the approaches thereto, and the drains and sewers connected with the houses to be built as aforesaid within five years of the date of these presents to the satisfaction in all respects of the said surveyors. And it is further agreed and declared that when and so soon as any plans or elevations of the said messuages or dwelling-houses, roads, ways, streets and squares, drains, sewers and other works hereby agreed or authorized to be constructed shall have been approved of by the surveyor for the time being of the lessor he the lessee shall and will at his own cost cause good and accurate copies or tracings thereof to be deposited with such surveyor, and that no messuage, building or work whatever shall be erected, made or constructed by the lessee upon the said piece or parcel of land hereby agreed to be demised, or upon any part thereof except only in accordance and in conformity with the stipulations and provisions herein contained respecting the erection and construction of the messuages, buildings and works hereby agreed or authorized to be erected, made and constructed on the said land: PROVIDED ALWAYS, and it is hereby agreed and declared between and by the parties hereto that notwithstanding anything hereinbefore contained in case the lessee shall not in the manner and within the respective periods aforesaid expend in and about the erection of such messuages or dwelling-houses and buildings as aforesaid the sums hereinbefore agreed to be expended in the making and completing and rendering fit for habitation the same upon the ground hereby agreed to be demised, and shall not in all other respects carry out into complete effect the agreements hereinbefore contained and on his part to be performed and observed it shall be lawful for the lessor at any time after such default shall have been made as aforesaid by notice in writing under his hand to be delivered to the lessee or left at his last known place of abode in England to determine and make void this present agreement and every matter and thing herein contained as to all and singular the land and premises hereby agreed to be demised except such part or parts thereof as shall have been before such notice actually demised: PROVIDED ALSO, and it is hereby agreed and declared between and by the parties hereto that nothing in these presents contained is intended to be or shall in any way be held or construed to be or operate as a present demise or to give or vest in the lessee any term of years in the said piece or parcel of land and premises hereby agreed to be demised until such lease or leases thereof shall be actually granted as aforesaid [insert interpretation clause, see Sect. 9, ante, p. 868]. AS WITNESS, &c.

APP. B. s. 12.

To lay out
Roads, &c.

To deposit
Plans.

Power on
Default for
Lessor to deter-
mine this Agree-
ment.

Operation of
Agreement.

APP. B. s. 13.

SECT. 13.—*Concise Lease pursuant to 8 & 9 Vict. c. 124 (b).*

Date and Parties. THIS INDENTURE, made the — day of —, 18—, in pursuance of an act to facilitate the granting of certain leases, BETWEEN A. B. of —, in the county of — [esquire], of the one part, and C. D. of —, in the same county [tailor], of the other part; WITNESSETH, that the said A. B. (d) DOTH demise unto the said C. D., his executors, administrators and assigns, ALL [here describe the parcels, *ex. gr.*]: ALL that piece of land situate at —, in the parish of —, in the county of —, containing [— square yards, or — acres, — roods and — perches, or thereabouts], little more or less, now or late in the occupation of — or his undertenants; [which said piece of land is delineated in the plan drawn in the margin of these presents, or hereunto annexed, marked with the letter A, and with the initials of the said parties hereto, and therein edged with a red colour, or say, and therein coloured green, or as the case may be (the position, boundaries and dimensions thereof appearing in the said plan)] (c) TOGETHER with the [messuage or dwelling-house] and all other erections and buildings on the said land or any part thereof EXCEPT (f) and always reserved unto the said A. B., his [heirs, or executors, administrators] and assigns, and his and their lessees and under-tenants, free passage and running of water and soil (g) coming or to come from any other lands or buildings of the said A. B., his [heirs, or executors, administrators] or assigns, adjoining or near to the premises hereby demised, in and through the channels, drains, sewers and watercourses belonging or to be made thereto: FROM the — day of — [instant, or last, or next, or 18—], for the term of — years [and one-half, or three-quarters of another year, wanting — days] thence ensuing: YIELDING therefor during the said term the rent of [state the rent and mode of payment, *ex. gr.*] £ — per annum by equal [quarterly, or half-yearly] payments on the — day of — [the — day of —, the — day of —], and the — day of —, in each year, the first of such payments to be made on the — day of — next [and the last of such payments to be made three days before the expiration of the said term, instead of the day in that behalf above mentioned (h)] THAT the said C. D. covenants with the said A. B. to pay rent; and to pay taxes [if so intended, say, “including land tax, sewers rates and all other taxes, rates, duties and assessments whatsoever, except property tax”]; and to repair; and to paint outside every third year; [or say, “and in every three years of the said term to paint all the outside woodwork and ironwork belonging to the said premises, with two coats of proper oil colours in a workmanlike manner;”] and to paint and paper inside every seventh year; [or say, “and in every seven years of the said term to paint the inside wood, iron and other works now or usually painted with two coats of proper oil colours in a workmanlike manner; and also repaper with paper, of a quality as at present, such parts of the premises as are now papered; and also wash, stop, whiten or colour such parts of the said premises as are now plastered”]; and to insure from fire in the joint names of the said A. B. and the said C. D.; to show receipts; and to rebuild in case of fire: And that the said A. B. may enter and view state of repair, and that the said C. D. will repair according to notice; That the said C. D. will not use premises as a shop [if the premises may be used for other purposes than as a private dwelling-house only, say according to the actual agreement of the parties, “That the said C. D., his executors, administrators or assigns, will not at any time during the said term, use or exercise, or permit or suffer to be used or exercised in or upon the said premises or any part thereof, any noisome, noxious, offensive or dangerous trade or business whatsoever without the

(b) Ante, 821.

(c) Ante, 841.

(d) If any premium paid, here say, “In consideration of the premium or sum of — pounds sterling, now paid to him by the said C. D. (the receipt whereof is hereby acknowledged), and of the rent and lessee’s covenants hereinafter reserved and contained.”

(e) A map or plan is not so necessary in a lease as in a conveyance; it may be omitted when more convenient.

(f) Here state any exceptions, as agreed on; see post, Sect. 33. The above is given merely as an example of common

occurrence.

(g) This exception extends to water and soil coming through the adjoining premises, but not to the refuse of tan pits. *Chadwick v. Marsden*, L. R., 2 Ex. 285; 36 L. J., Ex. 177.

(h) The last payment need not be specially mentioned when the term expires on any quarter-day, or other day whereon rent is made payable. But it may be convenient to mention it (as above) where the lease is for a certain period, “wanting — days,” and perhaps sometimes in other cases.

consent in writing of the said A. B., his heirs or assigns": And will not assign without leave [*if so agreed, add, "nor sublet the said premises or any part thereof without such leave"*]: And that he will leave premises in good repair: Proviso for re-entry by the said A. B. on non-payment of rent or non-performance [or non-observance] (*l*) of covenants: THE said A. B. covenants with the said C. D. for quiet enjoyment. IN WITNESS whereof the said parties hereto have hereunto set their hands and seals.

Signed, sealed and delivered by the [above }
or within] named —, in the presence of }
If any premium paid indorse a receipt as }
follows: "Received of Mr. C. D. the sum }
of — pounds, as within mentioned." }

Arr. B. s. 13.

Covenants by
lessor.

SECT. 14.—*Lease of a House, &c.: the Tenant to pay all Rates and Taxes (except as otherwise agreed), and to Repair, Paint, Insure, &c.: Option for Tenant to purchase the Fee.*

THIS INDENTURE, made the — day of —, 18—, BETWEEN A. B. of, &c. (hereinafter called the lessor), of the one part, and C. D. of, &c. (hereinafter called the lessee), of the other part; WITNESSETH, that in consideration of [the premium or sum of — pounds sterling (*k*), now paid by the said C. D. to the said A. B. (the receipt whereof is hereby acknowledged); and also in consideration of the expense which the said C. D. hath incurred and will incur in the erection and finishing of the messuage or tenement hereinafter mentioned, and also in consideration of] the rent and les-see's covenants hereinafter reserved and contained, the lessor hath demised unto the lessee, his executors, administrators and assigns ALL [*state parcels (l) and general words (m), also any exceptions or reservations (n)*]: To HAVE AND TO HOLD the said premises hereinafter expressed to be demised, with the appurtenances [except as before excepted (*n*),] unto the lessee, his executors, administrators and assigns from the — day of — [last, or next, or instant, or 18—], for the term of — years (*p*). YIELDING AND PAYING therefor yearly during the said term the rent of £— sterling by equal quarterly payments on [*state days of payment, ex. gr.* the 25th day of March, the 24th day of June, the 29th day of September, and the 25th day of December (*q*), the first of such payments to be made on the — day of — next, and the last payment to be made in advance — days before the expiration of the said term]. [AND ALSO YIELDING AND PAYING (*r*) a proportionate part of the said rent for the fraction of the current quarter up to and immediately upon the determination of the said term, in case the same shall determine under the proviso for that purpose hereinafter contained; the said rent to be paid clear of all deduction.] AND the lessee doth hereby for himself, his heirs, executors, administrators and assigns, covenant with the lessor, his heirs (*s*) and assigns, in manner following, that is to say, THAT he the lessee, his executors, administrators and assigns, will during the said term pay unto the lessor, his heirs or assigns, the rent hereby reserved at the times and in manner hereinbefore mentioned, without any deduction or abatement whatsoever: [AND FURTHER (*t*), that in case any of the said rent

Date and Parties.

Testatum.

Consideration.

Stamp (*l*).

Operative

Words.

Parcels.

General Words.

Exceptions.

Habendum.

Reddendum.

Covenants by

Lessee.

To pay Rent.

And Interest on
Arrears of Rent;

(i) See ante, p. 291.

(k) See ante, 811.

(l) See 897.

(m) Id.

(n) Id.

(o) Omit these words, if there be no previous exception.

(p) If the lease contains a proviso for determining it at the end of the first [seven or fourteen] years, or at some other specified period, here say, "determinable nevertheless as hereinafter mentioned," and add the proviso at the end of the deed; see form, post, Sect. 15, p. 878.

(q) The days of payment may stand in this order, whether the term commences from Christmas or any other quarter-day.

(r) Perhaps the Apportionment Act, 1870, renders this unnecessary; ante, 377;

and see 15 & 16 Vict. c. 76, s. 214.

(s) If lessor only a termor, say, "his executors, administrators and assigns," instead of "his heirs and assigns," and so throughout the deed.

(t) This covenant was drawn by the previous Editor, Mr. W. R. Cole, who strongly recommended it as equitable to both parties, and likely to induce tenants to pay their rent with reasonable punctuality, i. e., within one calendar month after it becomes due. "The loss," he considered, "of a month's interest (to say nothing of the subsequent interest till payment) would probably operate more powerfully on a tenant's mind than even a proviso for re-entry for non-payment of rent, &c., such proviso being seldom acted on strictly, except where there is ill-feeling

APP. B. s. 14. shall at any time or times be and continue in arrear and unpaid for and during one calendar month next after the day hereinbefore appointed for payment thereof, the lessee, his executors, administrators or assigns, shall and will pay to the lessor, his heirs or assigns, interest upon and for such arrears of rent at the rate of *five* pounds per centum per annum, calculated from the day hereinbefore appointed for payment of such rent to the time of the actual payment thereof; such interest to be paid together with the rent in respect whereof it becomes payable, and to be recoverable with expenses by action or distress and sale, in like manner as rent in arrear; but no interest whatever shall be payable in respect of any rent that has not been in arrear and unpaid for one calendar month or more): AND ALSO will pay all taxes, rates, duties and assessments whatsoever, whether parochial, parliamentary or otherwise, now charged or hereafter to be charged upon the said demised premises or any part thereof, or upon the rent thereof or any part thereof, or upon the lessor, his heirs or assigns in respect thereof [*here state any exception or extraordinary charges as agreed on, i.e. gr., except sewers rates (x), or including all private improvement rates imposed by virtue of the Public Health Act, 1875 (y), and all other rates, taxes and assessments chargeable entirely or in part upon the* landlord in the absence of a special stipulation to the contrary (z).] AND ALSO will during the said term keep the said demised premises, and all fixtures and additions thereto, in good and substantial repair and condition [except substantial repairs to the main walls, roof and foundations, or fair and reasonable wear and tear and damage by fire or tempest excepted (a): AND ALSO will in every [third] year of the said term paint all the outside woodwork and ironwork belonging to the said premises with two coats of proper oil colours [to be approved by the lessor] in a workmanlike manner: AND ALSO will in every [sixth] year of the said term paint the inside wood, iron and other works now or usually painted with two coats of proper oil colours [to be approved as aforesaid] in a workmanlike manner: and also wash, stop, whiten or colour such parts of the said premises as are now plastered [and grain and varnish such parts thereof as are now grained or varnished]: AND ALSO will during the said term keep insured the said premises hereby demised to the amount of £—— at least in some respectable fire insurance office (b), in the joint names of the lessor, his heirs or assigns, and of the lessee, his executors, administrators or assigns, and will upon the request of the lessor or his heirs or assigns, or of him or their agent, show the receipt for the last premium paid for such insurance for every current year; and as often as the said premises hereby demised shall be damaged by fire or other accident insured against, all the moneys which shall be received by the lessee, his executors, administrators or assigns, in respect of such insurance, shall be expended by him or them in rebuilding or repairing the said demised premises, or such parts thereof as shall be so damaged: [provided, that the deficiency, if any, of such insurance moneys shall not be made up by the lessee, his executors, administrators and assigns personally, and that the covenants hereinbefore contained shall not be applicable to such damage and deficiency (c)]: [AND that he the lessee, his executors, administrators or assigns shall and will at all times during the said term, at his or their own expense, keep all the plate glass of the said demised premises (except, &c., *as may be agreed*) insured to the amount of £—— at the least from all accidents and damage (whether occasioned wilfully, or by negligence or otherwise), in some respectable office for the insurance of plate glass, having an office or agent at — aforesaid, or in London or Westminster, by a policy or policies in the usual form in that behalf: AND shall and will forthwith, after any accident or damage to any of the said plate glass, cause the same to be efficiently restored or replaced with other plate glass of equal value at the least, at his or their own expense, with or without the aid of any such insurance money]: AND it is hereby agreed that it shall be lawful for the

and to pay Taxes;

and to repair;

and to paint Outside every --- Year;

and to paint Inside every --- Year;

and to insure;

to show Receipts;

and to rebuild in case of fire.

Insurance of plate glass.

Lessor may enter to view

between the landlord or his agent and the tenant." A clause giving interest on the arrears of an annuity has been held unobjectionable; *Tynte v. Hodge*, 2 H. & M. 257.

(x) Ante, 512.

(y) Ante, 552.

(z) See, *c. g.*, Rating Act, 1874, ante, 547.

(a) See proviso for cesser of rent in case of fire, &c., Sect. 15, *post*, p. 878.

(b) Or say, "In the [*name of office or company*], or in some other respectable fire insurance office to be approved of by the lessor, his [heirs, or executors, administrators] or assigns," in the joint names, &c.

(c) This seems to be fair. The "usual" covenant runs the other way. See, for instance, the covenant as to insurance of plate glass below.

lessor, his heirs and assigns, and all persons authorized by him or them, at all reasonable times, during the said term, to enter the said premises to examine the condition of the said premises; and further, that all defects and wants of reparation contrary to any of the covenants hereinbefore contained which upon any such view shall be found, and for the amendment of which notice in writing (a) shall be left at the premises, the lessee, his executors, administrators and assigns, will, within three calendar months next after every such notice, well and sufficiently repair and make good: AND ALSO, that the lessee, his executors, administrators and assigns, will not use or suffer to be used the said premises or any part thereof as a shop, warehouse or other place for carrying on any trade or business whatsoever, or otherwise than as a private dwelling-house without the consent in writing of the lessor, his heirs or assigns: AND will not without the like consent assign or underlet the said premises or any part thereof (otherwise than by will or codicil or by subletting from year to year, or for any less term): [Provided always, and it is hereby expressly agreed by and between the parties hereto that such consent as last aforesaid shall not be withheld without some reasonable objection to the respectability or responsibility of the proposed assignee or sub-lessee, and that no pecuniary consideration shall be required therefor(c)] AND FURTHER, that the lessee, his executors, administrators or assigns, will, at the expiration or other sooner determination of the said term, peaceably surrender and yield up unto the lessor, his heirs or assigns, the said premises hereby demised with the appurtenances, together with all buildings, erections and fixtures now or hereafter to be built or erected thereon (f) in good and substantial repair and condition in all respects (g) [reasonable wear and tear and damage by fire only excepted (h)]: PROVIDED ALWAYS, and it is expressly agreed, that if the rent hereby reserved, or any part thereof, shall be in arrear for [fifteen (i)] days (although no formal demand shall have been made thereof (k); or if there shall be a breach of any of the lessee's covenants herein contained or if the lessee, his executors, administrators or assigns shall while the said premises shall remain vested in him or them be adjudicated bankrupt (l), or if his or their interest shall be taken in execution, then and in any of such cases it shall be lawful for the lessor, his heirs or assigns to re-enter upon the said premises, and thereupon the said term shall absolutely determine: Provided also, that except in case of non-payment of rent within — days as aforesaid, or of breach of the covenant herein contained to [here insert the covenants to breach of which it is intended that an absolute power of re-entry should apply], or in case of such bankruptcy or taking into execution of the lessee's interest as aforesaid, the power of re-entry hereinbefore contained shall not be enforceable by action or otherwise unless and until the lessor, his heirs or assigns, or his or their agent or surveyor shall have served on the lessee, his executors, administrators or assigns, or left on some part of the said premises a notice in writing specifying the particular

APP. B. s. 14.

Fixtures and state of Repair.

Lessee to repair according to Notice.

Premises to be used only as a private Dwelling House, and not as a Shop, &c.

Not to assign or underlet (f) without Leave.

To leave in good repair.

Proviso for Re-entry.

See ante, 857

(d) See forms of such notice, post, Appendix C., Nos. 12, 13.

(e) For other forms of this provision see post, p. 899. It is important, in the interests of the tenant, that this proviso should be constituted an express agreement on the part of the lessor. *Trilcar v. Bigge*, 9 Exch. 151; followed by Hall, V.-C., in *Scar v. House Property and Investment Company*, 43 L. T. 531, W. N., 4th December, 1880, p. 186. The form in the text is taken (with modifications) from *Sheppard v. Hong Kong and Shanghai Banking Corporation*, 20 W. R. 459.

(f) (Except tenant's fixtures.)

(g) This proviso is taken, with some modification, from sects. 18 and 19 of the Conveyancing and Law of Property Amendment Bill, presented by Lord Cairns in 1880. See post, p. 935. For other forms of proviso for re-entry, see 903.

(h) These words are in 8 & 9 Vict. c. 121, Form No. 10, column 2; ante, 821; but they are unusual, especially where the tenant covenants to insure.

(i) Twenty-one days are more usual; but thirty-one days or more would be better if the tenant covenants to pay interest on rent when in arrear for one calendar month. Forty-two days has been held not unreasonable, so as to make a lease under a power void; *Dox d. Wythe v. Rutland*, 2 M. & W. 672; 5 M. & W. 694.

(k) These words are sufficient to dispense with a formal demand of the rent; ante, 295. Sometimes the words used are "the same being lawfully demanded at any time during the said — days or afterwards, and not paid when demanded."

(l) As to proviso for re-entry on the tenant's bankruptcy, see *Hodgkinson v. Crowe*, 19 Eq. 591. For other forms of proviso for re-entry, see Sects. 64—7.

APP. B. s. 14.

Option for
Tenant to pur-
chase the Fee.

Covenant by
Lessor for quiet
Enjoyment.

In witness, &c.

breach or breaches of covenant complained of, and default shall have been made by the lessee, his executors, administrators or assigns in remedying every such breach as shall be capable of remedy, or in making full and ample compensation for every such breach as cannot be otherwise remedied: PROVIDED ALSO, that if at any time before the expiration of [seven] years from the date of these presents the lessee, his executors, administrators or assigns, shall be desirous to purchase the fee simple and inheritance of the said premises hereby demised at or for the sum or price of £—, and of such desire shall give to the lessor, his heirs or assigns, or leave at his usual or last known place or places of abode in England not less than six calendar months' previous notice in writing, then the lessor, his heirs or assigns, shall and will at the expiration of such notice, and on payment of the said sum of £—, and of all rent then accrued due, and at the cost in all respects of the lessee, his executors, administrators or assigns, well and effectually convey and assure the said premises and the inheritance thereof in fee simple unto such person or persons as the lessee, his executors, administrators or assigns, shall direct (l). AND the lessor doth hereby for himself, his heirs, executors, administrators and assigns, covenant with the lessee, his executors, administrators and assigns, that he and they, paying the rent hereby reserved, and performing the covenants hereinbefore on his and their part contained, shall and may peaceably possess and enjoy the said demised premises for the said term hereby granted, without any interruption or disturbance from or by the lessor, his heirs or assigns, or any other person or persons lawfully claiming by, from or under him, them or any of them. IN WITNESS whereof the said parties to these presents have hereunto set their hands and seals, the day and year first above written.

Attestation, as ante, 873.

Receipt for premium (if any), as ante, *Id.*

SECT. 15.—*Lease to Builder's Nominee of a Town House for Twenty-one Years, determinable by Tenant at end of Seven or Fourteen Years—Rent to be suspended in case of Fire—Several Special Covenants.*

Date and
Parties.

Testatum.

Parcels.

General Words

Habendum.

Reddendum.
Covenants by
Lessee.

THIS INDENTURE, made the — day of —, 18—, BETWEEN A. B. of, &c. (hereinafter called the lessor), of the first part, C. D. of, &c. (*builder*) of the second part, and E. F. of, &c. (hereinafter called the lessee), of the third part; WITNESSETH, that in consideration (m) of the expense incurred by the said C. D. in erecting the dwelling-house and buildings hereby demised, and of the rent and lessee's covenants hereinafter reserved and contained, HE the lessor, by the direction of the said C. D., DOTH demise unto the lessee, his executors, administrators and assigns, ALL [*state parcels, ex. gr.*, that piece of ground situate on the [north] side of the — Road, in the parish of —, in the county of —]: AND ALSO, all that dwelling-house erected thereon, being the [third] house on the [north] side of the same road, east from — Street, and now known as No. —, — Road, TOGETHER with all and singular the actual and reputed rights, members, easements and appurtenances of the said premises respectively (n): TO HAVE AND TO HOLD the said premises hereinbefore expressed to be demised with the appurtenances, unto the lessee, his executors, administrators and assigns, from the — day of — [last, or next, or 18—], for the term of [twenty-one] years from thence next ensuing, (determinable nevertheless as hereinafter mentioned) (o): YIELDING AND PAYING (p) [*insert reddendum, see ante, p. 873*]: AND the lessee doth hereby for himself, his heirs, executors, administrators and assigns, covenant with the lessor

(l) Trustees cannot be safely advised to grant a lease containing a clause giving the tenant option of purchasing the fee. See *Clay v. Bufford*, 5 De G. & Sm. 768.

(m) Here mention also the premium or fine, or other consideration (if any), and indorse a receipt for it on the deed, as ante, 873.

(n) Here state any exceptions or reser-

vations; see post, 897.

(o) Omit these words, where there is no proviso for determining the lease at the end of first seven or fourteen years, or other agreed period.

(p) If lessor be a freeholder, say "heirs or assigns." If a leaseholder, say "executors, administrators or assigns," and so throughout the deed.

his heirs [or executors, administrators] and assigns in manner following, that is to say [insert covenant to pay rent and taxes, ante, p. 873(g)]: AND ALSO will within three months of the date hereof well and substantially, and to the reasonable satisfaction of the surveyor for the time being of the lessor, complete and render fit for habitation the said dwelling-house hereby demised: AND (r) will not erect on any part of the garden or forecourt of the said premises any buildings whatsoever, without the previous consent in writing of the lessor, his heirs [or executors, administrators] and assigns, but will keep and use the same as and for a garden and forecourt only: AND will not set up any erections on any part of the said premises which may lessen the air, obstruct the light, or in any way intercept the views from the adjoining buildings or destroy the uniformity of the premises, or cut or main any of the principal timbers or walls of the buildings hereby demised: AND will not make any alteration in the plan and elevation of the said messuage or tenement, or in the architectural decorations thereof, without the licence in writing of the lessor, his heirs [or executors, administrators] or assigns, first obtained for the purpose: AND ALSO will during the said term without being required so to do, and as often as shall be necessary repair, maintain, glaze, pave, cleanse and keep in good and substantial repair the said premises and all erections at any time hereinafter to be erected thereon, and all the walls, posts, pales, rails, gates, privies, sinks, sewers, wy-draughts, drains, houses of office and other appurtenances which shall belong to the same premises: AND also will paint all the external wood and iron-work belonging to the said demised premises in every *fourth year* with two coats of good paint mixed in oil; and paint the inside of the said premises in every seventh year; and once at least in every eight years re-colour and re-joint in imitation of Bath stone the outside stucco, and clean the outside stonework of said premises: AND also will pay a reasonable share towards the expense of repairing of all ways, roads, pavements, gutters, drains, pipes and watercourses which do or at any time or times shall belong to the said demised premises, and which shall be used in common with other premises near or adjoining thereto, and also of cleansing such gutters, drains, pipes, and watercourses, and that such proportion shall be ascertained by the surveyor of the lessor, his heirs [or executors, administrators] or assigns, and shall be recoverable as or in the nature of rent in arrear, or as stated damage: AND will at the end or other sooner determination of the said term, deliver up to the lessor his heirs [or executors, administrators] or assigns the said premises, Together with the fixtures mentioned in the schedule hereunder written, and together, also, with all marble and other chimney-pieces, mantel-pieces, covings, hearth-stones, jambs, foot-pieces and slabs, sash and other window casements, window-shutters, doors, locks, keys, bolts, bars, latches, fastenings, water-closets, cisterns, machinery and other things belonging thereto: And all wainscots, partitions, shelves, dressers, drawers, fixed presses, pumps, cisterns, sinks, pipes, posts, pales, rails and other materials and things which at the expiration of the said term shall be in anyways fixed or fastened to the premises, whole, safe, undamaged and fit for use (reasonable use and wear thereof in the meantime only excepted) (s). AND also, that it shall be lawful for the lessor, his heirs [or executors, administrators] or assigns, and his or their surveyors, agents and workmen respectively, twice or oftener in every year during the said term, at reasonable times in the daytime, to enter upon the said demised premises and view the state of the same, and of all defects and want of reparation contrary to any of the covenants hereinbefore contained, then and there found, to give notice by leaving the same in writing (t) at or upon the said demised premises: And that the lessee, his executors, administrators and assigns, will, within [three] calendar months next after such notice, well and sufficiently repair the

APP. B. s. 15.

To pay Rent and Taxes.

Also Rates, Taxes, &c (except Sewers Rates).

Not to build in Front Garden without Licence.

Not to make other Erections of a specified nature.

Not to alter Plan, Elevation, &c. without Licence.

To repair.

To paint, re-colour and re-joint, &c.

To contribute to repair of Roads, cleansing of Drains, &c ;

To leave in Repair;

Together with Fixtures;

Wainscots, &c. ;

Lessor may enter and view state of Repair;

And give notice of Defects.

(g) State such exceptions (if any) as are mutually agreed on; and see 874.

(r) This and the subsequent covenants are usual in town leases of superior residences, but the covenants of course vary according to the actual agreement of parties. For lessee's covenants to concur with other owners in forming pleasure-garden, to pay garden rate, and that in default of payment

of expenses and rates, the lessor may pay the same, and to repay the lessor, see Davidson, vol. v. pt. i. p. 150. See also Key & Elphinstone, vol. i. p. 535.

(s) Here insert, if required, covenants by the lessee to insure and produce policies, &c., ante, Sect. 14, p. 874.

(t) See Forms, post, App. C., Sects. 13, 14.

APP. B. s. 15.	same accordingly. AND, moreover, that it shall be lawful for the workmen of the lessor, his heirs [or executors, administrators] or assigns, and for their tenants, occupiers of the said houses adjoining, such tenants or occupiers previously obtaining the consent in writing for that purpose of the said surveyor, at seasonable times in the daytime to enter upon the said premises hereby demised, for the purpose of the repair of any adjoining houses, as often as occasion shall require: AND further, that the lessee, his executors, administrators or assigns will not suffer to be done on the premises hereby demised, any act which may be or grow to be an annoyance, damage or disturbance of the lessor, his heirs [or executors, administrators] or assigns, or his or their tenants: AND will keep and use the said dwelling-house as or for a private dwelling-house only, unless the lessor, his heirs [or executors, administrators] or assigns, shall, by licence in writing under his hand [or their hands], permit the same to be otherwise used: [PROVIDED ALWAYS, and it is hereby agreed and declared, that in case the said demised premises or any part thereof shall be destroyed or damaged by fire, then the lessee, his heirs, executors, administrators or assigns, shall not be liable to pay any of the rent hereinbefore reserved (except arrears previously due), until the lessor, his executors, administrators or assigns, shall have caused the said premises or such part thereof as aforesaid to be rebuilt or repaired, as the case may require, and then only a fair and just proportion of such rent during such rebuilding or repairing, the amount thereof to be settled by mutual consent or by an arbitrator to be mutually agreed on, or to be appointed pursuant to the Common Law Procedure Act, 1851, and to be paid one week next after the amount thereof shall have been so settled as aforesaid (n), the costs of any such reference and award to be in the discretion of the arbitrator(x), who shall direct by whom and to whom the same shall be paid, and shall in other respects have all the usual powers of an arbitrator, and whose award and decision shall be final:] PROVIDED ALWAYS [here insert a proviso for re-entry, - see 903(y)]: PROVIDED ALWAYS, and it is hereby further agreed and declared, that if the lessee, his executors, administrators or assigns, shall be desirous of putting an end to this lease at the end of the first seven or fourteen years of the said term, and of such his or their desire shall give at least six calendar months' notice in writing before the end of the first seven or fourteen years, as the case may be, unto the said A. B., his heirs [or executors, administrators] or assigns, by delivering to or leaving such notice at his or their usual place of abode, and shall pay all arrears of rent (if any) and all rent to the expiration of such notice, and shall then or previously quit and relinquish possession of the said demised premises(z), then and in such case from the expiration of such first seven or fourteen years this indenture shall be void and of no effect, except only for the purpose of enforcing the payment of the rent and performance of the covenants up to the end of the first seven or fourteen years(a): AND the lessor doth hereby for himself, his heirs, executors, administrators and assigns, covenant that he will forthwith put the premises hereby demised into thorough tenantable [and decorative] repair, [and in particular will lay down pipe drains of the best construction](b) [here also insert the usual qualified covenant for quiet enjoyment, ante, 876]. IN WITNESS whereof the said parties have hereunto set their hands and seals on the day and year first above written.
Lessee to repair - Months after Notice.	
Workmen of Landlord may enter to repair adjoining Houses.	
Against Nuisances, &c.	
To use as a private Dwelling-house only.	
Proviso for Cesser of Rent in case of Fire, until, &c.	
Proviso for Re-entry.	
Option of Lessee to determine in 7 or 14 Years.	
Covenant by Lessor to put in Repair.	

THE SCHEDULE above referred to.

Here describe the fixtures, ex. gr., Five register stoves, and three elliptic stoves with covings, two kitchen ranges, copper, sink and plate-rack.

(u) See ante, 861 (y).

(x) See Id. (z). As to making submission a rule of court, see post, 896u, and note (y).

(y) And see Sect. 12, note (z), p. 870.

(z) See ante, Ch. VIII., Sect. 8.

(a) For a proviso giving the lessee the

option to purchase the fee within a prescribed time, see ante, Sect. 7, p. 864.

(b) Add any items specially required. There is no implied promise by the landlord that the house, if let unfurnished, is even fit to live in. *Hart v. Windsor*, 12 M. & W. 68, and 159, ante.

SECT. 16.—*Lease of a House by Joint Tenants—Power for Landlord to give Orders to view previous to determination of Tenancy—Landlord to Insure.* APP. B. s. 16.

THIS INDENTURE made the — day of —, 18—, BETWEEN A. B. of, &c., and C. D. of, &c. (hereinafter called the lessors) of the one part, and E. F. of, &c. (hereinafter called the lessee) of the other part: WITNESSETH that, in consideration of the rent and lessee's covenants hereinafter reserved and contained, the lessors do hereby demise unto the lessee, his executors, administrators and assigns, ALL [state parcels (d), general words (d), also any exceptions or reservations (d), and insert habendum, reddendum, and covenants by lessee "with the lessors, their heirs and assigns," to pay rent, and interest on arrears of rent, and taxes, and to repair and paint, to permit lessor to view, and to repair according to notice (e)]: PROVIDED ALWAYS, AND IT IS HEREBY FURTHER AGREED, that during the last three calendar months of the said term it shall be lawful for the lessors or their agents to grant to any person or persons orders to inspect the said premises with a view of taking the same, and that the lessee shall and will at all reasonable times during such three months as aforesaid permit the person or persons named in such order to go over and inspect the said premises accordingly (f) [lessee's covenants to use as private house only, not to assign, &c. without leave, to leave in good repair and proviso for re-entry (e)]. AND the lessors do hereby for themselves, their heirs, executors, administrators and assigns, covenant with the lessee, his executors, administrators and assigns in manner following, that is to say, THAT the lessors, their heirs or assigns, or some or one of them, shall and will during the said term, at his and their own costs, insure and (unless in case any policy or policies shall be vacated or forfeited by any act of the lessee, his executors, administrators or assigns) keep insured the said premises hereby demised against loss or damage by fire to the amount of £ — at least in some respectable insurance office, and will upon the request of the lessee, his executors, administrators or assigns, show the receipt for the last premium paid for such insurance for every current year; and further, in case the said premises hereby demised or any part thereof shall be damaged or destroyed by fire, that all the moneys which shall be received by the lessors, their heirs or assigns or any of them in respect of such insurance shall with all convenient speed be expended by them or him in rebuilding or repairing the said demised premises or such parts thereof as shall be so damaged or destroyed, and in case such moneys shall be insufficient for such purpose, shall and will make good such deficiency out of their and his own moneys [or PROVIDED ALWAYS that the lessee, his executors, administrators and assigns shall continue liable under the general covenant to repair hereinafter contained to make good any damage which the moneys so received in respect of insurance as aforesaid shall be insufficient to repair: For proviso for cesser of rent in case of fire, see Sect. 15, p. 878]. AND that they, the lessors, their heirs or assigns, or some or one of them, shall and will during the said term pay all tithe, rents-charge and land tax for the time being payable in respect of the said premises hereby demised. AND that the lessee, his executors, administrators and assigns paying the rent, &c. [covenant for quiet enjoyment, ante, p. 876]. IN WITNESS, &c.

Power for Lessor to give Orders to View.

Lessor's Covenants.

To Insure.

To pay tithe.

Quiet Enjoyment.

SECT. 17.—*Sub-lease subject to the Covenants in Original Lease (g); Ground Landlord being made a Party.*

THIS INDENTURE, made the — day of —, 18—, BETWEEN A. B. of, &c. [the under-lessor] of the first part, C. D. of, &c. [the ground landlord] of the second part, and E. F. of, &c. [the under-lessee] of the third part: WHEREAS, by an indenture of lease dated the — day of —, 18—, and expressed to be made between C. D. of [&c.] of the one part, and the said A. B. of the other part, for the considerations therein mentioned the said C. D. did demise unto the said A. B. all that [describe parcels from the lease] with the appur-

Date and Parties.

Recital of Lease.

(d) See ante, pp. 896, 897.

(e) See ante, pp. 873 and 903.

(f) See for another form post, Sect. 45.

(g) When the consent of the ground landlord is necessary to an underlease, it is advisable, if possible, that he should be

a party. A sublease is, however, frequently drawn without reciting the original lease or making the ground landlord a party, his licence, if required, being given by a separate document; see post, Sect. 62, p. 909.

App. B. s. 17.	tenances [except, &c. <i>as in the lease</i>]: To hold the same unto the said A. B., his executors, administrators and assigns, from the — day of —, 18—, for the term of — years, at the yearly rent of £—, payable [quarterly] as therein mentioned, and subject to the covenants and conditions therein contained on the part of the said A. B., his executors, administrators and assigns, to be performed and observed, including a covenant by the lessee not to assign or underlet the said premises without the consent in writing of the said C. D., his heirs or assigns: AND WHEREAS the said E. F. hath agreed with the said A. B. for an under-lease of the said demised premises, upon the terms and conditions hereinafter expressed, and the said C. D. has agreed to join in these presents in manner hereinafter appearing for the purpose of giving his consent in writing to the under-lease intended to be hereby granted: NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement [and in consideration of the sum of — pounds sterling, now paid by the said E. F. to the said A. B. by way of premium for these presents, the receipt whereof the said A. B. doth hereby acknowledge], and in consideration of the rent hereinafter reserved, and of the covenants and conditions hereinafter contained or referred to on the part of the said E. F., his executors, administrators and assigns, to be respectively paid, performed and observed, HE the said A. B. (hereinafter called the lessor), with the consent in writing of the said C. D. (testified by his executing these presents), NOTH hereby demise and lease unto the said E. F. (hereinafter called the lessee), his executors, administrators and assigns, ALL THAT [“the messuage or tenement,” or <i>as the case may be</i>], and all and singular other the premises described in and demised by the said recited indenture of lease, with the appurtenances (except as in the same indenture is excepted): TO HAVE AND TO HOLD [the said messuage or tenement and] all and singular [other] the premises hereby demised or intended so to be with the appurtenances (except as aforesaid) unto the lessee his executors, administrators and assigns, from the — day of — [<i>next, or last</i>] for the term of — years [<i>or for the residue of the said term of — years (except the last three days thereof)</i>], determinable nevertheless as is hereinafter mentioned: YELDING AND PAYING [<i>insert reddendum and lessee's covenant to pay rent and other covenants to be observed by the lessee (h).—see ante, pp. 873, and 874</i>]: AND also during the term hereby granted perform and observe all and singular the covenants and conditions contained in the said hereinbefore-recited indenture of lease, and on the part of the said A. B., his executors, administrators and assigns, to be respectively performed and observed, so far as the same respectively relate to the said premises hereby demised, except the covenant for payment of the said rent of £— by the same indenture reserved as aforesaid, and except the covenant [<i>here mention any other covenant or covenants in the original lease which the under-lessee is not to perform: ex. gr., “to insure and keep insured the said premises, and all covenants touching or relating to any such insurance,” or as the case may be</i>]: AND ALSO will keep indemnified the said lessor, his executors, administrators and assigns, and his and their lands, tenements, goods and chattels respectively of and from the same covenants and conditions respectively (except as aforesaid), and all actions, entries, re-entries, forfeitures, losses, damages, costs, charges and expenses whatsoever (including costs of defence as between solicitor and client) in anywise relating thereto: AND ALSO will [<i>here insert such further or additional stipulations (if any) as may have been mutually agreed on between A. B. and E. F.</i>]: PROVIDED ALWAYS, [<i>insert proviso for re-entry,—see post, p. 903</i>]. AND the lessor doth hereby for himself, his heirs, executors and administrators, covenant with the
And of Contract for Sub-Lease.	
Testatum.	
Stamp (g).	
Operative Words.	
Parcels.	
Habendum.	
Reddendum.	
To perform Covenants and Conditions in original Lease (i);	
(except as to the Rent thereby reserved); and to indemnify Sub-Lessor therefrom, &c. Additional Covenants (if any).	
Proviso for Re-entry.	

(g) As to the stamp duty, see ante, 841.

(h) The lessee's covenants will be similar to those contained in the original lease, which it is intended that the lessee should observe, substituting the lessor for the ground landlord, and the lessee for the lessor, who is the original lessee; the covenants not to assign or underlet, and not to erect buildings, &c. will be “without the consent in writing of the lessor, his executors, administrators or assigns,

and of the said C. D., his heirs or assigns, or other the superior landlord or landlords for the time being of the said premises hereby demised;” and the power to enter and view, &c. will be similar to those in the last preceding Sect. p. 877; but will be given to “the lessor, his executors, administrators or assigns, and the superior landlord or landlords for the time being of the said premises hereby demised.”

(i) See another form, ante, 861.

lessee, his executors, administrators and assigns, that he and they, paying the said yearly rent of £— hereby reserved and performing and observing all the covenants and conditions hereinbefore contained or referred to (except the said covenant for payment of the said rent of £—, reserved and contained in the said recited indenture of lease), shall and may *[insert usual qualified covenant for quiet enjoyment, ante, p. 876]*: AND FURTHER, that he the said C. D., his executors, administrators or assigns, will during the continuance of the said term hereby granted pay the said yearly rent of £—, reserved in the said recited indenture of lease, at the times and in manner therein appointed for payment thereof, and will perform and observe the covenants on his and their part to be observed and contained in the same lease to *[here insert any covenants contained in the head lease which it is intended the lessee should perform, e.g. to insure]* or (j) keep harmless and indemnified the lessee, his executors, administrators and assigns, and his and their lands, tenements and chattels respectively, of and from the same rent and every part thereof, and all actions, suits, distresses, entries, re-entries, forfeitures, losses, damages, costs, charges and expenses whatsoever (including costs of defence as between solicitor and client), in anywise relating thereto: AND ALSO, will from time to time and at all times during the continuance of the said term hereby granted, unless prevented by *[fire or other]* inevitable accident, at the request and costs of the said E. F., his executors, administrators or assigns, produce to him or them, or to his or their solicitor or agent or counsel, or to such other person or persons as he or they shall direct, as occasion shall require, the said hereinbefore-recited indenture of lease, in manifestation, defence and support of the title of the said E. F., his executors, administrators and assigns, to the said hereby demised premises; and at such like request and costs make and grant true and attested or other copies, extracts or abstracts of the same indenture, and will permit such copies, extracts or abstracts to be compared with the said original lease (l). IN WITNESS, &c. (ante, 873).

Attestation, Id.

Receipt for premium, Id.

APP. B. s. 17.

Covenants by Sub-Lessor; for quiet Enjoyment;

and to pay Rent reserved in original Lease.

To indemnify Sub-Lessee therefrom.

To produce original Lease (k).

Testatum.

Parcels.

SECT. 18.—*Lease by a Company of Houses or Shops (m)—A stringent Form.*

THIS INDENTURE, made the — day of —, 1869, BETWEEN the Master and Keepers or Wardens and Conunonalty of the Mystery or Art of Brewers of the City of London (hereinafter called the lessors), of the one part, and — (hereinafter called the lessee), of the other part: WITNESSETH, that in consideration of the rent and covenants hereinafter reserved and contained they, the said lessors, have demised and leased, and by these presents Do demise and lease unto the said lessee, ALL that messuage and tenement situate and being in —, and distinguished by the number in the said —, as the same, with the abutments and dimensions thereof are more particularly delineated in the plan in the margin hereof: TOGETHER with all cellars, vaults, arcus, ways, passages, lights, drains and appurtenances hereto belonging and appertaining; To HAVE AND TO HOLD the said messuage or tenement, shop and premises, with the appurtenances, unto the said lessee, his executors, administrators and permitted assigns, from the — day of —, 18—, during the term of — then next ensuing: YIELDING AND PAYING therefor yearly during the said term at Brewers' Hall, London, unto the said lessors, their successors and assigns, the rent or sum of £—. AND the said lessee doth hereby for himself, his heirs, executors, administrators and assigns, covenant with the said lessors, their successors and assigns, in manner following, that is to say . . . AND that the said lessee, his executors, administrators or assigns will during the said term insure and keep insured the said messuage and buildings in the — Fire Office,

Habendum.

Reddendum.
Covenant to Insure;

(j) If the word "and" instead of "or" be here used, there will be two distinct covenants, viz.:—1. To pay the rent. 2. To indemnify. *Seward v. Ansley*, 2 Bing. 519; *Piggott v. Stratton*, 1 De Gex, F. & J. 33; 29 L. J., Ch. 1. Whereas the word "or" makes only one covenant in the alternative. The difference is material.

(k) The sub-lessee should have an attested copy of the original lease.

(l) Here add the usual *defeasance*, if so intended. See post, sect. 50, p. 902.

(m) This form is taken from the model lease of the Brewers' Company, settled in 1869 by Mr. Joshua Williams, Q.C., and Mr. J. G. Witt. Only the special provisions are inserted.

APP. B. s. 18. or in some other fire office to be approved of by the said lessors, their successors or assigns, in the joint names of the said lessors, their successors or assigns, and of the said lessee, his executors, administrators or assigns, in the sum of £—— at the least, and will upon the request of the said lessors, their successors or assigns, or of their clerk or agent, produce the receipt for the premium of such insurance for the current year, and will as often as the said messuage or buildings that are or shall be erected upon the said ground or any part thereof shall be destroyed or damaged by fire, forthwith expend, under the direction of the surveyor for the time being to the said lessors, their successors or assigns, the money to be received for such insurance, and if such money shall not be sufficient to rebuild or reinstate the same, the said lessee, his executors, administrators or assigns will at his or their own costs rebuild or reinstate the said buildings fit for habitation under the direction and to the satisfaction of the said surveyor, and if the said buildings shall be so destroyed or damaged the said reserved rent shall not be discontinued, but shall be paid in the same manner as if no such accident had happened: AND also that he the said lessee, his executors, administrators or assigns shall not nor will at any time or times during the continuance of the term hereby granted, use, exercise or carry on, or permit or suffer to be used, exercised or carried on, in or upon the said premises or any part thereof the trade of . . . or make any erections or buildings behind the said messuage, or any alteration in the elevation thereof without the licence of the said lessors, their successors or assigns for the time being in writing first had and obtained, nor suffer any matter or thing to be in or upon the said premises which may grow to the annoyance, damage or disturbance of the said lessors, their successors or assigns, or of the tenants or occupiers of their estate or any part thereof: AND FURTHER, that he the said lessee, his executors, administrators or permitted assigns shall not during the said term grant any lease for any term whatsoever, or make any agreement for the assignment or other letting of the said premises hereby demised, or of any rooms, offices or counting houses within or forming part of the same, or alien, assign or otherwise convey, dispose of or give (except by will only) this indenture of lease or the said hereby demised premises or any part thereof to any person or persons whomsoever without the special licence in writing of the said lessors, their successors and assigns, upon each occasion first had and obtained, and also, to the intent that the said lessors, their successors and assigns may the better know the tenants and occupiers of the said premises, that all and every lease and leases, agreement and agreements to let, deeds and deeds of alienation, assignments, conveyance, disposition or gift, with such licence as aforesaid, of all or any part of the said premises (except wills) shall be made, drawn, written and completed by the clerk to the said lessors for the time being, he taking reasonable satisfaction for his pains in that behalf: PROVIDED ALWAYS, and it is hereby agreed and declared between and by the said parties to these presents, That if the said yearly rent or sum of £—— hereinbefore reserved, or any part thereof, shall be behind or unpaid in part or in whole by the space of twenty-one days next over or after any of the days of payment whereon the same ought to be paid as aforesaid contrary to the true intent and meaning of these presents, although no formal demand shall have been made thereof, or if the said lessee, his executors, administrators or assigns shall not from time to time and at all times hereafter during the continuance of the said term hereby granted well and faithfully observe, perform, fulfil and keep all and singular the covenants, clauses, provisoes, agreements and stipulations herein contained on the part and behalf of the said lessee, his executors, administrators or assigns to be observed, performed, fulfilled and kept, or shall make any breach in the observance or performance of the same respectively according to the true intent and meaning of these presents, or if the said lessee, his executors, administrators or assigns shall become bankrupt or insolvent, then and in any or either of such cases it shall and may be lawful to and for the said lessors, their successors or assigns, into and upon the said messuage or tenement and premises hereby demised, or into and upon any part thereof in the name of the whole to re-enter and the same to have again, retain and enjoy as in their former estate, and the said lessee, his executors, administrators or assigns to expel, put out and remove without any legal process whatever, and as effectually as any sheriff might do, in case the said lessors, their successors or assigns, had obtained judgment in ejectment for the recovery of the possession thereof, and a writ of habere facias possessionem or other process had issued on such judgment directed to such sheriff in due form

Not to carry on Trade, &c.

Covenant against Alterations.

Not to Assign or Sub-let.

Proviso for Re-entry.

of law, and in case of such entry and any action being brought or other proceedings taken for the same by any person whomsoever, the said lessors, their successors or assigns may plead leave and licence in respect thereof, and these presents may be used as conclusive evidence of the leave and licence of the lessee, his executors, administrators or assigns, to the said lessors, their successors or assigns, and all persons acting therein by their order for the entry or trespasses or other matters complained of in such action or other proceedings. App. B. s. 18.
[Qualified Covenant for Quiet Enjoyment, p. 876.]

SECT. 19.—*Agricultural Lease—Concise Form (n).*

THIS INDENTURE, made the — day of —, 18—, BETWEEN A. B. of, &c. (hereinafter called the lessor) of the one part, and C. D. of, &c. (hereinafter called the lessee) of the other part; WITNESSETH, that in consideration of the rent and lessee's covenants hereinafter reserved and contained, HE the lessor DOTH hereby demise unto the lessee, his executors, administrators and assigns, ALL [*state parcels, ex. gr.*, that messuage or tenement and farm-house, situate in the parish of —, in the county of — called — Farm, with all those three cottages, and all those several pieces or parcels of land particularised in the schedule hereto, containing by estimation eighty acres or thereabouts, and now or late in the occupation of —]: AND all rights, privileges, easements, members and appurtenances to the same premises, belonging or reputed to belong, or therewith at any time heretofore held, used, occupied or enjoyed, (EXCEPT and always reserved unto the lessor, his heirs and assigns, all timber and timberlike trees, pollards and saplings now or hereafter growing on the said demised premises, and also free liberty for him and them, with workmen and others, at all reasonable times, with horses, carts and carriages, to fell, cut down, square, saw and carry away the same, and to enter, pass and re-pass into, upon and from the said demised premises, compensation being paid for any damage done to the corn, grain or seeds growing on the same) (o): TO HAVE AND TO HOLD the said [*messuage or tenement, farm, lands and*] premises hereby demised, with the appurtenances, unto the lessee, his executors, administrators and assigns, from the — day of — next, for the term of [*seven*] years thence next ensuing: YIELDING AND PAYING therefor yearly during the said term the yearly rent or sum of £—, by equal half-yearly payments, on the — day of — and the — day of — in each year, clear of all deductions (except for land tax, property or income tax and quit-rent): AND the lessor, for himself, his heirs, executors, administrators and assigns, doth hereby covenant, promise and agree to and with the lessor, his heirs and assigns that he the lessee, his executors, administrators or assigns, shall and will pay or cause to be paid unto the lessor, his heirs and assigns, the said rent of £— hereby reserved, on the days and in manner hereinbefore mentioned for payment thereof: AND ALSO, shall and will at all times during the said term pay and discharge all tithes, tithe commutation-rent-charge (including a proportionate part of the accruing payment up to the day of the expiration, or sooner determination of this demise (q), and also all taxes, rates, duties and assessments, at any time during the said term imposed on the said premises (except land tax, property tax and quit-rents): AND ALSO shall and will from time to time and at all times during this demise well and sufficiently

Date and Parties.
Testatum.

Parcels.

General Words.

Exceptions of Timber, &c.

Habendum.

Reddendum.

Covenants by Lessee

To pay Rent

Rates and Taxes;

To Repair.

(n) Taken, with variations, from *Beer v. Santer*, 10 C. B., N. S. 435. It is in many respects more favourable to the tenant than is usual.

(o) For forms of reservation of timber, minerals and sporting rights, see pp. 897, 898.

(q) The tithe-commutation-rent-charge is a charge upon the land itself, but the statute creates no personal liability, either in the landlord or in the tenant to pay it; 6 & 7 Will. 4, c. 71, s. 67; *Willoughby v. Willoughby*, 4 Q. B. 687; 6 Id. 722; *Griffenhoofe v. Daubuz*, 4 E. & B. 230;

6 Id. 746; *Bedford v. Sutton Coldfield*, 3 C. B., N. S. 449, 472; except as mentioned in 14 & 15 Vict. c. 25, s. 4; ante, 829. It is payable half-yearly on 1st January, and 1st July under 6 & 7 Will. 4, c. 71, s. 67; or quarterly on 1st January, 1st April, 1st July, and 1st October under other acts; 1 Vict. c. 69, s. 11; 2 & 3 Vict. c. 62, s. 10; 3 & 4 Vict. c. 15, s. 13; consequently a tenant whose term expires on 25th March or 29th September, would escape all liability to the payment then becoming due in a few days, unless the contrary be specially provided as above.

App. B. s. 19.	repair the premises hereby demised (damage by fire or tempest excepted): and also fetch and bring to the said demised premises all such materials necessary for the repair of the premises, from any distance not exceeding five miles therefrom: AND the said messuage and premises hereby demised, and every part thereof, being so repaired, shall and will at the end or other sooner determination of the said term peaceably leave and yield up, damage by fire or tempest excepted: AND ALSO shall and will purchase, bestow and bring upon the said lands one load of good manure for every ton of hay or clover sold off the said premises: AND ALSO shall and will leave one-third of the arable land hereby demised fallow, or in pea or bean stubble, at the end of the said term: AND ALSO shall and will at all times during the said term manage and cultivate the said lands in a good and husbandlike manner, except that the lessee, his executors, administrators or assigns, shall be at liberty to break up any of the pasture land hereby demised, without compensation or increased rent therefor: AND ALSO, that it shall be lawful for the lessor, his heirs or assigns, with or without workmen and others, to enter upon the said premises twice or oftener in every year of the said term, to view the state of repair and condition thereof, and to do all such painting and repairs as he or they may have occasion to do; PROVIDED ALWAYS [<i>here insert proviso for re-entry, 903</i>]: AND the lessor, for himself, his heirs, executors and administrators, hereby covenants with the lessee, his executors, administrators and assigns, that he the lessor shall and will repair all the buildings, gates, fences and hedges, and paint and tar the same whenever required, before the 11th day of October next: AND ALSO shall and will grub in a proper manner all the hedgerows belonging to the said premises when required by the lessee, his executors, administrators or assigns: [AND ALSO, that he will pay and bear all tithes and rent-charge in lieu of tithes chargeable during the said term on the said land and premises (except the extra tithe rent-charge on hops)]: AND ALSO, that he will paint the external part of the said messuage, with the buildings and cottages on the said farm, and all the gates and fences, twice during the said term [or oftener] if required by the lessee, his executors, administrators or assigns: AND ALSO, that he and they will drain with proper drain-tiles, one rod apart, ten acres of the land now in rye grass, at his and their costs, except the carriage of the said drain pipes, which is to be borne and paid by the lessee; and will drain the remainder of the lands hereby demised in manner aforesaid and except as aforesaid (r), upon being paid a further yearly rent of 5 <i>l.</i> for every 100 <i>l.</i> so expended, and so in proportion for any less sum expended, and which the lessee hereby agrees to pay accordingly from the time of such draining; AND ALSO, that the lessor, his heirs or assigns, shall and will find and provide all such materials as may be necessary for repairs, and all rough timber within five miles of the said premises, and will pay half-part of the labour on such timber and repairs, the lessee paying the other half-part: AND ALSO, that he the lessor, his heirs or assigns, or the succeeding tenants, shall and will take and pay for, to the lessee, his executors, administrators or assigns, the growing crops, and all hay, clover, straw and manure, at sale prices, household furniture, live and dead stock, and all machinery necessary for carrying on a farm of eighty acres that shall be erected by the lessee on the said premises and effects which shall be in, upon and about the said messuage, lands and premises at the expiration of the said term, at a fair valuation thereof to be made by two valuers, one to be chosen by each party, or in the event of their differing, then by a third person to be chosen by such valuers: PROVIDED ALSO, that in the event of the lessor, his heirs or assigns, being desirous of putting an end to this demise, as far as it affects part of the said lands called —, containing about [ten acres], at the end of the first five years of the said term, it shall be lawful for him or them so to do, upon giving to the lessee, his executors, administrators or assigns, notice of such desire at any time; and thereupon a reduction of [twenty shillings per acre, and so in proportion for less than an acre] shall be made from the said rent of —: PROVIDED ALSO, that if the lessee, his executors, administrators or assigns, shall be desirous of putting an end to this demise at the end of the first three or five years of the said term of seven years, it shall be lawful for him and them so
To leave in Repair.	
Hay and Clover.	
Fallows.	
To manage and cultivate in a husbandlike manner.	
Liberty to break up Pasture.	
Liberty to Lessor to enter and view state of Repair.	
Proviso for Re-entry.	
Covenants by Lessor.	
To do certain Repairs, &c.	
To grub Hedgerows.	
To pay Tithes, &c.	
(Except on Hops.)	
To paint external Parts twice or oftener.	
To drain part.	
Also Residue upon certain Terms.	
To find Materials and Rough Timber for Repairs, &c.	
To purchase at end of Term the Growing Crops, Stock in Trade, &c.	
Proviso enabling Lessor to determine Term as to part of the Land (s).	
Proviso enabling Lessee to determine Term in 3 or 5 years.	

(r) If the words "and except as aforesaid" be omitted, the landlord must pay for the carriage of the drain pipes for the

remainder of the land; *Beer v. Santer*, 10 C. B., N. S. 435.

(s) See another proviso, post, Sect. 46.

to do, upon giving to the lessor, his heirs or assigns, six calendar months' notice in writing of such desire, whereupon this demise shall cease, determine and be at an end as if by effluxion of time, anything hereinbefore contained to the contrary notwithstanding. IN WITNESS, &c.

ART. B. s. 19.

SECT. 20.—*Agricultural Lease (of Farm in Sussex)—Special Clauses.*

THIS INDENTURE, made the — day of —, 18—, BETWEEN A. B. of &c., of the one part, and C. D. of &c., of the other part, WITNESSETH that the said A. B., in consideration of the rent hereinafter reserved, and of the covenants on the part of the said C. D. hereinafter contained, DOTH by these presents demise unto the said C. D., his executors and administrators, ALL [*parcels and general words, see Sects. 30, 31, p. 896*].

Parties.
Testatum.
Parcels.

EXCEPTING and always reserving out of this demise all mines, minerals, quarries, surface and other clays, gravels, stone, chalk, flints, sand, and other valuable earths upon or under any part of the farm and lands, with liberty to the said A. B. and the succeeding owners, and all persons authorized by him or them to enter, to sink pits, and erect buildings, and fix machinery and works of any kind, for getting, using, and converting any of the same, and to carry away the produce at his or their pleasure, doing no wilful damage, and paying compensation, or allowing an abatement of rent for the extent of surface so occupied or interfered with, according to the scale of rent per acre paid for the said surface by the said C. D., and also excepting and reserving all timber and other trees and saplings, also all hawthorn now on the said farm and lands, or that may grow thereon in any wood, plantation, hedgerow, or otherwise, with full right and power to the said A. B. and such owners as aforesaid, to fell, lop, cut, convert, and carry away any part or the whole of the same. ALSO full power to cut down and carry away the same and any underwood from any other woods or plantations adjoining, or otherwise, or to permit the same, after being cut, to remain and be converted upon any part of the said farm and lands, and to make and use saw-pits without making compensation. AND excepting and reserving also (subject only to the concurrent rights of the lessee under the Ground Game Act, 1880) all game, rabbits, wildfowl, and fish, that is or are, now or may be hereafter on the said farm and lands, with full liberty for the said A. B. and such owners as aforesaid, and those he or they may authorize to come on the said farm and lands, with horses, carriages, dogs, guns, or otherwise, to shoot, hunt, sport, and fish at all times. AND excepting also and reserving full liberty for the said A. B. and such owners as aforesaid, and those he or they may authorize to come on the said farm and lands at all reasonable times, to examine and take notes of the state of the said farm and lands, and do any repairs thereto.

Exceptions and Reservations.

TO HOLD the said farm lands and premises, with the appurtenances, unto the said A. B., his executors or administrators, from the — day of — next, for the term of — years, YIELDING AND PAYING therefor yearly, during the continuance of the said demise, the yearly rent of £—, by four equal quarterly payments on the — day of —, the — day of —, the — day of —, and the — day of — in every year, and the first payment thereof to be made on the — day of —, 18—.

Habendum.
Reddendum.

AND the said A. B., for himself and his assigns, and the person or persons who for the time being after the determination of his estate shall be entitled to the rents and profits of the said farm and lands (hereinafter called "the lessor"), but so far only as relates to the covenants and agreements to be observed and performed by him or them, DOTH hereby covenant and agree with and to the said C. D., his executors and administrators. AND the said C. D., for himself, his heirs, his executors and administrators (hereinafter called "the lessee"), so far only as relates to the covenants and agreements to be observed and performed by him or them, DOTH hereby covenant and agree with and to the said A. B. and his assigns, and with and to the person or persons who for the time being after the determination of his estate shall be entitled to the rents and profits of the said farm and lands (hereinafter called "the lessor"), in manner following (that is to say)—

Mutual covenants.

THAT the lessee shall pay the said yearly rent of £—, at the times and in manner hereinbefore appointed for payment thereof, and shall also pay all rates and taxes (except land tax, landlord's property tax, and landlord's water scot, which shall be allowed by the lessor out of the rent); also tithe rent-

To pay Rent and Taxes.

APPENDIX B. (CONVEYANCING PRECEDENTS).

- Arr. B. s. 20.** charge and tenant's proportion of water scot; and do all duties and serve all offices incident to his tenancy.
- To Reside.** THAT the lessee shall reside personally with his family on the said farm and lands, and keep at all times a sufficient head of cattle, sheep, and horses, and stock of implements on the said farm and lands.
- Cultivation of Arable Lands.** THAT the lessee shall use, cultivate, and manage the said farm and lands properly and consistently with good husbandry, and keep and leave the same clean, and in good heart and condition, and shall not injure, misuse, or over crop the same in any way, and the land in tillage shall be kept under regular rotation or course of cropping, and such of the arable lands as are on the down or hill shall be used exclusively for the rearing and feeding of sheep, and the whole of the produce of such arable lands, except the grain of the white crop, shall be consumed thereon by penning and folding thereon, at proper times, the flock of sheep kept on the said farm and lands, and (without prejudice to the generality of this clause) the lessee shall in no case take from any such arable lands as are on the down or hill, more than one white crop in five years, nor from any other of the arable lands hereby demised, two or more white crops in succession, without grass, fallow, pulse, or green crop intervening.
- Grass Lands.** THAT the lessee shall not mow any of the grass lands more than once in any one year, and shall (except as hereinafter mentioned) mend annually one-third part of the lands usually mown, with good dung manure at the rate of twelve tons or ten bushels of half-inch bones per acre, and shall not in the last year of the said term mow any greater or less quantity of such grass lands than has on an average been usually mown in the previous years of the said term.
- Thistles, &c.** THAT the lessee shall pull up or mow previous to the month of August yearly, all thistles and docks growing upon the said farm and lands.
- Repairs.** THAT the lessee shall keep in good repair and condition the cottages on the said farm and lands, and all roads, doors, fences, walls, gates, stiles, cribs, rails, bars, trunks, culverts, gutters, ditches, drains, pumps, ponds, wells, banks, and glass windows, and also the interior of the dwelling-house, and fine straw for thatching, and repair all old thatched roofs, and on failure in any of the above respects, after notice in writing of the same by the lessor or his agent, the lessor may repair the same at the expense of the lessee.
- Carriage of materials.** THAT the lessee shall do all team work and carriage of materials from a distance of not more than ten miles, gratis, for any repairs of the house and buildings, or works of any kind to be done on the said farm and lands, whether such repairs are to be done by himself or the lessor, and shall pay one-half part of the cost of the labour attending any of the repairs to be done by the lessor.
- Hedges and Ditches.** THAT the lessee shall protect young hedges, and keep clean and open all the ditches and watercourses that are now on the said farm and lands, or that may be made hereafter, and shall not cause or allow any obstruction or injury to streams, rivulets, ditches, or watercourses, or divert the water into other channels, to the injury and inconvenience of adjoining tenants. And in case of a breach of this clause, it shall be lawful for the lessor or his agent to do the works above specified, and to remove any such obstruction, and compensate any person who may have sustained injury by such breach, and to charge the cost thereof, and the amount of any compensation paid, against the lessee, and to apply the first moneys coming to his hands from the tenant in liquidation of the aforesaid charges, or to distrain for the same as for rent in arrear.
- Waste.** THAT the lessee shall not commit any act of waste or damage, or allow any person or persons in his employ, or under his control, to commit or sanction any person directly or indirectly in committing any such act in or upon any part of the said farm and lands.
- Trespass.** THAT the lessee shall attend to prosecute any action or other proceeding for trespass if required on being paid all proper expenses actually incurred by him in so doing.
- Breaking up Pasture.** That the lessee shall not break up any permanent pasture or down or grass land, without the consent in writing of the lessor, under a penalty of five pounds per acre, and so on in proportion of any less quantity than an acre of the land so broken up, and for every time that such act shall be done, the same to be recovered by distress as for rent in arrear.
- Underletting.** THAT the lessee shall not underlet any part of the said farm and lands except

cottages to labourers, nor allow any person to acquire a right of way or other easement not existing at the commencement of his occupation. App. B. s. 20.

THAT the lessee shall prune, preserve, and properly train all fruit trees and shrubs, and keep in good order all enclosed and fenced gardens and grounds, and so leave the same. Fruit Trees.

THAT the lessee shall not carry away from the said farm, or otherwise dispose of any grass, clover, seeds, hay, straw, fodder, roots, vetches, dung, manure, or compost of any kind, that shall grow or be made on the said farm, nor allow any other person or persons to do so, without previous consent in writing of the lessor, under a penalty of five pounds for every ton of hay, straw, fodder, and manure so carried away or disposed of, to be recoverable by distress as for rent in arrear. All such produce of the said farm and lands shall be annually consumed upon, and all dung made and arising therefrom shall be laid on the land in a proper manner to the entire satisfaction of the lessor. To consume Fodder, &c. on premises.

THAT the lessee shall not use, alter or convert the buildings or any part thereof for any other purposes than those connected with the demise hereby made, nor make any addition to buildings, or any alteration without the lessor's consent in writing. Not to alter Buildings.

THAT the lessee shall not cut, lop, fell or wilfully injure or suffer to be injured any trees or saplings of the said farm and lands, or that may hereafter grow thereon, under the penalty of five pounds for every tree or sapling so cut or felled. And shall not cut any hedgerows or underwood at an unreasonable time, nor at less than such growth, nor suffer the same to remain above such growth, as shall be approved of by the lessor, nor injure or destroy any fence under the penalty of five pounds for every rod of hedgerow or underwood, and every yard of fence so improperly cut or destroyed, such sums respectively to be recoverable by distress as for rent in arrear. Not to lop Trees.

THAT the lessee shall not cut up any surface ground or banks of fences for the purpose of carrying the same away for forming compost or manure, heaps nor make any new chalk pits without previous consent in writing of the lessor. Not cut up Surface Ground.

THAT the lessee shall in the last year of his tenancy leave all the unspent manure, dung and compost which shall have been made and have arisen from the produce of the preceding year for the use of the lessor, but shall carry out only such dung, manure and compost as he may be authorized and directed in writing by the lessor or his agent to do and not to do any labour or carriage to any manure or mould without previous authority in writing from the lessor or his agent. At Determination of Term to leave Manure.

THAT the tenant shall at the determination of his tenancy leave and properly plough and prepare in such manner as the lessor shall direct, the proper proportion of arable land for a wheat season, and sow, roll and harrow in seeds on that portion of the lands which is intended for a green crop, and not suffer such seeds to be depastured, otherwise than with sheep, nor longer than the first day of September, and he shall also properly prepare a sufficient quantity of land under the regular rotation, and sow it with mangel wurzels and turnips, duly manuring, ploughing and otherwise cultivating the same for the said root crops (and the said quantity of land, and its situation and preparation, shall be such as the lessor shall direct): or, if the lessee shall refuse or neglect so to do, shall and will permit the lessor or incoming tenant to enter upon any part of the said lands and to plough and to carry out all manure, and prepare the same, and sow, roll and harrow in seeds, mangel wurzel and turnips, and provide reasonable accommodation for his horses. To plough Arable Land.

THAT the lessee shall house and stack all the corn, grain, pulse and hay which shall be grown on the farm in the last year of the tenancy in the barns or rick yards adjoining thereto. To stack Corn, &c.

THAT the lessor shall be at liberty to take land to make new roads, or to widen old roads. Also to abandon and close up old roads on any part of the said farm and lands, and the lessee shall maintain such new or altered roads or the parts of such roads as are used by him. Lessor's powers to make Road;

THAT the lessor shall also be at liberty to make alterations upon the said farm and lands, either by straightening boundaries, and with that object to cut new ditches or watercourses, to straighten old ditches and fences, and make new fences, and to enlarge or diminish fields and enclosures, or by exchanging lands with adjoining landlords or tenants or otherwise, and if in consequence of any such alteration there shall be any variation in the acreage of the said farm and lands hereby demised a proportionate increase or decrease of rent (as the case to alter Boundaries and exchange Lands;

APP. B. s. 20.	may be) shall be paid or allowed according to such variation. In case of dispute the points of difference shall be left to arbitration in the usual manner.
to resume Land;	THAT the lessor shall have power at any and at all times to take pieces or portions of land for the purpose of planting the same or for erecting buildings or other purposes beneficial to the farm or the estate, allowing an abatement of rent for the land taken according to the scale of rent per acre paid for the said land by the lessee. In case of dispute the points in difference shall be left to arbitration in the usual manner.
to select Land for Draining.	THAT the lessor shall have power to select such lands to be drained as he or his agent may think require draining, and the lessee shall pay such additional rent (if any) as may be agreed on in consequence of such draining, or in case of difference the amount of such additional rent (if any) shall be settled by arbitration in the usual manner.
Lessor to find materials for repairs by Lessee;	THAT the lessor shall find timber in the rough bricks, tiles, sand, and lime for the repair of cottages, gates, stiles, and culverts and other necessary repairs hereinbefore covenanted to be done by the lessee, such materials to be delivered to the lessee within ten miles of the said farm and lands.
and to do other repairs.	THAT the lessor shall do all necessary repairs other than those hereinbefore covenanted to be done by the lessee.
To take Straw, &c. at valuation.	PROVIDED ALWAYS and it is hereby agreed and declared that on the determination of the said tenancy the lessor shall have and take all the straw, haulm, and fodder to arise from the corn, grain, and pulse raised on the premises in the last year on paying the charges of thrashing such corn, grain, and pulse, and carrying the same to market within seven miles, and all the hay which shall then be thereon according to the valuation hereinafter mentioned (which is to be made at a feeding price) and also shall pay the lessee one half of the actual cost of any lime laid in a quick state and spread and at once ploughed in on the premises in the year preceding from which only one crop shall have been since taken and for all the hedgerows, underwood, and grass which shall then be on the premises and for any mangle wurzels, turnips, and seeds which shall have been sown, rolled, or harrowed by the lessee pursuant to the covenant hereinbefore contained and for the fallowing, ploughing, sowing, and preparation of the arable lands hereinbefore agreed to be left for a wheat season and for mangle wurzels and turnips including rent and taxes thereon and for the foldtail and for all the unspent manure, dung, and compost to be left as hereinbefore mentioned, and for the carriage of so much as shall be carried out under the authority and direction aforesaid according to the valuation of two impartial persons to be chosen by the said parties respectively or in case of the disagreement of such two persons according to the valuation of an umpire to be chosen by them from the amount of which valuation shall be deducted any sum that may then be due from the said lessee to the said lessor or for which the said lessor may be liable by reason of the breach or nonperformance of any of the covenants, clauses, or conditions herein contained on the lessee's part, and such umpire shall be chosen previously to such two persons proceeding on their valuation, and shall accompany them during the progress thereof so that any matter in difference between them may at once be referred to such umpire with a view to the immediate settlement thereof, and no valuation purporting to be made in pursuance of this clause or proviso shall have any force or effect, nor shall the lessor or lessee be bound thereby even although the same shall be formally signed by such two persons and their umpire unless the same shall contain an inventory and full and detailed account of every separate matter of valuation.
Arbitration.	[For proviso for re-entry, see p. 903.]
Proviso for Re-entry.	PROVIDED LASTLY and it is hereby agreed and declared between and by the lessor and lessee that the Agricultural Holdings (England) Act, 1875, shall not apply to the contract made by those presents.
Agricultural Holdings Act, 1875.	IN WITNESS, &c.

SECT. 21.—*Agricultural Lease (of farm in South Wales) in exercise of a Power—Special Clauses.*

Parties.	THIS INDENTURE, made the — day of — 18—, BETWEEN A. B., of, &c. of the one part (hereinafter called the lessor), and C. D., of &c. (hereinafter called the lessee) of the other part; WITNESSETH, that in consideration, &c. he, the lessor, in exercise of the power limited to him by the last will of J. B., deceased, dated the 15th day of July, 18—, and of all powers him thereto
Testatum.	

enabling, DOTH by this deed duly sealed and delivered by him in the presence of two credible witnesses attesting the sealing and delivery by him of these presents appoint by way of lease, AND DOTH HEREBY demise unto the lessee ALL that farm, &c. [*parcels and general words, see ante, Sects. 30, 31, p. 896, and exceptions and reservations, see p. 897*]. To HOLD the said farm, lands, and premises hereby appointed and demised with the appurtenances unto the lessee, his executors and administrators from the 29th day of September, 18—, for the term of twenty-one years: YIELDING AND PAYING, therefor, the yearly rent or sum of £— clear of land tax, tithes, tithe rent-charge, and all rates, taxes, and assessments whatsoever (except property tax) by equal half-yearly payments on the 25th day of March and the 29th day of September in every year, the first payment to be made on the 23th day of March, 18—. AND ALSO YIELDING AND PAYING an additional yearly rent of £20 for every acre, and proportionally of every part of an acre of the meadow or pasture land hereby appointed and demised which shall be broken up and converted into tillage. AND THE LESSEE DOTH HEREBY for himself, his heirs, executors, and administrators, covenant with the lessor and his assigns, and the reversioner or reversionsers, and his or their heirs and assigns, that the lessee shall and will [*pay rents and taxes, see ante, Sect. 20, p. 885*]. AND FURTHER shall and will during the term hereby demised maintain and keep all the said buildings, tenements, gates, posts, and stiles, together with all other appurtenances belonging to the said premises in good and sufficient repair, the lessee, his executors, administrators, or assigns being allowed a sufficient quantity of slates, tiles, and unsawn timber for that purpose, and moreover shall and will at all times during the said term, when needful, duly cleanse and scour all the ditches, drains, and watercourses thereto belonging. AND FURTHER shall and will permit the lessor and his assigns, and the reversioner or reversionsers, his or their heirs or assigns, and all persons authorized by him or them respectively during the said term at all reasonable times to enter into and upon the said demised premises to examine the condition thereof, and to give notice in writing of any repairs required, and after such notice left on the demised premises, shall and will well and sufficiently repair and amend the same within three calendar months accordingly. AND that the lessee, his executors, administrators, and assigns shall not assign, set over, underlease, underlet, or part with the possession of the said demised premises or any part thereof without the licence and consent in writing of the said — or his assigns or other the reversioner or reversionsers, his or their heirs or assigns, for that purpose first obtained. AND FURTHER, that the lessee, his executors, administrators, and assigns shall and will from time to time use his and their best endeavours to preserve the coppice, woods, underwoods, young trees, and other trees, layers, and quicksets of kinds now standing, growing, or being, or which during this demise shall stand, grow, or be in or upon the said demised premises or any part thereof; and shall not grow more than two white straw crops in succession on any part of the land hereby demised. AND shall and will consume on the said premises all the hay, straw, chaff, turnips, fodder, and haulm grown thereon during the said term. AND shall and will lay all dung made therefrom on the said demised premises yearly, or such of the said demised fields as may be most in need of the same, and will keep and leave the said demised lands at the end or other sooner determination of this present lease in proper fair proportions of seeds and fallows clean and in good condition. AND FURTHER, that the said lessee, his executors, administrators, or assigns shall not commit or suffer to be committed any wilful waste, spoil, or damage upon the said demised premises, nor plough, break up, or convert, or cause to be converted, into tillage, any part of the meadow or pasture land hereby demised, nor cause to be felled, cut down, lopped, topped, stubbed up, or taken or carried away, spoiled, or destroyed any of the excepted coppice, woods, underwoods, timber, timber-like trees, willows, sallows, alders, and pollards which may be standing, growing, or being in or upon the said demised premises. AND MOREOVER, that it shall be lawful for the said lessor and his assigns, and other the reversioner or reversionsers, his or their heirs and assigns, and his or their succeeding tenant or tenants, in the spring season of the last year of the said term to enter upon the lands hereby demised, and with the summer corn to sow such of their said lands as unto him or them shall seem proper with clover and grass seed. AND ALSO to have all the dung made from the said lands and premises during the last year of the said term thrown up in heaps for the use of the incoming tenant or tenants without any compensation for the same. AND

APP. B. s. 21.

Parcels.

Exceptions and Reservations.

Habendum.

Reidendum.

Lessee's Covenants.

To pay Rent, &c.
To repair Buildings, &c.

To cleanse Drains.

To permit Lessor to view premises.

Not to Assign or Underlet.

To preserve Trees, &c.

To consume Hay, &c. on premises.

Not to commit Waste.

Powers for Lessor in last Year of Tenancy to Sow,

and to take Manure,

APP. B. s. 21. FURTHER, that the said lessee, his executors, administrators, or assigns shall sell to the landlord, at a valuation to be made in the usual way, all the hay the produce of the last year of the said term at a consuming price, and all the green crops on the said premises at the expiration of the term hereby granted. AND ALSO all the corn in the straw the produce of the last year. PROVIDED THAT notice of the desire of the said lessor and his assigns, or other the reversioner or reversioners, his or their assigns, to purchase such corn in the straw, be given on or before the 1st day of July in the same year. PROVIDED ALSO, that if no such notice be given, or if no agreement to purchase be entered into, the lessee, his executors, administrators, or assigns shall be at liberty to im-barn and stack upon the said premises all such corn in the straw as aforesaid, and to thrash out the same at his own expense, leaving the straw gratis for the succeeding tenant. PROVIDED ALSO, that the whole of such corn must be thrashed out and removed on or before the 21th day of December next after the expiration of this demise. AND the said lessor for himself, his heirs, and assigns doth hereby covenant, promise and agree to, and with the lessee, his executors, administrators, and assigns, in manner following (that is to say): THAT the lessee, his executors, administrators, and assigns paying the rents hereinbefore reserved, and performing, observing, and keeping all and singular the covenants hereinbefore contained, and which on the tenant's or lessee's part are and ought to be performed, observed, and kept, shall and may peaceably and quietly have, hold, occupy, possess, and enjoy all and singular the said premises hereby demised, and every part and parcel thereof for and during all the term hereby granted. PROVIDED ALWAYS, that if either of the said yearly rents hereinbefore reserved and made payable, or any part thereof, shall be unpaid by the space of fifteen days next over or after any or either of the said days on which the same ought to have been paid as aforesaid, or if the lessee, his executors, administrators or assigns shall neglect to fulfil and perform the covenants, provisions and stipulations hereinbefore contained, or if in case of nonpayment of the said rent or rents there shall not be found upon the premises sufficient distrainable effects to satisfy the rent then due, and all expenses incident to distress and sale, or if it should happen that the lessee, his heirs, executors, administrators or assigns shall become bankrupt or insolvent, or in any manner compound with his or their creditors for the payment of his or their debts, then and from thenceforth in either of those cases it shall be lawful for the said lessee and his assigns, or other the reversioner or reversioners, his or their heirs or assigns at any time thereafter into and upon the said demised premises or any part thereof in the name of the whole, wholly to re-enter, and the same to have again, re-possess and enjoy as in his or their former estate this indenture or anything herein contained to the contrary notwithstanding. AND IT IS HEREBY AGREED AND DECLARED, that such part only of the Agricultural Holdings (England) Act, 1875, as gives the tenant a property in fixtures affixed by the tenant, shall apply to this contract of tenancy. IN WITNESS whereof the said parties to these presents have hereunto set their hands and seals the day and year first above writton.

SECT. 22.—*Public-house Lease. Lease for — years. Covenant by Tenant to reside and conduct Business. Proviso for re-entry on Forfeiture of Licence, &c.*

Parties. THIS INDENTURE, made the — day of —, 18—, BETWEEN A. B. of — and C. D. of — (in which indenture the term "landlord" means the said A. B., and includes the heirs and assigns of the said A. B., and the term "tenant" means the said C. D., and includes the executors, administrators and permitted assigns of the said C. D.); WITNESSETH, that the landlord doth demise unto the tenant ALL THAT public-house known as the Swan Inn, situate in — Street, in the parish of —, in the county of —; together with all easements and appurtenances whatsoever, To HOLD the said premises unto the tenant, from the — day of —, 18—, for the term of — years thence next ensuing, YIELDING AND PAYING [*insert reddendum, see ante, p. 873*]: AND the tenant hereby covenants with the landlord as follows: That he will pay the said net rent as aforesaid: AND will [*insert covenants to repair, keep in repair, &c., as agreed on. See ante, 873*]: AND will apply for and endeavour to obtain the licence or renewal of licences which may for the time being be necessary for the opening and keeping open during the tenancy the said premises as a house for the sale of ale, beer, wine and spirits to be consumed

Testatum.
Parcels.
Habendum.
Reddendum.
Covenants by Tenant.
To apply for Licence.

on or off the premises: And will, so long as the necessary licences can be obtained for the purpose, use the said premises as a licenced inn or victualling house only: AND will at all times during the said term reside on the premises hereby demised, and will personally conduct the business of the said public-house in a proper and orderly manner, not permitting drunkenness, disorder, gaming or unlawful games therein: AND will not do or suffer to be done upon the premises anything which may be or grow to be an annoyance or damage or disturbance to the lessors or their tenants, or whereby such licences as aforesaid, or any of them, may be forfeited or suspended or a renewal thereof withheld: AND will not assign or sub-let (u) the premises hereby demised, or any part thereof, without on each occasion first obtaining the consent in writing of the landlord: AND the landlord covenants with the tenant as follows: That he will forthwith insure and during the said term keep insured the said premises against fire to the amount of £ — at least in the — Fire Office or some other respectable fire office in the joint names of the landlord and tenant, and as often as the said premises shall be destroyed or damaged by fire, that the landlord will expend the moneys received from such insurance office in rebuilding or reinstating the same, it being agreed that the landlord shall not be liable to rebuild or reinstate the premises out of his own moneys in any case whatever: AND that [*insert covenant for quiet enjoyment*, 876]: PROVIDED ALWAYS, and those presents are upon the express condition that, if the tenant fail to obtain a licence for the sale of intoxicating liquors to be consumed both on and off the premises, or if and whenever any part of the rent hereby reserved shall be in arrear for twenty-one days, whether having been legally demanded or not, or in case of breach or non-performance or non-observance of any or either of the covenants on the part of the tenant hereinbefore contained [except the covenants to apply for licences and to sell liquors so far as the same relate to spirits (x)], or if and whenever the tenant shall be adjudicated bankrupt, or if the licence of the tenant shall be forfeited, or if the tenant shall be convicted of any offence against the existing or future Licensing Acts [which shall be recorded on the licence of the tenant] (y); then and in any of such cases the landlord may enter upon the premises hereby demised or intended to be demised, and the same may have again, repossess and enjoy as of his former estate. IN WITNESS, &c.

APP. B. s. 22.

Not to assign.

Covenants by Landlord.
To Insure.Quiet Enjoyment.
Proviso for Re-entry.

SECT. 23.—*Lease of Public-House by Firm of Brewers; Rent reducible in case of Lessees dealing with Lessors for Liquor; Increase of Rent by Lessors' Insurance Money; Covenant by Lessors to renew at the end of Term* (z).

THIS INDENTURE, made the — day of —, 18—, BETWEEN A. B. and C. D. both of &c., carrying on business as brewers in co-partnership under the firm of — (hereinafter called the lessors), of the one part, and E. F., of &c. (hereinafter called the lessee), of the other part: WITNESSETH, that in consideration of the rents hereinafter reserved, and of the covenants by the lessee hereinafter contained, THE lessors hereby demise unto the lessee, his executors, administrators and assigns, ALL THAT messuage and public-house called —, situate in the parish of —, in the county of —, and now in the occupation of the lessee: TO HAVE AND TO HOLD the premises hereinbefore expressed to be hereby demised unto the lessee, his executors, administrators and assigns, for the term of — years, from the — day of —, 18—: YIELDING AND PAYING therefor during the said term the yearly rent of £ — (subject to the proviso for reduction thereof hereinafter contained), by four equal quarterly payments, on the — day of —, the — day of —, the — day of —, and the — day of —, the first of such quarterly payments to be made on the — day of —, 18—, and the last of such quarterly payments to be made in advance on the — day of — next immediately preceding the expiration of the said term: AND YIELDING AND PAYING IN THE EVENT (*supra*, p. 873): And yielding and paying, as a further rent, the sum or sums of money which the

Parties.

Testatum.

Parcels.

Reddendum.

Further Rent for Insurance.

(u) For form of stipulation for leaving assignment or sub-lease with solicitor of ground landlord for registration, see *Brooks v. Drydale*, L. R., 3 C. P. D. 53.

(z) This is suggested by the increase of duties under the Inland Revenue Act, 1880 (43 & 44 Vict. c. 20, ss. 40—43).

(y) See *Wooler v. Knott*, L. R., 1 Ex. D. 625; and 639, ante.

(z) This precedent, which is inserted by the kind permission of Mr. Davidson, is taken from Davidson's *Precedents*, vol. v. p. 134, only the special clauses being copied.

APP. B. s. 23. lessors, their heirs or assigns, shall expend in effecting and maintaining the insurance of the said messuage and buildings against loss or damage by fire as hereinafter mentioned, such last-mentioned rent to be paid on demand on the next or any subsequent quarterly day of payment happening at any time after the said sum or sums shall have been expended: The said several rents to be paid clear of all deductions: PROVIDED ALWAYS, and it is hereby agreed and declared, that if and so long as the lessee, his executors, administrators or assigns, or the tenant or tenants for the time being of the said premises, shall deal with the lessors or the persons or person who for the time being shall compose or succeed to the said firm of — or the said business thereof, for all the porter, stout, beer and ale sold and consumed upon the said premises, the lessee, his executors, administrators and assigns shall, during the continuance of such dealing be entitled to deduct from quarterly payment of the said rent of £— the sum of £—, less income tax (if any): AND the lessee doth hereby for himself, his heirs, executors, administrators and assigns, covenant with the lessors, their heirs and assigns, THAT he the lessee, his executors, administrators or assigns, will during the said term pay the rents hereinbefore reserved on the days and in manner hereinbefore appointed for payment thereof, clear of all deductions except as aforesaid: *[and here insert covenants to pay taxes, and repair, and paint, and permit lessors to enter and view condition of premises, and repair upon three months' notice, p. 873, and use the public-house as a licensed victualling house only, and not to do anything to forfeit the licence, and not to assign or underlet without leave, pp. 890, 891]* and will at the expiration or sooner determination of the said term do all necessary acts for assigning and transferring the then existing licence or licences to the person to be named by the lessors, their heirs or assigns, on payment only of the aliquot proportion of the sum paid for the same *[insert here covenant to deliver up in good repair, proviso for re-entry, and covenant by lessors for quiet enjoyment, pp. 875, 876]* and that the lessors, their heirs or assigns will throughout the said term insure and (unless where any policy or policies shall be vacated or forfeited by any act of the lessee, his executors, administrators or assigns) keep insured against damage by fire the said messuage hereby demised and all buildings for the time being upon the said premises for the sum of £—, in some or one of the public offices in London or Westminster for insuring against damage by fire, AND will produce and show to the lessee, his executors, administrators or assigns, whenever he or they shall require it, the policy or policies of such insurance as aforesaid, and the receipt for the then current year's premium and other sums payable in respect of such insurance: AND will, when and as often during the said term as the said messuage and buildings hereby covenanted to be insured as aforesaid shall be burnt down or damaged by fire, forthwith apply all such sums of money as shall from time to time be received by virtue of any such insurance in repairing or rebuilding and reinstating the said messuage and buildings so burnt down or damaged: PROVIDED ALWAYS, nevertheless, that the lessee, his executors, administrators and assigns shall remain liable under the general covenant to repair hereinbefore contained, to make good any damage which the money received by virtue of any such insurance shall be inadequate to repair: AND that if the lessee, his executors, administrators or assigns shall be desirous of taking a renewed lease of the said premises for the further term of — years, from the expiration of the said term hereby granted, and of such desire shall, prior to the expiration of the said last-mentioned term, give to the lessors, their heirs or assigns, or leave at their last known place of business or abode in England, six calendar months' previous notice in writing, and shall pay the said rent hereby reserved, and observe and perform the several covenants and agreements herein contained, and on the part of the lessee, his executors, administrators or assigns, to be observed and performed up to the expiration of the said term hereby granted, they, the lessors, their heirs or assigns will upon the request and at the expense of the lessee, his executors, administrators or assigns *[and upon payment by him or them of the sum of £— as a premium for such renewal]*, and upon his or their executing and delivering to the lessors, their heirs or assigns a counterpart thereof, forthwith execute and deliver to the lessee, his executors, administrators or assigns a renewed lease of the said premises for the further term of — years, at the same yearly rent and under and subject to the same covenants, provisos and agreements as are herein contained other than this present covenant. IN WITNESS, &c.

Deduction
from Rent so
long as Lessor
dealt with for
Liquors.

Transfer of
Licence.

Insurance.

Renewal.

APP. B. s. 24.

SECT. 24.—*Lease by a Tenant for Life, &c., pursuant to Settled Estates Act, 1877, 40 & 41 Vict. c. 18, s. 46 (ante, 5).*

THIS INDENTURE, made the — day of —, 18—, BETWEEN A. B. of —, in the county of — [esquire], of the one part, and C. D. of —, in the county of — [farmer], of the other part: WHEREAS the said A. B. is entitled to the possession, or to the receipt of the rents and profits, of the hereditaments hereinafter described and intended to be hereby demised, with the appurtenances, as tenant thereof for his own life, *or, as the case may be*, under and by virtue of a settlement created [by the will of E. F., late of —, esquire, deceased, bearing date on or about the — day of —, 18—, and proved at —, on or about the — day of —, 18—, *or*, by an indenture dated on or about the — day of —, 18—, and made or expressed to be made between, &c., *as the case may be*]: AND WHEREAS the said A. B. has agreed to demise the said hereditaments to the said C. D. in manner hereinafter appearing: NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement, and in consideration (i) of the rent and lessee's covenants hereinafter reserved and contained, HE the said A. B. DOth by these presents, made in exercise and execution of the power vested in him under and by virtue of the Settled Estates Act, 1877, and of all other statutes, powers, authorities, estates, rights and interests, in anywise enabling him in this behalf, APPOINT, demise and lease unto the said C. D., his executors, administrators and assigns, ALL [describe parcels and general words—the latter may be concisely expressed thus], "Together with all and singular the actual and reputed rights, members, easements, and appurtenances of the said premises respectively"—[EXCEPT, and always reserved unto the said A. B. and his assigns, *here state any exceptions as agreed on (k).*] TO HAVE AND TO HOLD the said [short general description of the property, *e.g.*, "farm and lands"], and all and singular other the premises hereinbefore expressed to be demised, with the appurtenances [except as before excepted], unto the said C. D., his executors, administrators and assigns, from the — day of — last (l), for the term of — years (m) thence next ensuing, YIELDING AND PAYING therefor yearly and every year during the said term (n) the rent or sum of £— sterling (being the best rent that can reasonably be obtained for the said premises), by equal [quarterly or half-yearly] payments, on the — day of — &c., *state days of payment*, the first of such payments to be made on the — day of — next: AND the said C. D. doth hereby for himself, his heirs, executors, administrators, and assigns, covenant with the said A. B. and his assigns, in manner following, that is to say, that he the said C. D., his executors, administrators or assigns, will, during the said term, pay unto the said A. B. or his assigns (o), the rent hereby reserved, at the times and in manner hereinbefore mentioned and appointed for payment thereof: AND FURTHER, [here insert such usual and proper covenants as the lessor shall think fit, and also a condition of re-entry on nonpayment for a period of 28 days, or some less period, of the rent reserved (p)—All the covenants should be made with the said A. B. "and his assigns"—And after the usual qualified covenants for quiet enjoyment, add the following proviso, viz.]: "Provided always, and it is hereby agreed and declared, that neither the heirs, executors or administrators of the said A. B. (but only his assigns) shall be liable for any breach of the above covenant happening after the death of the said A. B.: AND it is hereby declared and agreed, that whenever the assigns of the said A. B. are hereinbefore mentioned, such word 'assigns' shall be construed and deemed and taken to include the persons or person for the time being entitled to the reversion of the said demised premises immediately expectant upon the determi-

Date and Parties.

Recital of Lessor's Title.

Agreement for Lease.

Testatum.

Operative Words.

Parcels.

General Words.

Exceptions.

Habendum.

Reddendum.

Covenants by Lessee.

Condition of Re-entry.

(i) No fine, &c. may be taken; 40 & 41 Vict. c. 18, s. 46; ante, 5.

(k) See forms, post, pp. 897, 898.

(l) Not from a future day, ante, 5.

(m) Not exceeding 21 years, ante, 5.

(n) If necessary, here say "except such part thereof as elapsed on or before the — day of — last." Buck rent may be considered as a benefit to the tenant for life in the nature of a fine or premium, that should be avoided.

(o) If the rent be reserved and made payable to A. B., his "heirs and assigns," the lease will be void as an execution of the power; *Yellowly v. Gower*, 11 Exch. 274; 24 L. J., Ex. 289.

(p) See 40 & 41 Vict. c. 18, s. 46, ante, 5. The covenants must depend upon the nature of the property demised, *i.e.*, whether a house or land, &c., and of the terms actually agreed on between the parties.

APP. B. s. 24. nation of the said term hereby granted, unless there be something in the subject
In witness, &c. or context repugnant to such construction" (s). IN WITNESS, &c. (ante, 873).

(Indorsement.)

Received this — day of —, 18—, of Mr. C. D., a counterpart of the within-written indenture duly executed by him.

Witness,

E. F.

A. B.

SECT. 25.—*Lease by a Mortgagee and Mortgagor (t).*

Date and Par-
ties.
Recital of Mort-
gage.

Agreement for
Lease.

Testatum.

Parcels and
General Words.

Exceptions.

Habendum.

Reddendum.
Proviso for
Mortgagor to
receive the Rent
until Notice
given to the
contrary.

Mortgagor's
Receipts to be
sufficient.

Power to Mort-
gagor to dis-
train.

THIS INDENTURE, made the — day of —, 18—, between C. D. (*mortgagee*) of &c. of the first part, A. B. (*mortgagor*) of &c. of the second part, and E. F. (*leasee*) of &c. of the third part (u): WHEREAS, by indenture dated the — day of —, 18—, and made between the said A. B. of the one part, and the said C. D. of the other part; for the considerations therein mentioned, the said A. B. conveyed and assigned the hereditaments hereinafter described and intended to be demised (together with other hereditaments) unto and to the use of the said C. D., his heirs and assigns, subject to a proviso for redemption thereof on a certain day therein mentioned and since past: AND WHEREAS the said C. D. and A. B. have agreed with the said E. F. to demise to him the said hereditaments upon the terms and in manner hereinafter appearing: NOW THIS INDENTURE WITNESSETH, that in pursuance of the said agreement and in consideration of the rent and lessor's covenants hereinafter reserved and contained, THE said C. D. (at the request of the said A. B.), according to his estate and interest in the premises, DOTH demise, and the said A. B. DOTH demise and confirm unto the said E. F., his executors, administrators and assigns, ALL [*describe parcels*, 896]: TOGETHER with all and singular the actual and reputed rights, members, easements and appurtenances of the said premises respectively [EXCEPT and always reserved unto the said C. D., his heirs and assigns all, *here state any exceptions*, 897]: TO HAVE AND TO HOLD the said [messuage and land, and all and singular other the] premises hereinbefore expressed to be demised unto the said E. F., his executors, administrators and assigns, from the — day of — [last or next or 18—] for the term of — years from thence next ensuing, YIELDING AND PAYING [*insert reddendum, see ante, p. 875*]: PROVIDED ALWAYS, and it is hereby agreed and declared, that until the said C. D., his heirs, executors, administrators or assigns, shall give notice in writing to the said E. F., his executors, administrators or assigns, or leave the same at [*the dwelling-house on the said demised premises*], requiring the said E. F., his executors, administrators or assigns, to pay the said yearly rent of £— to the said C. D., his heirs or assigns, such yearly rent shall be paid unto the said A. B., his heirs or assigns, and his and their receipts shall be a valid discharge for the same: PROVIDED ALWAYS, and it is hereby agreed and declared, that if at any time previously to the giving or leaving of such notice as aforesaid the said yearly rent of £— or any part thereof shall be unpaid by the space of [twenty-one] days next after either of the days hereinbefore appointed for payment thereof, then and in such case, and so often as the same shall happen (although no formal demand shall have been made thereof), it shall be lawful for the said A. B., his heirs and assigns, into and upon the said demised premises to enter, and then and there to distrain for the said yearly rent, or so much thereof as shall be then in arrear, and impound and dispose of the distress or distresses so taken, or otherwise to act therein according to due course of law; to the intent, that by the ways and means aforesaid the said A. B., his heirs or assigns, shall and may be fully paid and satisfied the arrears of the said rent, and also all expenses incurred in respect of such distress or distresses: PROVIDED ALSO, and it is hereby agreed and declared, that notwithstanding these presents or anything herein contained the said C. D., his heirs or assigns, shall not be

(*) As to the necessity for this proviso, see *Williams v. Burrill*, 1 C. B. 402; *Smith L. & T.* 281, 282 (2nd ed.).

(t) The lessee must execute a counterpart; 40 & 41 Vict. c. 18, ss. 46, 48, ante, 6.

(u) If wished, the recital of the mort-

gage may be avoided by describing C. D., of &c., as "mortgagee in fee of the hereditaments hereinafter described and intended to be demised." And A. B., of &c., as "owner of the fee simple and inheritance of the said hereditaments, subject to the said mortgage."

deemed to be a mortgagee or mortgagees in possession until such notice shall be given or left as aforesaid. Here add lessee's covenants with the mortgagee (x) for payment of the rent, rates and taxes, and to repair and leave in repair, &c.; also proviso for re-entry by mortgagee or mortgagor on non-payment of rent or non-performance of covenants; also the usual qualified covenant by mortgagee for quiet enjoyment, &c.; and (if so agreed) a proviso for determining the term before the expiration thereof by effluxion of time. IN WITNESS, &c. (ante, 873).

APP. B. s. 25.

Lessee's Covenants, &c.

SECT. 26.—*Lease of a Brickfield to two Partners—Concise Form.*

THIS INDENTURE made the — day of — 18— BETWEEN A. B. of, &c. (hereinafter called the lessor), and C. D. and E. F., both of, &c. (hereinafter called the lessees) of the other part: WITNESSETH that in consideration of the rent and monies hereinafter reserved, and of the lessor's covenants hereinafter contained, the lessor doth hereby demise unto the lessees, their executors, administrators and assigns, ALL that piece or parcel of land situate, &c., together with full liberty to the lessees, their executors, administrators and assigns, to dig, work and get clay, brick, earth and sand therefrom, and to make, manufacture and burn the same into bricks, pipes and tiles, and for that purpose to erect and construct on the same piece of land hereby demised such machinery, kilns, sheds or other buildings and works as may be necessary: TO HOLD the said piece or parcel of land, liberties and premises respectively hereby demised to the lessees, their executors, administrators and assigns from the — day of — next for the term of — years: YIELDING AND PAYING therefor the fixed yearly rent of £ — to be paid by equal half-yearly payments on the — day of —, and the — day of — in every year, without any deduction (except for landlord's property tax), and also yielding and paying a royalty of — for every 1,000 bricks, to be paid on the days aforesaid, on all bricks manufactured on the said piece or parcel of land during the half-year preceding each such payment: AND the lessees do hereby for themselves, their heirs, executors, administrators and assigns, and as a separate covenant each of them doth hereby for himself, his heirs, executors, administrators and assigns, covenant with the lessor, his heirs and assigns, that they the lessees, their respective executors, administrators or assigns, shall and will [pay the "rent and royalty hereinbefore mentioned," and rates, see ante, sect. 14, p. 871]: AND shall and will at all times during the said term hereby granted, unless prevented by unavoidable accident, effectually and vigorously carry on the manufacture of bricks, pipes and tiles on the said piece or parcel of land, and not discontinue the same, unless prevented as aforesaid, for the space of more than — weeks in any one year: AND shall and will at their own expense, within three calendar months after any day brick, earth or sand shall have been taken to the extent of — acres, level the ground from which the same respectively shall have been taken, and replace the whole of the surface soil removed therefrom, so as to render the surface fit for agricultural purposes [here insert any special stipulations]: PROVIDED ALWAYS, that if the rent and royalty hereinbefore reserved, or any part thereof respectively, shall be unpaid [proviso for re-entry, see post, p. 903]. IN WITNESS, &c.

Rent and Royalty.

Covenant to carry on Trade.

SECT. 27.—*Lease of Right of Shooting.*

THIS INDENTURE made the — day of —, 18—, BETWEEN A. B. of, &c. (hereinafter called the lessor) and C. D. of, &c. (hereinafter called the lessee). WITNESSETH that in consideration of the rent and lessee's covenant hereinafter reserved and contained THE said lessor doth hereby demise unto the said lessee ALL THAT the sole and exclusive right (subject only to the concurrent rights of tenants under the Ground Game Act, 1880) of shooting, fowling, coursing, fishing and sporting in, over and upon the farms, lands, woods and plantations mentioned in the schedule hereunder written, and situated in the several parishes mentioned in the same schedule, and containing altogether — acres or thereabouts, and also all that keeper's lodge situate at —, now in the

Parcels.

(x) The covenants should be made with "the said C. D., his heirs and assigns, and also as a separate covenant with the

said A. B., his heirs and assigns," otherwise they will not run with the land; ante, 47.

APP. B. s. 27. occupation of E. F. : TO HOLD the said premises unto the said lessee from the — day of — last past, for the term of — years, if the said lessee shall so long live: YIELDING AND PAYING therefor the yearly rent of £—, by equal quarterly payments on the 25th day of March, the 24th day of June, the 29th day of September, and the 25th day of December in each year, with a proportionate part of the said rent up to the day of the decease of the said lessee within the said term, the first payment to be made on the — day of — next: AND the said lessee doth hereby covenant with the said lessor, his heirs and assigns in manner following, that is to say, that he the lessee will pay the said rent at the times hereinbefore mentioned, and will also pay all rates and taxes payable in respect of the said keeper's lodge: AND will exercise the said rights and privileges hereby demised in a proper and sportsmanlike manner: AND will during the said term at his own cost keep at least one effective gamekeeper who shall live in the said keeper's lodge: AND will at all times during the said term keep up a proper stock of game, and particularly of hen pheasants, and will to the best of his power preserve the eggs and young of game birds from being destroyed or injured: AND will not at any time assign or underlet, or otherwise part with the said rights and privileges, and other the premises hereby demised, or any of them, without the consent in writing of the lessor, his heirs or assigns, first had and obtained for that purpose: AND the said lessor doth hereby covenant with the said lessee that he paying the — rent hereby reserved, and observing and performing the covenants hereinbefore on his part contained, shall and may peaceably possess and enjoy the rights and privileges and other the premises hereby demised without any interruption or disturbance from or by the lessor, his heirs or assigns, or any person or persons lawfully claiming through, under or in trust for him or them or any of them: AND that if this lease shall determine by the death of the said lessee during the said term, he the said lessor, his heirs or assigns, will pay or allow to the executors, administrators and assigns of the said lessee all expenses incurred by the said lessee in preserving and roaring the game from the end of the preceding season up to the day of the death of the said lessee. IN WITNESS, &c.

Covenant to
keep up Game.

[The Schedule above referred to.]

SECT. 28.—*Parcels—House in a Town.*

ALL that messuage or dwelling-house [with the coach-house, stables, yard, garden, and outbuildings thereto belonging] situate and known as No. —, — Street in the parish of — in the county of —, and now in the occupation of E. F.

SECT. 29.—*Parcels—Piece of Land.*

ALL that piece or parcel of land situate at — in the parish of — in the county of —, and containing by admeasurement — acres, — roods, and — perches or thereabouts, as the same is delineated in the plan drawn in the margin of these presents and therein coloured —. AND ALSO the messuage or dwelling-house and outbuildings now standing on part of the same piece or parcel of land and also delineated in the said plan and therein coloured —.

SECT. 30.—*Parcels—Farm.*

ALL that messuage or farm-house and farm with the — cottages (now let with the farm), barns, stables, sheds, buildings, and several closes and pieces or parcels of land thereto belonging, known as the — farm, situate in the parish of — in the county of — and containing by admeasurement — acres, — roods, and — perches or thereabouts, and late in the occupation of —, and all which premises are more particularly described in the schedule hereunder written and delineated with the chattels in the map or plan drawn in the margin of these presents and therein coloured — [such schedule and map being respectively extracts from the apportionment of tithe commutation rentcharge for the parish of — aforesaid and from the map referred to in the same apportionment].

SECT. 31.—*General Words.*

APP. B. s. 31.

TOGETHER with all rights, easements, and appurtenances to the said premises hereby demised belonging, or reputed to belong, or usually held, occupied, or enjoyed therewith.

SECT. 32.—*Grant of a Right of Road (in a Lease).*

Together with all and singular the actual and reputed rights, members, easements and appurtenances of the said premises respectively; And with full and free liberty, licence, power and authority for the lessee, his executors, administrators and assigns, at all times during the continuance of this demise for him and them and his and their agents, servants and workmen, and the tenants and occupiers for the time being of the land hereby demised, or of any buildings to be erected thereon, at his and their will and pleasure, and whether by night or by day, and for all legitimate purposes whatsoever to go and return, pass and repass with or without horses, carts, waggons, wains and carriages of any description laden or unladen, and also to drive all manner of cattle and beasts whatsoever, in, along, over and through [ten] feet at least in breadth of certain closes of land of him the lessor, situate and adjoining the [most easterly end and the south-easterly side] of the said plot of land hereinbefore described and hereby demised, in order to afford free egress and regress from and to the said plot of land hereby demised, and the high road leading from — to —, and which said intended right of road or way, together with its course or direction, is delineated and set forth in the said plan hereupon indorsed and therein coloured *brown*, the lessee, his executors, administrators and assigns, nevertheless making good from time to time all damage done to the said land, the right of road over which is so granted as aforesaid.

Appurtenances.
Right of Road.

With Horses,
Carts, &c.
And with
Cattle, &c.

Road delineated
in Plan.

SECT. 33.—*Exception and Reservation of Use of Roads, &c.*

EXCEPT and always reserved unto the lessor [his heirs and assigns or executors, administrators and assigns], and his and their lessees and tenants in common with the lessee, the full and free use of all roads and ways which may at any time during the term hereby [agreed to be] granted, be made or set out upon or over any part or parts of the said land hereby [agreed to be] demised; he the lessee, his executors, administrators and assigns, repairing, keeping and leaving the same in good repair so long as the same shall continue private roads or ways.

SECT. 34.—*Exception and Reservation of Use of Drains, &c.*

EXCEPT and always reserved unto the lessor, [his heirs and assigns or executors, administrators and assigns], and his and their lessees and tenants, free passage and running of water and soil coming or to come from any other lands or buildings of the lessor, his [heirs or assigns, or executors, administrators or assigns], adjoining or near to the premises hereby demised, in and through the channels, drains, sewers and watercourses belonging or to be made thereto (y).

SECT. 35.—*Exception and Reservation to Landlord of all Timber and Trees, Mines, Minerals, Quarries and Game, &c.*

EXCEPT and always reserved unto the lessor, his heirs and assigns, all timber and timberlike trees and trees likely to become timber and all other trees whatsoever, whether now standing or being, or which hereafter during the said term shall be standing or being upon the said demised premises: AND ALSO all mines, minerals and quarries: AND ALSO (subject only to the concurrent rights of the lessee under the Ground Game Act, 1880 (z)) all game and wild fowl,

Exceptions of
Timber and
Trees.

Mines, Minerals
and Quarries.
Game.

(y) This exception extends to water and soil coming *through* the adjoining premises but not to the refuse of tan pits. *Chadwick v. Marsden*, L. R., 2 Ex. 285; 36 L. J., Ex. 177.

(z) In law, it is immaterial whether this saving is inserted, but it may be desirable to insert it to show that the question has not been forgotten.

APP. B. s. 35.	woodcocks, snipes, quails, landrails [deer] and rabbits, and also the sole liberty of hunting, coursing and shooting in, upon, through and over the said lands and premises, and at his and their free will and pleasure, and for that purpose it is hereby declared and agreed that the lessor, his heirs and assigns, and his and their friends ^(a) , companions and servants, with dogs and horses, from time to time, at all seasonable times of the year during the term hereby granted, may enter into and upon the said demised premises or any part thereof, to hunt, course and shoot thereon, and the game and wild fowl, woodcocks, snipes, quails, landrails and rabbits there killed and taken to have and carry away to the use of the lessor, his heirs and assigns, he and they doing no more damage to the said lands and premises or the crops thereon growing and being than what necessarily happens in killing, taking and following such game and other animals: AND ALSO, that he the lessee, his executors, administrators and assigns, shall and will from time to time and at all times during the said term use his utmost endeavours to preserve the nests and eggs of all partridges and pheasants, as well as the young of those birds and of all manner of game, free from injury and from being taken and removed from the places where the same may be found, except for the necessary preservation thereof, and when such removal shall become necessary, then the lessee, his executors, administrators and assigns, shall and will take due and proper care of such eggs and young birds as aforesaid, and endeavour to rear them for the use of the lessor, his heirs and assigns: AND ALSO reserving to the lessor, his heirs and assigns, free liberty and power into, upon or over the said demised premises, upon or for any other reasonable purpose or occasion whatsoever, doing thereby no wilful or unnecessary injury or damage to the corn, hay, grass or fences of the lessee, his executors, administrators or assigns.
Sporting.	
Nests, Eggs and young Birds to be preserved.	
Right of Entry.	

SECT. 36.—*Exception and Reservation to Landlord of all Mines, &c.*

Except all Mines, &c.	EXCEPT and always reserved unto the lessor, his heirs and assigns, all mines, veins, seams and beds of stone, coal and cannel, and all other mines, minerals, delphs and quarries whatsoever, which now are or hereafter during the said term hereby granted or created, shall be found or be within or under the said hereby demised land and premises, or any part thereof; together with full and free liberty, power and authority to and for the lessor, his heirs and assigns, and his and their servants and workmen and others, by his and their authority, with or without horses, carts and other carriages and all necessary implements and materials, at all times during the said term to enter into and upon the land and premises hereby demised, or any part thereof other than any such part or parts of the surface thereof in or upon which there shall be any building, reservoir, drain, watercourse or stream in use for carrying on the business which may be carried on by the lessee, his executors, administrators or assigns in and upon the said premises or adjacent thereto: And to sink any pit or shaft therein, and to make any way or ways therein or thereon for the purpose of carrying and conveying coals, stone or minerals, and to bore, search for, dig, got, carry away and dispose of such coal, cannel, stone, slate and minerals respectively, without paying any compensation for any unavoidable or ordinary damage to be done or occasioned thereby ^(b) , he and they making compensation to the lessee, his executors, administrators or assigns, for all damages to be done or occasioned in or by the making any pit
With liberty to work them ^(b) .	
And to sink Pits and Shafts and make Ways. And to dig and get Minerals, &c.	
Compensation.	

(a) The words "any friend," are not confined to a single friend at a time; *Gardner v. Colyer*, 12 W. R. 979; 10 L. T., N. S. 715, Q. B.

(b) Where mines are excepted and reserved they must not be worked in such a manner as to let down the surface or buildings then erected thereon. *Harris v. Ryding*, 5 M. & W. 60; *Humphries v. Brogden*, 12 Q. B. 739; 20 L. J., Q. B. 10; *Richards v. Harper*, L. R., 1 Ex. 199; 35 L. J., Ex. 130. But an exception or reservation in a lease may be so framed as to entitle the lessor to remove the vertical or

lateral support, and so in effect to derogate from the grant, without paying any compensation for the damage. *Williams v. Bagnall*, 15 W. R. 272, Wood, V.-C. Where, under an inclosure act, all mines and minerals are reserved to the lord of the manor with full powers to win and work them, he has a right so to work them as to let down the surface, making compensation for the damage. *Duke of Buccleuch v. Wakefield* (in error), L. R., 4 H. L. 377; overruling L. R., 4 Eq. 613; 36 L. J., Ch. 763.

or shaft in or under the said premises, or by making any rail or other ways as aforesaid thereon, or by digging, getting and carrying away such coals and canal, stone, slate and other minerals in or after the rate and proportion following (that is to say), at the rate of — for every superficial square yard of land for a year, and so in proportion for any greater or less quantity than a yard, or a longer or a shorter space than a year: AND ALSO, excepting and reserving unto the lessor, his heirs and assigns, full and free liberty at all reasonable times during the said term hereby created, with or without surveyors and workmen, to enter into and upon all or any part of the said hereby demised premises, in order to inspect the condition thereof.

App. B. s. 36.

Right to enter
and view Slate
and Condition,
&c.

SECT. 37.—*Reservation of Timber and Minerals. (Concise form.)*

EXCEPT and always reserved unto the lessor, his heirs and assigns, all timber and other trees, pollards and saplings, and all mines and minerals, with full liberty of access to cut, work, and carry away the same respectively,

SECT. 38.—*Special form of Covenant not to Assign or Underlet.*

AND that the tenant [the said C. D., his executors, administrators and assigns] will not assign or underlet the premises hereby demised or any part thereof, except to a respectable and solvent assignee or under-tenant, nor without having given two months' previous notice in writing to the landlord [the said A. B., his heirs and assigns] of the name and abode of such proposed assignee or under-tenant.

SECT. 39.—*Another form for a Dwelling-House.*

AND that the tenant [the said C. D., his executors, administrators and assigns] will not assign or underlet the premises hereby demised or any part thereof except furnished for the period of — months, without the leave in writing of the landlord [the said A. B., his heirs or assigns] first obtained: Provided always, and it is hereby agreed by and between the parties hereto that such leave shall be granted without pecuniary consideration, and shall not be withheld in the case of a proposed assignee or under-tenant, whose respectability and solvency shall be vouched for by any two persons being either justices of the peace, bankers or solicitors.

SECT. 40.—*Covenant for Notice of Assignments, "The Norfolk Clause."*

AND upon every assignment of the said premises, or any part thereof not being by will or operation of law without deed, will, within one calendar month thereafter, give notice thereof in writing to the reversioner or reversioners, or his or their agent, stating in such notice the name, place, or residence, or business, and description of the party to whom such assignment shall be made, and will, within such period of one calendar month produce to the reversioner or reversioners, or his or their agent, such assignment or a duplicate or attested copy thereof, of which notice and production having been duly given and made a stamp or memorandum on such assignment duplicate or attested copy, or on a duplicate of such notice, signed by the reversioner or reversioners, or by his or their agent on his or their behalf, shall be conclusive evidence.

SECT. 41.—*Covenant to Insure.*

AND also will during every part of the said term other than the last twenty years thereof, insure and keep insured the buildings for the time being, on the ground hereby demised, in some respectable office for insurance against fire in England in the sum of —, and will, during the last twenty years of the said term, keep insured the buildings for the time being on the ground hereby demised, in some respectable office for insurance against fire in England, in such sum as the agent for the time being of the reversioner or reversioners shall at the commencement of, or during such twenty years, from time to time, fix and determine, and in default of any such fixing or determination in the sum of —, and will, if required so to do, produce the receipts for the premium of such insurance for every current year to such agent as aforesaid.

APP. B. s. 42.

SECT. 42.—*Covenant to produce Copies of Deeds of Assignment, &c.*

AND will, if and whenever the said premises hereby demised, or any part thereof, shall be assigned, underlet or otherwise disposed of, deliver, at his [and their] own expense, an attested copy of the deed of assignment, underletting or disposition, and of every plan thereon, to the landlord [the said C. B., his heirs or assigns], or his [or their] solicitors within — days after the execution thereof.

SECT. 43.—*Proviso that Tenant may remove Fixtures (b).*

PROVIDED ALWAYS, and it is hereby agreed and declared, that if the tenant shall affix to or on the premises any fixture which shall not be so affixed in pursuance of some obligation in that behalf, or instead of some fixture affixed to or on the premises at the date of the commencement of the lease hereby granted, then such fixture shall belong to and be removable by the tenant at any time during the term hereby granted, or within twenty-one days after the determination thereof: Provided always, that the tenant shall make good all damage to the said premises hereby demised or any part thereof by such removal, and shall give one month's previous notice in writing to the landlord of his intention to remove such fixture, and at any time before the expiration of the notice of removal the landlord by notice in writing to the tenant may elect to purchase such fixture at a fair value, and thereupon the same shall be left by the tenant and become the property of the landlord: Provided also, and it is hereby agreed and declared, that the landlord shall, during the remainder of the said term, be entitled to an additional rent equal to £5 per cent. on the purchase-money of any fixture so purchased by him as aforesaid, to be enforceable in the same manner as the original rent hereby reserved.

SECT. 44.—*Proviso for Compensation for Tenant's Improvements of House.*

PROVIDED ALWAYS, and it is hereby agreed and declared that the tenant may execute, in a workmanlike manner, all such improvements of and additions to the said messuage and premises as he may think proper, keeping and delivering up in good repair all such improvements and additions, and that at the expiration of the term hereby created the landlord shall pay to the tenant a sum equal to [ten] years' purchase of the additional rent, if any, which shall be obtained for the said messuage and premises by reason of such improvements and additions, such sum to be payable either immediately on a reletting of the said messuage and premises, or at the option of the landlord, by [ten] yearly instalments with interest upon unpaid instalments at the rate of five per cent. per annum.

SECT. 45.—*Proviso for allowing House to be inspected by intending New Tenant during last Three Months of Term (c).*

AND that the tenant will at all reasonable times [at any time between the hours of two and five in the afternoon] during the three calendar months preceding the termination of the tenancy at the request of the landlord or his agent, permit the said demised premises to be inspected by any person or the agent authorized in writing of any person *bonâ fide* desirous of becoming tenant to the landlord, and having given his name and address to the tenant or one of his servants.

SECT. 46.—*Proviso for Resumption of Lessor of all or any part of the Land demised, on giving Three Months' Notice, and making Compensation for Improvements, &c.—Residue of Rent to be reduced proportionately.*

PROVIDED NEVERTHELESS, and it is hereby lastly declared and agreed by and between the said parties hereto, that in case the lessor, his heirs or assigns, shall at any time, or from time to time during the continuance of the said term

(b) This clause is an adaptation to non-agricultural tenancies of the 53rd section of the Agricultural Holdings Act, 1875.

(c) See another proviso, ante, Sect. 16, p. 879.

heroby granted, be minded and desirous of having any part [or parts or the whole] of the said land hereby demised delivered up to him or them, and of such his or their mind and desire, shall give three calendar months' notice in writing to the lessee, his executors, administrators or assigns, or leave the same at his or their last or usual place of abode, or upon the said demised premises, such notice to expire at any time of the year, then at the expiration of such notice so given or left as aforesaid, he the lessee, for himself, his executors, administrators and assigns, doth hereby covenant peaceably and quietly to yield and surrender up, and that the lessor, his heirs and assigns, shall and may take peaceable and quiet possession of such part or parts of the said land as shall be mentioned and included in such notice as aforesaid, he the lessor, his heirs or assigns, paying to the lessee, his executors, administrators or assigns, a reasonable and fair compensation in respect of the monies which may have been laid out by the lessee, his executors, administrators or assigns, in improving the condition of so much of the said land as shall be so given up to the lessor, his heirs or assigns as hereinbefore mentioned, and then and from thenceforth the rent reserved by this indenture shall be reduced at the rate of [£2. 2s.] for each and every acre, and so in proportion for a less quantity than an acre, that may be given up to the lessor, his heirs and assigns as aforesaid, and the remainder of the said land shall be held by the lessee, his executors, administrators or assigns, at such reduced rent, and the lessor, his heirs and assigns, shall have the same powers and remedies in all respects as if the lease had originally been granted at such reduced rent, and all and every the covenants, clauses, provisions, stipulations and agreements herein contained shall be as valid and effectual of and for so much of the land hereby demised as shall not be included in any such notice, and this indenture shall be read and construed in all respects, in reference thereto, as if such reduced rent had been the original rent reserved therein and the land originally demised had been the land not included in any such notice as aforesaid, and the covenants, clauses, provisions, stipulations and agreements herein contained had only related to such last-mentioned land.

APP. B. s. 46.

SECT. 47. — *Notice to take Land pursuant to the above Proviso (d).*

To Mr. J. G., the executor of the will of C. D., deceased, and to all others whom it may concern:

Pursuant to and by virtue of a certain indenture of lease, dated the — day of —, 18 —, and made between A. B. therein described of the one part, and the said C. D. of the other part, I hereby give you notice, that I am desirous of having delivered up to me at the expiration of three calendar months from the service of this notice upon you, the peaceable and quiet possession of all that piece of land situate, &c. [and which said piece of land contains by admeasurement 22a. 2r. 14r. or thereabouts, and is bounded by the sea wall towards the river Thames, and on all other sides by a ditch which separates the same from other marsh land now belonging to me], together with all the appurtenances thereunto belonging: And I require you to deliver up possession of the same to me accordingly, and to surrender all your interest in the same to me, at the expiration of the said three calendar months; and, in consideration thereof, I hereby offer and agree to allow you a reasonable and fair compensation in respect of any monies which may have been laid out by you in improving the condition of the said piece or parcel of land above described, and to release you from all liability to the payment of rent, for the said piece of land with the appurtenances under the said indenture of lease from the time of my taking possession of the said piece of land: And I hereby further give you notice that the reversion in fee simple of and in all and singular the land and hereditaments comprised in the said indenture of lease with the appurtenances was conveyed to me by the said A. B. by indenture dated the — day of —, 18 —, and made between the said A. B. of the one part, and me the undersigned E. F. of the other part, and that I am now the absolute owner of the said reversion. Dated this — day of —, 18 —.

E. F. of, &c.

(d) A landlord was empowered to resume possession of any part of the land demised in case it should be required by him "for the purpose of building, planting, accommodation or otherwise." — Held,

that this did not entitle him to resume possession of land required by a railway company so as to defeat the tenant's right to compensation. *Johnson v. Edgware R. Co.*, 35 Beav. 480; 35 L. J., Ch. 322.

ART. B. s. 48.

SECT. 48.—*Covenant by Lessor for Renewal of Lease.*

And the lessor doth hereby for himself, his heirs, executors, administrators and assigns, covenant with the lessee, his executors, administrators and assigns, that if the lessee, his executors, administrators or assigns, shall be desirous of taking a renewed lease of the said premises for the further term of — years from the expiration of the said term hereby granted, and of such desire shall, prior to the expiration of the said last-mentioned term, give to the lessors, their heirs or assigns, or leave at the last known place of business or abode in England six calendar months' previous notice in writing, and shall pay the said rent hereby reserved, and observe and perform the several covenants and agreements herein contained, and on the part of the lessee, his executors, administrators or assigns, to be observed and performed up to the expiration of the said term hereby granted, they the lessors, their heirs or assigns, will upon the request and at the expense of the lessee, his executors, administrators or assigns (and upon payment by him or them of the sum of £—— as a premium for such renewal), and upon his or their executing and delivering to the lessors, their heirs or assigns, a counterpart thereof, forthwith execute and deliver to the lessee, his executors, administrators or assigns, a renewed lease of the said premises for the further term of — years at the same yearly rent, and under and subject to the same covenants, provisos and agreements as are herein contained, other than this present covenant.

SECT. 49.—*Covenant by Lessor not to permit Nuisance in adjoining Houses.*

AND further that he, the lessor, his heirs and assigns will not permit or suffer to be done in or upon the other houses and land appertaining thereto respectively, situate in — Road aforesaid, and belonging to him the said lessor, any act which may be or grow to be a nuisance to the lessee, his executors, administrators, and licensed assigns and subtenants, and that the lessor, his heirs and assigns will at all times, upon the reasonable request of the lessee, his executors, administrators, or licensed assigns or subtenants, permit him and them to bring any action or proceeding, and prosecute the same at law or otherwise in the name or names of the lessor, his heirs or assigns, with the full benefit of all restrictive covenants in that behalf entered into with him and them by the tenants of such houses as aforesaid.

SECT. 50.—*Covenant by Lessor to produce to Lessee his Title Deeds, &c., subject to usual Proviso for its Defeasance.*

After the usual qualified covenant for quiet enjoyment, say, "AND ALSO shall and will at all times during the said term at the request and expense of the lessee, his executors, administrators and assigns (unless prevented by inevitable accident) produce and show forth to them or either of them, or to their or his attorney or agent in England, the several deeds, evidences and writings mentioned in the schedule hereunder written, and at the like request and costs (unless prevented as aforesaid) furnish the lessee, his executors, administrators and assigns, with copies or extracts attested or unattested of or from the same deeds, evidence and writings or any of them, and shall and will permit any person or persons lawfully appointed by the lessee, his executors, administrators or assigns to examine such copies and extracts respectively with the originals: *Provided always*, and it is hereby agreed and declared between and by the said several parties hereto, that in case the lessor, his heirs or assigns, shall at any time hereafter during the said term deliver up or cause to be delivered up to any person or persons the said deeds, evidences and writings hereinbefore covenanted to be produced, and shall procure the person or persons to whom the same shall be so delivered, at his and their own cost, to enter into a covenant with the lessee, his executors, administrators or assigns, to the same purport and effect and of the same legal validity as the covenant lastly hereinbefore contained, then and in that case and upon delivery to the lessee, executors, administrators or assigns of such new covenant, the said covenant lastly hereinbefore contained shall cease and be void.

Add a schedule of the deeds, &c., at the end of the deed.

SECT. 51.—*Covenant by Landlord not to distrain.*

APP. B. s. 51.

AND the landlord hereby for himself, his heirs, executors, administrators and assigns, covenants with the tenant, his executors and administrators and assigns that except in the case of the bankruptcy of the tenant or his assigns, he the said landlord will not distrain for rent in arrear, if any, but will recover the said rent so in arrear by ordinary action at law only.

SECT. 52.—*Undertaking by a Landlord not to distrain on a Lodger's Goods.**Landlord's address and date.*

Sir,—In consideration of your becoming [or “having at my request become”] a lodger in the house of my tenant C. D., situate and being No. —, — Street, in the parish of —, in the county of —, and of one peppercorn now paid by you to me (the receipt whereof is hereby acknowledged), I hereby undertake and promise you that I will not distrain upon any of your goods or chattels for any rent due or to become due to me from the said C. D., except when rent shall be due and in arrear for [seven] days or more from you to the said C. D., and then only to the extent of such last-mentioned arrears (c), with the lawful expenses of and incident to a distress for that amount.

Stamp, 6d.

To Mr. E. F.

Yours, &c., A. B.

SECT. 53.—*Proviso for Re-entry—The Absolute Form.*

PROVIDED ALWAYS, and it is expressly agreed, that if the rent hereby reserved, or any part thereof shall be unpaid for fifteen days after any of the days on which the same ought to have been paid (although no formal demand shall have been made thereof), or in case of the breach of any of the covenants and agreements herein contained on the part of the said lessee, his executors, administrators and assigns, then and in either of such cases it shall be lawful for the said lessor at any time thereafter into and upon the said demised premises, or any part thereof, in the name of the whole to re-enter, and the same to have again, repossess and enjoy as of his or their former estate, anything hereinafter contained to the contrary notwithstanding.

SECT. 54.—*Qualification of Proviso for Re-entry (f). (Mr. Davidson's form.)*

PROVIDED ALWAYS, that except for non-payment of rent within — days as aforesaid, or for a breach of covenant committed or suffered after notice in writing of an intention to re-enter for the same as hereinafter mentioned, the power of re-entry hereinbefore contained shall not be exercised unless and until the lessor, his heirs or assigns, or his or their agent or surveyor shall have given to the lessee, his executors, administrators or assigns, or left on some part of the said premises a notice in writing of the intention to re-enter, and of the specific breach or breaches of covenant in respect of which the re-entry is intended to be made, and default shall have been made by the lessee, his executors, administrators or assigns for six calendar months after the giving or leaving of such notice in repairing every such breach and in performing and observing every covenant referred to in such notice.

SECT. 55.—*Qualification of Proviso for Re-entry. (Form adapted from Lord Cairns' Bill.)*

PROVIDED NEVERTHELESS, that, except in case of non-payment of rent within — days as aforesaid, or in case of the bankruptcy or taking into execution of the lessee's interest, the power of re-entry hereinbefore contained shall not be enforceable by action or otherwise unless and until the lessor, his heirs or

(c) This is rendered almost unnecessary by the Lodgers' Goods Protection Act, 1871. See 414, ante.

(f) This form, which is here inserted by kind permission of Mr. Davidson, is taken verbatim from Davidson's Precedents, vol. v. p. 189.

APP. B. s. 55. assigns, or his or their agent or surveyor, shall have served on the lessee, his executors, administrators or assigns, or left on some part of the said premises, a notice in writing specifying the particular breach or breaches of covenant complained of, and default shall have been made within reasonable time after the receipt of such notice by the lessee, his executors, administrators or assigns, in remedying every such breach as shall be capable of remedy, or in making full compensation for every such breach as shall not be capable of remedy.

SECT. 56.—*Proviso for Re-entry. (Adapted from the Ecclesiastical Leasing Act.)*

Provided always, and these presents are on the express condition that if and whenever the rent hereby reserved, or any part thereof, shall be in arrear for — days, whether the same shall have been legally demanded or not, or if and whenever there shall be a breach of any of the lessee's covenants herein contained to [here insert any breaches of covenant to which it is intended that an absolute proviso for re-entry shall apply], or in case judgment shall be recovered in an action for the breach or non-observance of any of the covenants hereinbefore contained, and damages and costs to be recovered in such action shall remain unpaid for the space of three calendar months, then and in either of such cases it shall be lawful for the lessor, his heirs and assigns, at any time thereafter, to re-enter upon the said premises, and thereupon the said term shall absolutely determine.

SECT. 57.—*Proviso for Re-entry. (Compensation to Tenant for Improved Value.)*

PROVIDED ALWAYS, and these presents are on the express condition that if and whenever the rent hereby reserved, or any part thereof, shall be in arrear for — days, or if and whenever there shall be a breach of any of the lessee's covenants herein contained, then it shall be lawful for the landlord to re-enter the said premises and re-possess the same in the manner and on the conditions following, that is to say: the tenant shall pay to the landlord all costs as between solicitor and client of and incident to such re-entry, and the landlord shall pay to the tenant such sum (if any) as shall be equivalent to nine-tenths of the premium or increased capital value of such premises accruing to the landlord by reason of such re-entry; saving always to the landlord his rights to damages for breaches of covenant.

SECT. 58. *Arbitration Clause.*

PROVIDED ALWAYS, and it is hereby agreed and declared that if and whenever any dispute or question shall arise between the lessor and lessee, and their respective heirs, executors, administrators or assigns, touching these presents or anything herein contained, or the construction hereof, or the rights, duties or liabilities in relation to the premises, the matter in difference shall be submitted and referred to two arbitrators or their umpire in all respects pursuant to "The Common Law Procedure Act, 1854," or any Act amending the same: [AND it is hereby also agreed and declared that such submission may be made a rule of her Majesty's High Court of Justice at the instance of either the lessor, his heirs or assigns, or of the lessee, his executors administrators or assigns, without any notice to the other or others of them (g).

SECT. 59.—*Contract for Sub-lease of House in Mortgage—Term Twenty-one Years with option for Lessee to determine at the end of Seven or Fourteen—Purchase of Fixtures at Valuation—Covenants to paint, &c.—Option to purchase Ground Lease subject to Mortgage with Conditions of Sale.*

AN AGREEMENT made the — day of —, 18—, between A. B., of —, who and whose executors and administrators are hereinafter called the landlord

(g) Unless the words in brackets are added to the arbitration clause, it will be competent for either party to revoke the

submission at any time before the award, *Re Rouse and Meur*, L. R., 6 C. P. 212.

of the one part, and C. D. of —, who and whose executors and administrators are hereinafter called the tenant of the other part. APP. B. s. 59.

1. The landlord will whenever required by the tenant grant, and the tenant will (without requiring or investigating the landlord's title) accept a lease of [parcel] for the term of twenty-one years from the — day of —, but determinable as hereinafter mentioned, at the yearly rent of — pounds, payable by equal quarterly payments on the 24th day of June, the 9th day of September, the 25th day of December, and the 25th day of March, the first payment to be made on the — day of —, 18—, and the last payment to be made in advance one calendar month before the expiration of the term. Agreement for Lease.

2. The lease shall contain covenants by the tenant to pay rent and taxes, And to keep the said messuage and premises (including all landlord's fixtures) in good and substantial repair and condition during the term, whether required to do so by notice or not, And particularly to paint in a workmanlike manner with two coats of best oil paint in every fourth year, and also in the seventh year if the lease be determined at the end of seven years, the outside wood, iron, stucco, cement and stone work previously or usually painted, and in every seventh year the inside wood, iron and other work previously or usually painted, and with appropriate papers repaper or distemper the walls previously papered or distempered, and wash, stop and whiten all the ceilings and cornices: And to permit the landlord and his agents, and surveyors and the agents and surveyors of the superior landlords, to enter upon the premises twice in every year for the purpose of viewing the condition thereof: And to make good all defects there found within three calendar months after receiving notice from the landlord: And to keep the said messuage and premises insured from damage by fire or explosion in the joint name of the landlord and tenant in the sum of — pounds at the least in the — Fire Insurance Company, or some other company to be approved by the landlord. And to produce the policies of insurance and receipts for premiums and other payments when required by the landlord. And to expend all moneys received in respect of such insurance in re-building, re-instating and repairing the premises to the approbation of the landlord's surveyor, and make good any deficiency. And not to alter the elevation of the said messuage, nor injure any of the timbers or walls. And not to permit any trade or business to be carried on on the premises, or do any act which may invalidate the superior lease held by the landlord from the freeholders, but to use the same as a private dwelling-house only, and not to assign or underlet the said premises except furnished for a period not exceeding six months without the previous licence in writing of the landlord, it being hereby agreed that such licence shall be granted free of charge, and not unreasonably delayed or withheld. And at the expiration or sooner determination of the term to deliver up the premises together with all additions in the nature of landlord's fixtures in such good and substantial repair and condition as aforesaid. And also a proviso for re-entry if any part of the rent shall be in arrear for twenty-one days, whether legally demanded or not, or if the tenant, his executors, administrators or assigns, or any of them, shall be adjudicated bankrupt, or shall compound with his or their creditors, or if there shall be a breach of any of the tenant's covenants within [three calendar months] after notice to observe the same. And a power for the tenant on giving not less than six calendar months previous notice in writing to determine the lease at the end of the first seven or fourteen years of the term. Also the usual qualified covenant by the landlord for quiet enjoyment. Covenants.

3. The tenant will execute and deliver to the landlord a counterpart of the said lease.

4. The lease and counterpart shall be prepared by the landlord's solicitors, and all expenses attending the preparation and execution thereof and of this agreement shall be paid by the tenant.

5. These presents are intended to operate as an agreement only and not as an actual demise of the premises, or to give to the tenant any legal interest therein until the said lease shall be executed.

6. The fixtures included in the Schedule hereto shall be paid for by the tenant at a valuation to be made in manner following, that is to say,—The landlord and tenant shall each appoint one valuer and intimate such appointment in writing to the other within one month from the date hereof. The valuers when appointed shall before they proceed to act appoint in writing an umpire, and the two valuers, or if they disagree, their umpire, shall make the valuation. If either Purchase of Fixtures at valuation.

Arr. B. s. 59. party shall neglect to appoint a valuer or to give notice thereof to the other party for the period aforesaid, the valuer appointed by the other party shall make a final valuation alone.

7. The amount of such valuation shall be paid by the tenant to the landlord on the — day of —, 18—, on which day possession shall be given of the premises to the tenant.

8. The landlord agrees to make good all broken glass or other damage done by him to the premises after the date hereof, reasonable wear and tear excepted.

Option of
Purchase.

9. If at any time after the said — day of —, 18—, and before the expiration of [three] years from the date of this agreement, the tenant shall give to the landlord or leave at his last known place of abode three calendar months' notice in writing stating his intention to purchase the messuage and premises herein referred to for the unexpired residue of the term granted by a certain indenture of lease thereof which is dated the — day of —, 18—, and is made between — of the one part and — of the other part, being a lease for — years from the — day of —, 18—, at the yearly rent of £—, and also subject to a mortgage of the said lease and premises for £— and interest thereon at five pounds per cent. per annum created by indenture, dated the — day of —, 18—, and made between the landlord of the one part and — of the other part; then the landlord agrees to sell the same subject as aforesaid and subject to the conditions of sale hereinafter contained at the price of £—.

Abstract of
Title.

10. The vendor shall within one month from receiving such notice deliver to the tenant an abstract of this title to the said leasehold premises commencing with the said indenture of lease of the — day of —, 18—, and the tenant shall not require the production of, or investigate or make any objection or requisition in respect of the prior title.

Examination
of Title.

11. The last receipt for ground rent demanded under the said indenture of lease for the said messuage and premises shall be conclusive evidence that all the covenants contained in the said lease on the part of the lessee to be performed have been duly performed up to the day of the completion of the said purchase, and the purchaser shall assume that the person giving such receipt is rightfully entitled to give it.

12. The production and inspection of all deeds and other documents not in the possession of the landlord or his mortgagees, and the procuring and making of all certificates, official or other copies, or extracts from any records, registers, deeds, wills or other documents, and of all declarations and other evidence whatsoever which may be required by the tenant for the purpose of verifying the abstract or for any other purpose, and which shall not be in the possession of the landlord or his mortgagees, shall be at the expense of the tenant.

13. All objections and requisitions in respect of the title or the abstract, or anything appearing therein or in this agreement, which consistently with the terms of this agreement the tenant can make shall be stated in writing and sent to the office of the landlord's solicitor within twenty-one days within the delivery of the abstract, and all objections and requisitions not sent in within that time shall be considered to be waived, and in this respect time shall be of the essence of the contract. If any objection or requisition shall be made which the landlord shall be unable to remove or comply with, or the compliance with which would, in the opinion of the landlord's counsel, be probably attended with unreasonable inconvenience or expense, the landlord notwithstanding any treaty, discussion or litigation in reference thereto or any attempt to remove or comply with the same, shall have full power by notice in writing signed by him or his solicitor to be delivered or sent by post to the purchaser or his solicitor to annul the sale without payment of costs, unless within seven days of delivery of such notice the purchaser shall, by notice signed by him or his solicitor, and delivered or sent by post to the vendor's solicitors, withdraw such objection or requisition.

Completion of
Purchase.

14. The purchase shall be completed at the expiration of three months from the date of the notice declaring the intention of the tenant to purchase, being received by the landlord, and shall take place at the office of the landlord's solicitor. The ground rent reserved by the said lease of the — day of —, 18—, and the interest reserved by the said indenture of mortgage of the — day of —, 18—, or the proper apportionment thereof respectively being paid or allowed by the landlord up to the date of completion, and the said rent of — pounds, or the proper apportionment thereof being paid by the tenant up to the same date.

Assignment.

15. On the completion of the purchase, the landlord shall execute to the

tenant a proper assignment of the premises, such assignment to be prepared by and at the expense of the tenant, and to be left by him at the office of the landlord's solicitor, not less than ten days before the date of completion, for execution. In such assignment the landlord shall enter into the usual covenants that the lease is not void or voidable, and the tenant shall enter into the usual covenants to pay the rent reserved by and perform the covenants contained in the lease; and also to pay the said sum of — pounds and interest reserved by the said indenture of mortgage, and indemnify the landlord from all future payments under or in respect of the said lease and mortgage respectively.

16. The assignment or surrender of any outstanding term or interest of any description which the purchaser may require, and the tracing and deducing the title thereto, shall be made at the expense of the purchaser.

APP. B. s. 59.

SECT. 60.—*Assignment of a Lease (by Indorsement), Landlord being made a Party to give his Consent to the Assignment.*

THIS INDENTURE, made the — day of —, 18— (f), BETWEEN the within-named C. D. of the first part, the within-named A. B. of the second part, and E. F. of &c. of the third part: WITNESSETH, that in consideration of the sum of — pounds sterling (g) now paid by the said E. F. to the said C. D. (the receipt whereof the said C. D. doth hereby acknowledge, and from the same doth release and discharge the said E. F., his executors, administrators and assigns), He the said C. D. [with the consent in writing of the within-named A. B., testified by his execution of these presents], DOth assign, unto the said E. F., his executors, administrators and assigns ALL [parcels], comprised in and expressed to be demised by the within-written indenture, TOGETHER with the appurtenances [except as within excepted (h)], AND ALSO the within-written indenture (i): TO HAVE AND TO HOLD the said [messuage and] premises hereinbefore expressed to be assigned unto the said E. F., his executors, administrators and assigns, henceforth for the residue now unexpired of the term of — years expressed to be granted by the within-written indenture; SUBJECT nevertheless to the payment of the rent, and the performance and observance of the covenants and conditions in the within-written indenture reserved and contained, and on the lessee's part to be paid, performed and observed: AND the said C. D. doth hereby for himself, his heirs, executors and administrators, covenant with the said E. F., his executors, administrators and assigns, that, notwithstanding any act or thing by him the said C. D. made, done or executed, or knowingly suffered, the within-written indenture is now a good, valid and effectual lease of the said hereditaments and premises hereinbefore expressed to be assigned, and is in full force, unforfeited, unsurrendered, and in nowise become void or voidable: AND THAT all the rents, covenants and conditions in and by the said indenture reserved and contained, and on the part of the lessee, his executors, administrators and assigns to be paid, performed or observed, have been paid, performed and observed up to [the date of these presents] (k): AND THAT, notwithstanding any such act or thing as aforesaid, he the said C. D. now hath good right and full power to assign the said premises unto the said E. F., his executors, administrators and assigns, for the term and in manner aforesaid: AND THAT it shall be lawful for the said E. F., his executors, administrators and assigns, at all times during the said term, quietly to enter into and upon, and to hold, occupy and enjoy the said hereditaments and premises, and receive and take the rents and profits thereof respectively, without any lawful interruption or disturbance by him the said C. D., his executors, administrators or assigns, or any person claiming by, from, through, under or in trust for him, them or any of them: AND THAT free and discharged or otherwise by the said C. D., his heirs, executors or administrators, sufficiently indemnified from and against all estates, incum-

Date and Parties.
Testatum.
Stamp (v).

Habendum.

Subject, &c.

Covenants by Assignor.

Lease valid.

Rent and Covenants paid and performed.

Right to assign.

Quiet Enjoyment.

Free from Incumbrances.

(f) The date of assignment is frequently material; because on it depends whether the assignor or the assignee is to pay the quarter's rent.

(g) As to the stamp, see ante, 839.

(h) Omit these words, if there be no exception in the lease.

(i) If there be a fire policy, here insert an assignment thereof as in the next section, and alter the habendum as in that section.

(k) See *Minton v. Kerwood*, L. R., 3 Ch. 614.

ART. B. s. 60.

Further Assurance.

Covenants by Assignee

To pay subsequent Rent,
And perform
Lessee's Cove-
nants,And indemnify
Assignor there-
from, &c.

brances, claims and demands whatsoever, at any time heretofore, or any time hereafter, made, occasioned or suffered by the said C. D., his executors or administrators, or any other person claiming by, from, through, under or in trust for him, them or any of them: AND FURTHER, that he the said C. D., his executors and administrators, and every other person having or claiming any estate, or interest, in, or out of the said premises, through, under, or in trust for him the said C. D., his executors or administrators, will at all times during the said term, upon the request and at the cost of the said E. F., his executors, administrators or assigns, with the leave and consent in writing of the said A. B., his heirs or assigns (to be obtained by the said E. F., his executors, administrators or assigns), do and execute even such lawful act, thing and assurance, for the further or more perfectly assuring the said hereditaments and premises and every part thereof unto the said E. F., his executors, administrators and assigns, as by the said E. F., his executors, administrators or assigns shall be reasonably required. AND the said E. F. doth hereby for himself, his heirs, executors, administrators and assigns, covenant with the said C. D., his executors and administrators, that he the said E. F., his executors, administrators or assigns, will henceforth pay the said yearly rent of £—, by the within-written indenture reserved and henceforth to become payable, and perform and observe all and every the covenants and conditions in the same indenture contained and on the part of the lessee, his executors, administrators or assigns, henceforth to be performed or observed: AND ALSO will from time to time and at all times hereafter keep indemnified the said C. D., his heirs, executors and administrators, and his and their estates and effects of, from and against all actions, suits, proceedings, costs, charges, damages, claims and demands whatsoever (including costs of any defence as between solicitor and client), which shall or may be incurred or sustained by reason or on account of the non-payment of the said rent or any part thereof, or the breach, non-performance or non-observance of the said covenants and conditions, or any of them (n). IN WITNESS, &c.

Attestation, *as ante*, 873.Receipt for consideration, *as ante*, 1d.

SECT. 61.—Assignment of a Lease (not by Indorsement).

Date and
Parties,
Recital of
Lease.Mesne Assign-
ments.

THIS INDENTURE, made the — day of —, 18—, BETWEEN G. H. of &c., of the one part, and I. K. of &c., of the other part. WHEREAS by an indenture of lease dated the — day of —, 18—, and made or expressed to be made between A. B. therein described of the one part, and C. D. therein described of the other part, for the considerations therein mentioned the said A. B. did demise [and lease] unto the said C. D., his executors, administrators and assigns, ALL [*parcels from lease*] with the appurtenances, [except as therein is excepted]; To hold the same unto the said C. D., his executors, administrators and assigns, from the — day of —, 18—, for the term of — years, at the yearly rent of —, payable [quarterly], as in the said indenture mentioned; and under and subject to the covenants and conditions therein contained, and on the part of the said C. D., his executors, administrators and assigns, to be performed and observed: AND WHEREAS [by divers mesne assignments and other acts in the law, and ultimately] by an indenture dated the — day of —, 18—, made or expressed to be made between ["the said C. D." or "E. F. therein described" of the one part, and the said G. H. of the other part], ALL the [messuage, land and] premises comprised in and expressed to be demised by the said recited indenture of lease, with the appurtenances [except as in the same indenture is excepted], were assigned to and became vested in the said G. H. for the residue and remainder of the said term of — years, subject to the payment of the rent, and the performance and observance of the covenants and conditions in the same indenture of lease reserved and contained, and on the lessee's part to be paid, performed and observed: AND WHEREAS the said I. K. has contracted with the said G. H. for the purchase of the said leasehold tenements and premises for the residue of the said term of — years, subject as aforesaid, for the price or sum of £—:

NOW THIS INDENTURE WITNESSETH, that, in pursuance of the said recited contract, and in consideration of the sum of — pounds sterling ^(u) now paid by the said I. K. to the said G. H. (the receipt whereof the said G. H. doth hereby acknowledge, and from the same doth release and discharge the said I. K., his executors, administrators and assigns): He the said G. H. DOETH assign unto the said I. K., his executors, administrators and assigns, ALL [that messuage and land], and all and singular other the premises comprised in and expressed to be demised by the said recited indenture of lease, TOGETHER with the appurtenances [except as in the same indenture is excepted]; [AND ALSO all that policy of insurance in the — office, No. —, whereby the said buildings, or some part thereof are insured against loss or damage by fire as therein expressed, and the full benefit and advantage thereof, and all monies insured and to become payable under or in respect thereof; with power to the said I. K., his executors, administrators and assigns, at his or their own expense to sue and give receipts, releases and other discharges for the said monies or any part thereof in the name or names of the said G. H., his executors or administrators (o):] TO HAVE AND TO HOLD the said [messuage, land and] premises hereinbefore expressed to be assigned (except the said policy), unto the said I. K., his executors, administrators and assigns, henceforth for the residue and remainder now to come and unexpired of the said term of — years, expressed to be granted by the said recited indenture of lease; SUBJECT nevertheless to the payment of the rent, and the performance and observance of the covenants and conditions in the same indenture reserved and contained, and on the lessee's part to be paid, performed and observed; [AND TO HAVE AND TO HOLD the said policy, unto the said I. K., his executors, administrators and assigns, absolutely]. [*Add covenants by assignor and assignee, corresponding with those ante, 907, substituting the words "the said recited indenture of lease," for the within-written indenture," when necessary. Indorse a receipt for the purchase-money, as ante, 873.]*

APP. B. s. 61.

Testatum.

Stamp (s).

Operative Words.

Fire Policy.

Habendum.

Subject, &c.

Covenants.
Receipt for
Purchase-
Money.

SECT. 62.—*Licence to assign (p).*

WHEREAS by an indenture of lease, dated [*recite lease, as ante, 908, then go on thus:*] and in the said indenture is contained a covenant on the part of the said C. D. that he the said C. D., his executors, administrators or assigns, should not nor would [*recite covenant not to assign, &c.*], without the consent in writing of the said A. B., his heirs [*or executors, administrators*] or assigns, for that purpose first had and obtained: Now the said A. B., at the request of the said C. D., DOETH hereby give unto the said C. D. licence and consent to assign and transfer all his estate, term and interest of, in and to the said premises, with the appurtenances comprised in and demised by the said recited indenture of lease, unto I. K., of —, his executors, administrators and licensed assigns: SUBJECT nevertheless to the payment of the rent and the performance and observance of the covenants and conditions in the said recited indenture reserved and contained, and on the lessee's part to be paid, performed and observed: Provided always, that such licence as is hereby given shall not extend to any further assignment, underletting or dealing with the premises either by the said C. D. or the said I. K., or by their executors or administrators respectively. As WITNESS the hand of the said A. B., the — day of —, 18—.

Witness,

G. H. of [&c.].

(Signed) A. B. (s).

(n) Ante, 839.

(o) As to the necessity for this see *Poole v. Adams*, 33 L. J., Ch. 639; 12 W. R. 683. Notice of this assignment should be forthwith given to the insurance company.

(p) A licence to assign may be written in the margin of the proposed assignment as above; but sometimes there may be

reasons for writing it in a separate form.

(s) No seal or stamp is necessary, unless indeed the required licence must be *by deed*, which is seldom the case, but does sometimes happen; *Burke v. Prior*, 15 Ir. Ch. R. 106; and then A. B. should be made a party to the assignment of the second part, and therein give his consent, &c.

APP. B. s. 63.

SECT. 63.—*Surrender of a Lease by Indenture (indorsed).*Date and
Parties.

Testatum.

Stamp (t).

Parcels.

Estate.

Habendum.

Merger.

Covenant
against Incum-
brances.

THIS INDENTURE, made the — day of —, 18—, BETWEEN the within-named C. D. of the one part, and the within-named A. B. of the other part: WITNESSETH that the said C. D., at the request of the said A. B., and in consideration of the sum of £— sterling (t) now paid by the said A. B. to the said C. D. (the receipt whereof is hereby acknowledged), DOth assign, surrender and yield up unto the said A. B., his [heirs or executors, administrators] and assigns, ALL [that messuage or tenement, land] and premises, with the appurtenances comprised in and expressed to be demised by the within-written indenture; TOGETHER with the said indenture: AND all the estate, right, title, interest, property, profit, possession, benefit, claim and demand, legal and equitable, of him the said C. D., of, in and to the said premises respectively: To HAVE AND TO HOLD the same unto the said A. B., his [heirs or executors, administrators (v)] and assigns, for the residue and remainder now to come and unexpired of the term of — years, granted by the within-written indenture, and for all other the term, estate and interest of the said C. D. of and in the said premises respectively, To THE INTENT that the said term of — years may merge and be extinguished in the reversion [freehold and inheritance or (x) estate and interest] of the said A. B. of and in the said premises: AND the said C. D. hath hereby for himself, his heirs, executors and administrators, covenant with the said A. B., his [heirs or executors, administrators (v)] and assigns, that he the said C. D. hath not executed or done, or knowingly suffered, or been party or privy to any deed or thing whereby or by reason or means whereof the premises hereinbefore expressed to be surrendered or otherwise assured, or any of them or any part thereof, or these presents, are, is, or may be charged, incumbered, affected or impeached in title, estate or otherwise howsoever. IN WITNESS, &c.

SECT. 64.—*The like by Deed-Poll (indorsed).*

Stamp (y).

TO ALL TO WHOM THESE PRESENTS SHALL COME, C. D. of — [grocer] sends greeting: KNOW YE that the said C. D., at the request of the within-named A. B., and in consideration of the sum of £— sterling (y) now paid by the said A. B. to the said C. D. (the receipt whereof is hereby acknowledged), DOth assign, surrender and yield up unto the said A. B., his [heirs or executors, administrators] and assigns, ALL, &c. [remainder as ante, SECT. 30, including the covenant against incumbrances]. IN WITNESS whereof the said C. D. hath hereunto set his hand and seal, on the — day of —, 18—.

Signed, sealed and delivered, by the
above-named C. D. in the presence } C. D. (L.S.)
of

I accept the above surrender.

(Signed) A. B. (z).

SECT. 65.—*Surrender of a Lease by Indenture (not indorsed).*

THIS INDENTURE, made the — day of —, 18—, BETWEEN G. H. of — [tailor] of the one part and A. B. of — [esquire] of the other part: WHEREAS, by an indenture of lease [dated, &c. *recite lease, and any assignments thereof, as ante, SECT. 61*]: NOW THIS INDENTURE WITNESSETH, that the said G. H., at the request of the said A. B. [and in consideration of the sum of £— sterling now paid by the said A. B. to the said G. H. (the receipt whereof is hereby acknowledged)]; DOth assign, surrender and yield up, unto the said A. B. [his heirs or executors, administrators] and assigns, ALL, &c. [remainder as ante, SECT. 63, substituting the words, "the said recited indenture of lease," in lieu of "the within-written indenture," whenever necessary.

(t) As to the proper stamp, see ante, 843.

(r) If A. B. is the freeholder, say "his heirs and assigns;" if he is only a tenant, say "his executors, administrators and assigns."

(x) According as A. B. has a freehold or only a chattel interest.

(y) Ante, 843.

(z) This memorandum of acceptance is not essential, but generally advisable.

SECT. 66.—*The like by Deed-Poll (not indorsed).*

APP. B. s. 66.

TO ALL TO WHOM THESE PRESENTS SHALL COME, G. H. of — [tailor], sends greeting: WHEREAS by an indenture of lease [dated, &c., *recite lease; also any assignments, as ante*, SECT. 61]: NOW KNOW YE that the said G. H., at the request of the said A. B. [and in consideration of the sum of £— sterling now paid by the said A. B. to the said G. H. (the receipt whereof is hereby acknowledged)]; DOTH assign, surrender and yield up unto the said A. B., his [heirs or executors, administrators] and assigns, ALL, &c., [*remainder as ante*, SECT. 63, substituting the words “the said recited indenture of lease,” in lieu of “the within-written indenture,” whenever necessary].

IN WITNESS, &c.

I accept the above surrender.

(Signed) A. B.(a).

SECT. 67.—*Renewal of Lease (indorsed).*

THIS INDENTURE made the — day of, BETWEEN the within-named A. B. (hereinafter called the lessor) of the one part, and the within-named C. D. (hereinafter called the lessee) of the other part; WHEREAS the residue of the within mentioned term of — years is now vested in the lessee, subject to the payment of the rent reserved by and to the performance of the lessee's covenants contained in the within written Indenture: AND WHEREAS the reversion in fee expectant on the determination of the said term is now vested in the lessor: AND WHEREAS the lessor has agreed with the lessee to demise to him the within-mentioned messuage and hereditaments for the further term of — years, to commence on the — day of —, at the rent and subject to the covenants and provisions hereinafter reserved and contained or referred to: NOW THIS INDENTURE WITNESSETH that in consideration of the rent hereinafter reserved, and the covenants by the said — hereinafter contained or referred to, the lessor doth hereby demise unto the lessee, his executors, administrators and assigns ALL the messuage or dwelling-house and premises comprised in and demised by the within-written indenture [except and reserving as is within excepted and reserved (b)] To HOLD the said [messuage and] premises hereinbefore expressed to be hereby demised for the term of — years, from the said — day of — subject nevertheless to the yearly rent of £—, payable at the like times and in like manner as the rent reserved by the within-written indenture, and subject to the performance and observance, covenants and conditions on the part of the lessee, and the like proviso for re-entry in case of non-payment of rent or breach of covenant or the happening of any of the other events in the within-written indenture in that behalf mentioned, and with the benefit of the like covenants and agreements on the part of the lessor, and subject to and with the like provisions and conditions in all respects as are in the within-written indenture contained, in like manner as if all such covenants, agreements, conditions and provisions had been herein repeated, with such modification only as the differences in the names of the parties and in the amount of the rent, and in the term of the lease and other circumstances, may require: AND the lessor doth hereby for himself, his heirs, executors, administrators and assigns, covenant with the lessee, his executors, administrators and assigns, and the lessee doth hereby for himself, his executors, administrators and assigns covenant with the lessor, his heirs and assigns, that they the said respective covenanting parties, their heirs, executors, administrators and assigns respectively, shall and will during the said term of — years perform and observe all such covenants, agreements and provisions as aforesaid which on his or their respective part are or ought to be performed and observed: PROVIDED ALWAYS, and it is hereby agreed, that if the term of — years granted by the within-written indenture, shall be determined by virtue of the condition or provision for re-entry therein contained, then these presents shall become absolutely void and determined. IN WITNESS, &c.

(a) This memorandum of acceptance is not essential, but generally advisable.

(b) Omit these words if there are no exceptions in the original lease.

APP. B. s. 68.

SECT. 68.—*Memorial of a Lease (ante, 175).*

Stamp (b).

A MEMORIAL, to be registered pursuant to Act of Parliament, Of
 ——— } AN INDENTURE, bearing date the ——— day of ———, one thousand eight
 to } hundred and eighty ———, and made between A. B. of &c. [*as in the*
 ——— } *deed*], of the one part, and C. D. of, &c. [*as in the deed*], of the other
 part; WHEREBY the said A. B. demised to the said C. D. [*his executors, admin-*
 istrators and assigns], ALL [*parcels verbatim as in the deed*], with the ap-
 purtenances (c), [except, &c., *as in deed*]; To hold the same unto the said
 C. D., his executors, administrators and assigns, from the ——— day of ——— [*as*
in the deed], for the term of ——— years thence next ensuing, under and subject
 to the rent, covenants and conditions therein reserved and contained; which
 said indenture, as to the execution thereof by the said A. B. [and C. D.], is
 witnessed by [*name, address and addition of the witness or witnesses*] [And as
 to the execution thereof by the said C. D. is witnessed by (*name, address and*
addition of the witness or witnesses (d))] : And is hereby required to be registered
 by the said [A. B. or C. D.] As WITNESS his hand and seal.

Signed and sealed (e) by the above-named }
 ——— in the presence of }
 Two witnesses (f). }

Signature (L.s.)

SECT. 69.—*Memorial of an Assignment of a Lease (ante, 175).*

Stamp (b).

A MEMORIAL, to be registered pursuant to Act of Parliament, Of
 ——— } AN INDENTURE, bearing date the ——— day of ———, one thousand eight
 to } hundred and eighty ———, and made between A. B. of, &c. [*as in the*
 ——— } *deed*], of the one part, and C. D. of, &c. [*as in the deed*], of the other
 part, WHEREBY after reciting an indenture, dated ——— (g) purporting to be a
 lease of ALL [*here set out the description verbatim from the recitals in the deed*];
 FOR THE CONSIDERATIONS in the now memorializing indenture mentioned, the
 said A. B. did assign to the said C. D., his executors, administrators and assigns,
 ALL [*describe parcels verbatim, as in the operative part of the deed*]; To hold
 the same unto the said C. D., his executors, administrators and assigns, for the
 residue of a term of ——— years, from the ——— day of ———, one thousand eight
 hundred and ——— created by the said recited indenture of the ——— day of ———,
 18—, under and subject to the rent, covenants and conditions reserved and con-
 tained in the said recited indenture of the ——— day of ———, 18—: which said
 indenture, as to the execution thereof. [*remainder as in the last form*].

For other Forms of Memorials, see *Wilde's Supplement to Barton's Conv.*
Vol. II. pp. 198—222.

(b) Stamp 2s. 6d.; ante, 841.

(c) These need not be more fully stated.

(d) Omit this where the same witness attests the execution by both parties.

(e) A memorial need not be delivered as a deed.

(f) One of whom must be an attesting witness to the lease, and will have to prove

before the registrar upon oath that he saw the memorial signed and sealed, and the deed to which it refers duly executed. In the North Riding of Yorkshire the deed to be registered as well as the memorial must be attested by two witnesses; ante, 177 (g).

(g) Only the date need be mentioned.

APPENDIX C.

FORMS OF NOTICES, &c.

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himself	898	or Purchaser with the	
5. Notice to quit by Tenant's		Consent of Landlord	
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gor's Tenant	901	Firearms	904

(1.) Notice to Quit signed by the Landlord himself (*ante*, 315).

To Mr. C. D.

Sir, I hereby give you notice to quit and deliver up possession of the [house or farm, land] and premises, with the appurtenances situate [at or in the parish of] in the county of , which you hold of me, as tenant thereof, on the [twenty-fifth] day of [March] next (*a*) [or at the expiration of the year of your tenancy which shall expire next after the end of one half year from the service of this notice (*b*)] (*c*).

Dated the day of , 18 .

Yours, &c.

A. B. of

(*a*) Be correct as to the proper day; *ante*, 319, 321. If the day on which the tenancy commenced is accurately known, the words within brackets, "or at the expiration," &c., may be safely omitted. So, if the exact day be not known, and it is wished to make the notice *prima facie* evidence of the time when the tenancy commenced, omit those words, and serve the notice on the tenant personally, and read it to him, or get him to read it in your presence; *ante*, 326. By way of precaution against any damage arising from the omission of the above

L.T.

words, a second notice, including them, may be served in due time by another witness; *Colo Ejec.* 50, 697, *note*.

(*b*) *Ante*, 321; *Doe d. Horst v. Timothy*, 2 C. & K. 351; *Hirst v. Horn*, 6 M. & W. 393.

(*c*) Here may be added, "And I do also give you notice not to commit any waste, spoil or damage, in or upon the said premises, or any part thereof, in the meantime." But these words are unusual unless there be some special reason for them.

APP. C. s. 2.

(2.) *Notice to Quit, given by an Agent of the Landlord (ante, 315).*

To Mr. C. D.

Sir, I hereby, as agent for [A. B. esq.] your landlord, and on his behalf give you notice to quit and deliver up possession of the [house or farm, land] and premises, with the appurtenances, situate [at or in the parish of] in the county of , which you hold of him as tenant thereof, on the day of next (d) [or at the expiration of the year of your tenancy which shall expire next after the end of one half year from the service of this notice (e)] (f).

Dated the day of , 18 .

Yours, &c.

E. F. of

Agent for the above-named A. B. esq.

(3.) *Notice by Landlord to quit Lodgings.*

Sir, I hereby give you notice to quit and deliver up on the day of instant or next, the rooms or apartments with the appurtenances in my house [No. 25, Green Street, Grosvenor Square] which you now hold of me.

Dated this day of , 18 .

Yours, &c.

To Mr. C. D.

A. B. of

(4.) *Notice to Quit signed by the Tenant himself (ante, 317).*

To A. B. esq.

Sir, I hereby give you notice that it is my intention to quit and deliver up possession of the [house or farm, land] and premises, with the appurtenances, situate [at or in the parish of] in the county of , now held by me as your tenant thereof, on the [twenty-fifth] day of [March] next (g).

Dated the day of , 18 .

Yours, &c.

C. D. of

(5.) *Notice to Quit given by an Agent of the Tenant (ante, 317).*

To A. B. esq.

Sir, I hereby, as agent for Mr. C. D. your tenant, and on his behalf, give you notice that it is his intention to quit and deliver up possession of the [house or farm, land] and premises, with the appurtenances, situate [at or in the parish of] in the county of , now held by him as your tenant thereof, on the day of next (g).

Dated the day of , 18 .

Yours, &c.

G. H. of

Agent for the above-named C. D.

(6.) *Notice by Tenant to quit Lodgings.*

Sir, I hereby give you notice that on , the day of instant or next I shall quit and deliver up possession of the rooms and apartments with the appurtenances in your house [No. 25, Green Street, Grosvenor Square], which I now hold of you.

Dated the day of , 18 .

Yours, &c.

C. D. of

To Mr. A. B.

(d) Ante, 897 (a).

(e) Ante, 897 (b).

(f) Ante, 897 (c).

(g) The words, "or at the expiration of the year of [my or his] tenancy which shall expire next after the end of one half-year

from the service of this notice," are seldom necessary when the notice is given by or on behalf of the tenant, who generally knows at what time of the year his tenancy commenced.

(7.) *Notice to Quit given by Tenant in Common (ante, 316).*

To Mr. C. D.

Sir, I hereby give you notice of my intention to determine the tenancy under which you now hold of me [one undivided *third* part or share *as the case may be*] of and in the [messuage or farm, land] and premises with the appurtenances, situate at _____ in the county of _____, and require you to quit the same on the _____ day of _____ next [or at the expiration of the year of your tenancy, which shall expire next after the end of one half-year from the service of this notice].

Dated the _____ day of _____, 18 ____.

Yours, &c.

A. B. of _____

(8.) *Notice to determine a Lease for Twenty-one Years, at the end of the first Seven or Fourteen Years, pursuant to a Proviso or Power therein contained (ante, 330).*

To Mr. C. D.

Sir, In pursuance of the proviso or power (d) in this behalf contained in an indenture of lease dated the _____ day of _____, 188 __, made or expressed to be made between [as the case may be], I the undersigned [being the assignee of the immediate reversion of and in the tenements with the appurtenances demised by the said lease], do hereby give you notice that it is my intention to avoid the said lease, and to put an end to the term thereby granted at the end of the first [seven or fourteen, or as the case may be] years of the said term.

Dated the _____ day of _____, 18 ____.

Yours, &c.

E. F. of _____

(9.) *Demand of Possession, to determine any express or implied Tenancy at Will (ante, 213).*

To Mr. C. D.

Sir, I do hereby [if given by an agent, say, "as agent of and for A. B. of _____ esq."] demand and require you forthwith to quit and deliver up possession of [the messuage, land and premises] with the appurtenances situate and being [at _____ or in the parish of _____] in the county of _____, now in your possession. [In case of any refusal or neglect on your part to comply with this notice, an action of ejectment will be commenced against you without further notice.] And you are hereby warned not to commit any waste, spoil or damage in or upon the said premises or any part thereof.

Dated this _____ day of _____, 18 ____.

Yours, &c.

A. B. of _____

[or E. F. of _____]

Agent for the above-named A. B.]

(10.) *Demand of Possession (e) pursuant to 15 & 16 Vict. c. 76, s. 213 (ante, 761).*

To Mr. C. D.

Sir, I do hereby [if given by an agent, say, "as agent of and for A. B. esq., your landlord, and on his behalf"], according to the form of the statute in such case made and provided, demand of and require you forthwith to quit and deliver up possession of [the messuage, land and premises or the farm and premises, or as the case may be], with the appurtenances, situate and being [at _____ or in the parish of _____] in the county of _____, and which were held by you under a [lease or agreement in writing], bearing date the _____ day of _____,

(d) A notice to quit at the end of the first seven or fourteen years is sufficient, although it does not refer to the proviso; *Giddens v. Dodd*, 3 Drew. 486; 25 L. J., Ch. 451.

(e) This demand may be addressed to the tenant "or anyone holding or claiming by or under him," and may be "served

personally upon, or left at the dwelling-house or usual place of abode of such tenant or person;" 15 & 16 Vict. c. 76, s. 213; ante, 761; *Cole Ejec.* 379. If possible, an express refusal to deliver up possession pursuant to the notice should be obtained.

[Signature, &c. as in No. 9.]

[Signature, &c. as in No. 9.]

[owner or agent].

(k) Follow as closely as possible the language of the lease.

of _____, esq.]; and particularly that you do all and singular the amendments and repairs specified in the schedule hereunder written. Arr. C. s. 13.

Dated this _____ day of _____, 18 ____.

Yours, &c.

A. B. of

[or E. F. of

To Mr. C. D.

Surveyor of the said A. B. esq.].

THE SCHEDULE above referred to.

[Here specify the amendments and repairs required to be done.]

(14.) *The like—Another form.*

To Mr. C. D.

Sir, Having surveyed the [messuage] and premises, with the appurtenances, situate at _____ in the parish of _____ in the county of _____, now held by you under a lease, bearing date the _____ day of _____, 18 ____, and expressed to be made between A. B. esq., of the one part, and you the said C. D. of the other part; I find that the amendments and repairs specified in the schedule hereunder written, are now necessary to be done pursuant to the covenants in that behalf contained in the said lease. And I hereby give you notice to do all and singular such amendments and repairs [forthwith or within three calendar months next after the service of this notice].

Dated this _____ day of _____, 18 ____.

Yours, &c.

E. F. of

Surveyor of the said A. B. esq.

THE SCHEDULE above referred to.

[Here specify the amendments and repairs required to be done.]

(15.) *Notice of Mortgage by the Mortgagee to the Mortgagor's Tenant (ante, 47).*

To Mr. C. D.

Sir, Take notice, that by an indenture dated the _____ day of _____, 18 ____, and made or expressed to be made between [as the case may be], the [messuage or dwelling-house and land, or as the case may be], with the appurtenances situate and being [at _____ or in the parish of _____], in the county of _____, now in your possession (together with other hereditaments were conveyed and assured unto and to the use of me, the said E. F., my heirs and assigns [or executors, administrators and assigns, for a term of _____ years from the _____ day of _____, 18 __], for securing the sum of £ _____ with interest for the same at the rate of £ _____ per cent. per annum [at a day now past, or on the _____ day of _____ next], and you are hereby required to pay to me all rent and arrears of rent due and payable, and hereafter to become due and payable from you in respect of the said premises in your possession: And in case of any default I shall distrain or sue for the said rent, or bring an action of ejectment to recover possession of the said [messuage or dwelling-house and land], with the appurtenances in your possession, or otherwise put the law in force as I may be advised.

Dated this _____ day of _____, 18 ____.

Yours, &c.

E. F. of

(16.) *The like, by Mortgagee's Solicitor (ante, 47).*

To Mr. C. D.

Sir, Take notice, that by an indenture dated the _____ day of _____, 18 ____, and made or expressed to be made between [as the case may be], the [farm and lands, or as the case may be], with the appurtenances situate [at _____ or in the parish of _____], in the county of _____, now in your possession (together

APP. C. s. 16. with other hereditaments) were conveyed and assured to the said E. F. [*the mortgagee*], his heirs and assigns [*or his executors, administrators and assigns*], for the term of years from the day of 18], for securing the sum of £ with interest for the same at the rate of £ per cent. per annum [at a day now past *or* on the day of next]: Now I do hereby as the solicitor of and for the said E. F. and on his behalf give you notice of the said indenture, and require you to pay to the said E. F. all rent and arrears of rent now due and payable, and hereafter to become due and payable from you in respect of the said premises in your possession: And take notice, that in case of any default the said E. F. will distrain or sue for the said rent, or bring an action of ejectment to recover possession of the said [farm and lands], with the appurtenances in your possession, or otherwise put the law in force, as he may be advised.

Dated this day of , 18 .

Yours, &c.

G. H. of
Solicitor for the said E. F.

(17.) *Attornment by several Tenants, to a Purchaser from their Landlord*
(ante, 246).

I consent to these attornments. A. B. Stamp (l).
We, E. F. of [*trade*], G. H. of [*trade*], I. K. of [*yeoman*], and L. M. of [*labourer*], do hereby severally and respectively, with the privity and consent of our landlord A. B. of [*esquire*], testified by his signing his name in the margin hereof, ATTORN and become tenants to C. D. of [*gentleman*], of the premises in our respective occupations mentioned in the schedule hereunder written, with the appurtenances, as the same are now in our respective tenures or occupations: To HOLD the same respectively at the same rent, and under and subject to the same stipulations, agreements and conditions as those under which we now respectively hold the same. AND each of us has this day paid to the said C. D. the sum of [one shilling *or* one penny] for and on account and in part payment of the said rent, and by way of acknowledgment of the title of the said C. D. AS WITNESS our hands the day of , 18 .

THE SCHEDULE above mentioned:

PART THE FIRST. Premises in the tenure or occupation of the above-named E. F. upon a tenancy from year to year, commencing on the day of in each year, at the yearly rent of £ payable quarterly [on the usual days, *or as the case may be*], viz., ALL that [describe the premises, ex. gr. messuage and premises known as No. , street, in aforesaid, with the garden, yard and appurtenances], as the same are now in the occupation of the said E. F.

PART THE SECOND. Premises in the tenure or occupation of the above-named G. H. upon a tenancy from quarter to quarter, commencing from the day of last (*m*), at the yearly rent of £ payable quarterly [on the usual days, *or as the case may be*], viz., ALL that [piece of land with the messuage and outbuildings thereon, situate on the side of street in aforesaid, and known as No. in the said street, with the appurtenances], as the same are now in the occupation of the said G. H.

PART THE THIRD. Premises in the tenure or occupation of the above-named I. K. upon a tenancy from month to month, commencing on the day of each month, at the monthly rent of £ ; viz., ALL that [piece of land with the cottage and outbuildings thereon, situate and being No. , street, in aforesaid, with the appurtenances], as the same are now in the occupation of the said I. K.

PART THE FOURTH. Premises in the tenure or occupation of the above-named L. M., upon a tenancy from week to week, commencing on [Monday] in each week, at the weekly rent of [payable in advance on in each week],

(l) No stamp is necessary.

(m) Each quarter may be considered as the commencement of a new tenancy.

viz., ALL that [cottage and land] at aforesaid, with the appurtenances, APP. C. s. 17.
as the same are now in the occupation of the said L. M.

Witness to the signatures of the above-named }
[E. F., G. H., I. K. and L. M.] }

(Signed)

X. Y. of .

E. F.
G. H.
I. K.
L. M.

(18.) *Attornment to a Receiver or to a Purchaser, with the Consent of Landlord*
[and of his Mortgagee] (ante, 246).

I, C. D., of [farmer], do hereby, with the privity and consent of A. B. [esq.] my landlord [and of his mortgagee N. M. esq. (whose mortgage is become forfeited),] testified by their respectively signing their names in the margin hereof, ATTORN and become tenant to R. R. of [gentleman], of ALL that [farm or messuage, lands] and premises mentioned in the schedule hereunder written, with the appurtenances, as the same are now in my tenure or occupation, TO HOLD the same at and under the same rent, and subject to the same [covenants and conditions or stipulations, agreements and conditions] as those under which I now hold the same: AND I have this day paid to the said R. R. the sum of [one shilling] for and on account and in part payment of the said rent.

Stamp (m).
We consent to
this attornment.
A. B.
N. M.

AS WITNESS my hand this day of 18 .

THE SCHEDULE above mentioned.

ALL that [describe the property].

(Signed) C. D.

Witness E. F. of

Received of Mr. C. D. the sum of [one shilling] as above mentioned.

Witness E. F.

(Signed) R. R.

(19.) *Acknowledgment of Title to bar the Statute of Limitations (n).*

I, C. D., of , do hereby admit and declare that I am now in possession of [or in receipt of the rents and profits of] all that messuage, &c. [describe the property so as to identify it], with the appurtenances, situate at , or in the parish of , in the county of , by the sufferance and permission of A. B. of [esq.], and subject to the title of the said A. B., under whom I now hold the same.

Dated this day of , 18 .

C. D.

To A. B. esq.

(20.) *Landlord's Consent, pursuant to 14 & 15 Vict. c. 25, s. 3, to the Tenant erecting or putting up Buildings, Engines or Machinery (ante, 605). (o)*

To Mr. C. D. of

I hereby consent that you may at your own cost and expense erect or put up in [describe the part or place], being part of the property now occupied by you as my tenant, situate at , in the [parish or township] of , in the county of [here describe the building, engine or machinery] for agricultural purposes [or "for the purposes of trade and agriculture"].

As witness my hand this day of , 18 .

(Signed) A. B.

(m) No stamp is necessary.

(n) No stamp is necessary; *Barry v. Goodman*, 2 M. & W. 768.

(o) No particular form is prescribed. The above will do, or any other which sufficiently expresses all that is necessary. It

may be in the usual form of a letter. It would seem better that the landlord himself (not his agent) should sign this consent. At all events, the agents would have no implied authority to sign any such consent on behalf of the landlord.

APPENDIX D.

FORMS OF PROCEEDINGS IN DISTRESS.

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Proceedings on Distresses.(1.) *Warrant to distrain in a House for Rent (ante, 425).*

To Mr. R. S. my bailiff.

I hereby authorize and require you to distrain the goods and chattels^(a) in and upon the [house] and premises of C. D., situate and being [No. , street], in the parish of , in the county of , for £ , being quarters' rent, due to me for the same [at Lady-day, Midsummer-day, Michaelmas-day or Christmas-day last, *as the case may be*; or "on the day of last"]; and to proceed thereon for the recovery of the said rent as the law directs. But you are hereby expressly prohibited from taking any property not legally liable to a distress for rent.

Dated this day of 18 .

(Signed)(b) A. B. of
[or A. B. of
by P. Q., his agent].

(2.) *Warrant to distrain on a Farm for Rent (ante, 425).*

To Mr. R. S. my bailiff.

I hereby authorize and require you to distrain the goods and chattels [and also the cattle and growing crops], in and upon the farm, lands and premises of C. D., situate and being at in the parish, &c. [*as in No. 1, to the end*].

(3.) *Inventory of Goods distrained (ante, 432).*

AN INVENTORY of the goods and chattels [cattle and growing crops] distrained by [R. S. of as bailiff of and for] A. B. of , esquire, on the

(a) "Of C. D." may be here introduced, if wished for any special reason; but in ordinary cases the words would do more harm than good.

(b) This warrant must be signed by the person entitled to receive the rent; *Buller's case*, 1 Leon. 50; 2 Leon. 215; or by his

agent having sufficient express or implied authority; *Trent v. Hunt*, 9 Exch. 14; 22 L. J., Ex. 318; *Snell v. Finch*, 13 C. B., N. S. 651; 32 L. J., C. P. 117. It does not require a stamp; *Pyle v. Partridge*, 15 M. & W. 20.

Arr. D. s. 3.

day of _____, 18____, in and upon the [house or farm, lands] and premises of C. D., situate and being [No. _____, street], in the parish of _____, in the county of _____, for £____, being _____ quarters' rent due to the said A. B. [at _____ last; or "on the _____ day of _____ last"].

1. *In front room on ground floor.*—One dining table, one side-board, twelve chairs [describe each article in this room intended to be distrained].

2. *In back room on ground floor.*—[Here describe each article in this room intended to be distrained.]

3, 4, 5, &c.—[Here describe in like manner each article intended to be distrained in the "front room on first floor"—"back room on first floor"—"front room on second floor"—"back room on second floor," &c.—"front attic"—"back attic"—"front kitchen"—"back kitchen"—"wash-house"—"scullery"—"wine cellar"—"coal cellar"—"yard"—"garden"—"couch-house"—"stables"—"barns," &c. &c.]

In the Fields.

1. *In the field or close called or known as "Greenacre:"* cows, calves, oxen, bulls, sheep, lambs, horses, mares, geldings, colts, fillies, pigs, [as the case may be].

2. *In the field or close called or known as [name]:* haystacks, stacks of [wheat]; about acres (more or less) of growing crops of [wheat or barley, oats, potatoes, peas, beans, as the case may be].

3. *Describe in like manner each close and the articles therein intended to be distrained. At the end of the list may (if wished) be added, the following words or to the like effect, viz. :—*

"And all other goods, chattels and effects on the said premises," or "and any other goods that may be found in and about the said premises to pay the said rent and expenses of this distress" (c). *But it would be too indefinite and incorrect to say, "And all other goods, chattels and effects on the said premises that may be required in order to satisfy the above rent, together with all necessary expenses" (d).*

Dated this _____ day of _____, 18____.
(Signed) _____

R. S., bailiff of the said A. B.
[or A. B. of _____].

(4.) *Notice of Distress for Rent (c) (ante, 443).*

To Mr. C. D., and all others whom it may concern.

Take notice that I [R. S., as bailiff of and for A. B., esq., your landlord], have this day distrained on the premises in your occupation or possession, named in the inventory [above written or hereunto annexed], the [cattle], goods and chattels mentioned in the said inventory for £____, being _____ quarters' rent due to [me, or the said A. B.], at _____ last [or on the day of _____ last], for the said premises: And unless you pay the said rent, with the charges of distraining for the same, within five days from the service hereof, the said [cattle] goods and chattels will be appraised and sold according to law. [If cattle or goods removed, mention the place thus, "And take notice, that the said cattle have been removed to and are now in the common pound in and for the parish of _____, in the county of _____."]

Dated this _____ day of _____, 18____.
(Signed) _____

R. S. of _____
Bailiff of the above-named A. B.
[or A. B. of _____].

(5.) *Notice of Distress of Growing Crops, &c. (ante, 443).*

To Mr. C. D., and all others whom it may concern.

Take notice that I [R. S., as bailiff of and for A. B., esq., your landlord], have this day distrained on the [farm, lands and] premises in your occupation

(c) *Wakeman v. Lindsey*, 14 Q. B. 625; 19 L. J., Q. B. 166. But these words may perhaps make the distress excessive.

(d) *Kerby v. Harding*, 6 Fxch. 234; 20

L. J., Ex. 162.

(e) To be written at the foot of a true copy of the inventory, or such true copy to be annexed to this notice.

or possession, mentioned in the inventory [above written or hereunto annexed], **APP. D. s. 5.**
 the [cattle, goods and chattels, and also the] growing crops mentioned in the
 said inventory for £ , being quarters' rent due to [me or the said
 A. B.], at last [or on the day of last] for the said [farm,
 lands and] premises: And unless you pay the said rent, with the charges of
 distraining for the same [within five days from the date hereof, the said cattle,
 goods and chattels will be appraised and sold according to law, and] I shall
 [or if signed by the bailiff say, "the said A. B. will"] proceed to cut, gather,
 make, cure, carry and lay up the said crops, when ripe, in the barn or other
 proper place on the said premises, and in convenient time sell and dispose of the
 same in or towards satisfaction of the said rent, and of the charges of such
 distress, appraisement and sale, according to law.

Dated this day of , 18 .
 (Signed)

A. B. of
 [or R. S. of
 Bailiff of the above-mentioned A. B.]

(6.) *Request of a Tenant to his Landlord to withdraw a Distress for Rent, with
 Liberty to make a second Distress (f) (ante, 451).*

To A. B., esq.

Sir, I hereby request you, for my accommodation, to withdraw the distress
 for rent made by you on the [farm, land and] premises, situate at , in
 the county of , now in my occupation as your tenant: And in consideration
 of your so doing, I do hereby consent, promise and agree that it shall and may
 be lawful for you at any time [afterwards, or after the day of
 next] to make a second distress for the said rent, or for so much thereof as
 shall for the time being remain unpaid, and for the expenses of and incident to
 such second distress: [And I will also pay you on demand all expenses incurred
 of and incident to the said first distress to the time of its being withdrawn for
 my accommodation as aforesaid].

Dated this day of , 18 .

Yours, &c.

Witness, E. F., of (g). —

C. D.

(7.) *Consent of Tenant to the Landlord or his Bailiff continuing in Possession under
 a Distress for more than Five Days (ante, 445).*

To A. B., esq. [or to Mr. R. S., bailiff of A. B., esq.]

Sir, I hereby request you not to remove the goods and chattels which you
 have distrained and impounded for rent on the premises, situate at , in
 the county of , now in my occupation as [your tenant or tenant of the
 said A. B.]; but to keep the said goods and chattels in the place where they are
 now impounded, until the day of next inclusive, for my accommo-
 dation, and to give me the opportunity of obtaining money to pay the said
 arrears of rent with expenses of the distress; all extra expenses occasioned by
 keeping possession as aforesaid to form part of the expenses of and incident to
 the distress.

Dated this day of , 18 .

Yours, &c.

Witness, E. F., of (g). —

C. D.

(8.) *The Appraisement (h) (ante, 445).*

WE, the above-named L. M. and N. O., having viewed the [cattle], goods
 and chattels mentioned in [this or the within written] inventory, do appraise
 and value the same at the sum of pounds shillings and pence.

As witness our hands the day of , 18 .
 (Signed)

L. M. } Appraisers.
 N. O. }

(f) See other similar forms in *Hill v. Ramm*, 5 M. & G. 789; *Fishwick v. Milnes*, 4 Exch. 825; which cases show that no agreement stamp is necessary.

(g) An attesting witness is unnecessary.

(h) To be written under or indorsed on the inventory.

APP. D. s. 9. (9.) *Notice to Sheriff under 8 Ann. c. 14, s. 1, of Rent due to Landlord of Execution Debtor (ante, 458).*

To the sheriff of the county of _____, and his under-sheriff and bailiffs, and all others whom it may concern:

Take notice that the sum of £ _____ is now due and owing to [me or to I. K. of _____ esq.] from C. D., of _____, in the county of _____, for [one year's or one half year's or one quarter's] rent, due on the _____ day of _____ last, of the premises in his occupation at _____ aforesaid; upon which premises, as I am informed you have seized and taken in execution certain goods and chattels; And you are hereby required not to remove any of the said goods and chattels from off the said premises until the said arrears of rent are paid, pursuant to the statute in such case made and provided.

Dated this _____ day of _____, 18 _____.

Yours, &c.

I. K. of

[or E. F. of

Agent for I. K. of _____, esq.]

(10.) *Notice from Sheriff to Execution Creditor of Rent being due from the Defendant, and requiring Payment thereof by such Creditor, pursuant to 8 Ann. c. 14, s. 1 (ante, 459).*

In the High Court of Justice,
Division.

Between A. B., plaintiff,

and

C. D., defendant.

Take notice, that the sum of £ _____ is due and owing from the above-named defendant to his landlord I. K., of [&c. esq.] for [one year's or one half year's or one quarter's] rent, due on the _____ day of _____ last, for and in respect of the [house or farm, land and] premises situate at _____, in the county of _____, now in the occupation of the said defendant, and upon which certain goods and chattels have been seized by the sheriff of _____ shire under the writ of fieri facias issued in this action [and the said sheriff has had notice of such arrears of rent (i)]: Now I do hereby, as the agent of the said sheriff and on his behalf, give you notice that unless the above-named plaintiff do forthwith pay the arrears of rent due to the said landlord, either to him or to his bailiff, pursuant to the statute in such case made and provided, the said sheriff will withdraw from possession of the said goods and chattels under the said writ.

Dated this _____ day of _____, 18 _____.

Yours, &c.

L. M. of

Agent for the sheriff of _____ shire.

To the above-named plaintiff: and to)
Mr. _____, his solicitor or agent. }

(11.) *Notice to the High Bailiff of a County Court, pursuant to 19 & 20 Vict. c. 108, s. 75 (ante, 461).*

To the high bailiff of the County Court of _____, holden at _____, and to his bailiff and officers, and all others whom it may concern:

Take notice, that C. D., whose goods you have taken in execution under a warrant from the said County Court, holds the [house or apartments] in which the said goods were taken as tenant thereof to [me or to I. K. of _____ esq.] under a lease for _____ years [and three quarters of another year wanting five days] from the _____ day of _____, 18 _____, or under a tenancy from year to year, from the _____ day of _____ last (k), or under a tenancy from month to

(i) Omit this when inaccurate. Express notice to the sheriff appears to be unnecessary; it is sufficient if he knows of the arrears of rent (ante, 457). He should in-

spect the lease, and obtain legal proof of the arrears due (ante, 458).

(k) A tenancy from year to year recommences annually (ante, 206).

month from the [*first*] day of each month, or under a tenancy from week to week from each [*Saturday*] at the yearly rent of £ , payable [by APP. D. s. 11. equal half-yearly, or quarterly, payments, on the day of , &c., *state days of payment*], or at the monthly rent of £ payable [in advance (*l*)] on the day of each month, or at the weekly rent of £ payable [in advance (*l*)] on each [*Saturday*]: And I now [as the agent of and for the said I. K., and on his behalf,] claim the sum of £ for arrears of the said rent for (*m*) one year [or two quarters] ending on the day of last; or for two months [or four weeks] ending on the day of last, *as the case may be*, which said rent or sum of £ now remains in arrear and unpaid.

Dated this day of 18

(Signed) I. K. of
[or C. D. of

Agent for the above-named I. K.]

(12.) *Declaration by Lodger (ante, 415).*

To [*name of superior Landlord, or his Bailiff, as the case may be*].

Sir, I of do hereby declare that [*name of immediate tenant*] has no right of property or beneficial interest in the furniture, goods and chattels, of which an inventory is hereunto annexed, but that such furniture, goods and chattels are my property [*or in my lawful possession*].

I owe [*name of immediate landlord*] £ on account of rent from to

The inventory referred to in this declaration is as follows:—

Inventory:

- 1 Pianoforte,
- 4 Sofas,
- 2 Timepieces, &c., &c. [*state articles with precision*].

To

Yours, &c.

A. B.

(*l*) Omit these words if rent not payable in advance.

(*m*) Here say, "part of," if necessary,

and add (just before the date), "the residue of the said [year's] rent having been paid."

APPENDIX E.

FORMS OF PROCEEDINGS IN ACTIONS.

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SECT. 1.—FORMS OF PROCEEDINGS ON A REPLEVY (BEFORE ACTION).

(1.) Notice of Sureties (a).

No. of plaint (*when known*).

In the County Court of _____, holden at
 Between A. B., plaintiff,
 and
 C. D., defendant.

Take notice, that the sureties whom I propose as my security in the above
 cause [*here state the proceeding which has rendered the sureties necessary*] are
 [*here state the full names and additions of the sureties, whether housekeepers or free-*

(a) This is form No. 47 in the schedule
 to the C. C. Rules, 1875, prescribed by
 Ord. XXX., Rule 1, but it seems scarcely
 applicable to an *intended* replevy; espe-
 cially where the action of replevin is to be

brought in the High Court. It does not
 mention where the action is to be brought
 but assumes it to be already begun in the
 County Court. (See next form.)

holders, and their residences for the last six months, therein mentioning the county APP. E. s. 1.
or city, places, streets and numbers, if any].

Dated this day of 18 .

To the

[Signature of person sending notice.]

(2.) *Notice of Sureties (another suggested form).*

[Title of court and cause as in previous form.]

Take notice, that the sureties whom I propose as my security for the due prosecution of an action of replevin against the above-named C. D. in her Majesty's High Court of Justice are [see directions as in last form].

Dated this day of 18 .

To the above-named C. D. and
to the Registrar of the said
County Court. }

[Signature of person sending notice.]

(3.) *Notice to Distrainer of Goods [or Cattle] intended to be replevied (b).*

[Title of court and cause as ante, No. 1.]

Take notice, that A. B. of [&c.] whose goods [or cattle] you have distrained, intends to replevy the same, and has proposed as his sureties for the due prosecution of an action of replevin against you in the [here mention the court in which the action is to be brought], E. F., of &c., and G. H., of &c., and that if you have any valid objection to make to the proposed sureties, or either of them, you must attend at [here insert place of office of registrar], on the day of 18 , at the hour of , when the bond will be submitted to me for approval.

Dated this day of 18 .

[To Mr. C. D.,

of (c).]

I. K.,

Registrar of the Court.

Hours of attendance at the office of the registrar [place of office] from ten till four o'clock, except on [here insert the day on which the office will be closed] when the office will be closed at one o'clock (d).

(4.) *Affidavit of Justification (e) (ante, 470).*

[Title of court and cause as ante, No. 1.]

I, , of , one of the sureties for the [defendant (f)] make oath and say, That I am a housekeeper [or freeholder, as the case may be], residing at [describing particularly the county or city, the street or place, and the number of the house, if any]: That I am worth property to the amount of £ [the amount required by the practice of the court (g)], over and above what will pay my just debts [if security in any other action or for any other purpose, add, and every other sum for which I am now security]: That I am not bail or security in any other action or proceeding, or for any other person [or if security in any other action or actions, add, except for C. D., at the suit of E. F., in the court of , in the sum of £ ; for G. H., at the suit of I. K., in the court of , in the sum of £ , specifying the several actions, with

(b) This form is No. 182 in schedule to C. C. Rules, 1875.

(c) Not in the prescribed form.

(d) This memorandum is to be placed at the foot of every summons, notice, judgment, order, warrant, or any other process of the court. See Form 5 in schedule to C. C. Rules, 1875.

(e) This form is No. 48 in schedule to C. C. Rules, 1875.

(f) The prescribed form says "for the defendant," but in replevin it would seem more proper to say "for the plaintiff in this action of replevin."

(g) As to the amount, see 19 & 20 Vict. c. 108, ss. 65, 66, ante, 468.

APP. E. s. 4.

the courts in which they are brought, and the sums in which he has become bound : That this my property, to the amount of the said sum of £ [and if security in any other action, &c., over and above all other sums for which I am now security as aforesaid] consists of [here specify the nature and value of the property in respect of which the deponent proposes to become bondsman, as follows, stock in trade, in my business of , carried on by me at , of the value of £ , of good book debts owing to me to the amount of £ , of furniture in my house at of the value of £ , of a freehold [or leasehold] farm of the value of £ , situate at , occupied by , or of a dwelling-house of the value of £ , situate at , occupied by , or of other property, particularizing each description of property, with the value thereof], and that I have for the last six months resided at [describing the place of such residence, or if he has had more than one residence during that period, state it in the same manner as above directed.

Sworn at , in the county of , this day of , one thousand eight hundred and eighty , before me

(5.) *Bond in Replevin (h) where Action to be commenced in High Court under Sect. 65 of 19 & 20 Vict. c. 108 (ante, 468).*

I approve of this bond.

I. K.,
(L.S.) Registrar.

This bond now requires a stamp.

[Form of Bond as post, No. 7, to the date inclusive:] WHEREAS the above-named C. D. and E. F., at the request of the said A. B., have agreed to enter into the above-written obligation, and this security has been approved of by I. K., the Registrar of the County Court of , holden at , as appears by his allowance in the margin hereof :

NOW THE CONDITION of this obligation is such, that if the above-bonded A. B. do and shall within one week from the date of the said obligation commence an action of replevin against the above-named G. H., in her Majesty's High Court of Justice, for taking and unjustly detaining of certain goods and chattels of the said A. B., to wit, [here insert the description of the goods and chattels intended to be replevied], and prosecute such action with effect and without delay, and, unless judgment be obtained thereon by default, do and shall prove before the said court of (1) that he the said A. B. had good ground for believing that the title to the hereditament in respect of which the distress was made was in question [or that the title to a toll was in question], [or that the title to a market was in question], [or that the title to a fair was in question], [or that the title to a franchise was in question], [or that the alleged rent or damage in respect of which the distress was made exceeded twenty pounds], and do and shall also make return of the said goods and chattels, if return thereof shall be awarded, then this obligation shall be void and of no effect, otherwise shall be and remain in full force.

Signed, sealed and delivered by }
the above-bonded in the }
presence of }

A. B. (L.S.)
C. D. (L.S.)
E. F. (L.S.)

(6.) *Memorandum of Deposit (k) pursuant to 19 & 20 Vict. c. 108, s. 71, where the Action of Replevin is to be brought in the High Court (ante, 469).*

MEMORANDUM made on the day of , 18 : WHEREAS A. B., of , has this day deposited with I. K., registrar of the County Court of , holden at , the sum of £ (1), pursuant to 19 & 20 Vict. c. 108, s. 71 :

I approve of this memorandum.

I. K.,
(L.S.) Registrar.

NOW THE CONDITION of the said deposit is such, that if the said A. B. do and

(h) This form is No. 183 in schedule to C. C. Rules. The amount of the penalty must be fixed by the registrar, pursuant to 19 & 20 Vict. c. 108, s. 65.

(i) This is so in the form, but it is evidently copied by mistake from the old

form and should run, "In the said High Court."

(k) See ante, 469.

(l) The amount of the deposit must be fixed by the registrar, pursuant to 19 & 20 Vict. c. 108, s. 65 ; ante, 468.

shall within one week from the date of this memorandum commence an action of replevin against C. D., of [and R. S., of], in her Majesty's Court of [at Westminster, for taking and unjustly detaining of certain goods and chattels of the said A. B., to wit [here insert the description of the goods and chattels intended to be replevied], and prosecute such action with effect and without delay, and, unless judgment be obtained thereon by default, do and shall prove before the said Court of [that he the said A. B. had good ground for believing [that the title to the hereditament in respect of which the distress was made was in question; or that the title to a toll was in question; or that the title to a market was in question; or that the title to a fair was in question; or that the title to a franchise was in question; or that the alleged rent or damage in respect of which the distress was made exceeded twenty pounds], and do and shall also make return of the said goods and chattels, if return thereof shall be awarded, then the said deposit shall be void and returned to the said A. B., otherwise the same shall be applied and disposed of according to law.

APP. E. s. 1.

(Signed) A. B.
[or A. B. by E. F. his attorney.]

(7.) *Bond in Replevin (n) where Action to be commenced in County Court under Sect. 66 of 19 & 20 Vict. c. 108.*

Know all men by these presents that we, A. B. of &c., C. D. of &c., and E. F. of &c., are held and firmly bound unto G. H. (n) of &c. in £ (o), to be paid to the said G. H., or his certain attorney, executors, administrators or assigns, for which payment to be made we bind ourselves, and each and every of us, in the whole, our and each of our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated this [] day of [], 18 [].

WHEREAS the above-named C. D. and E. F., at the request of the said A. B., have agreed to enter into the above-written obligation, and this security has been approved of by [], the registrar of the County Court of [], holden at [], as appears by his allowance in the margin hereof:

I approve of this bond. I. K.,
(r.s.) Registrar.

This bond now requires a stamp.

NOW THE CONDITION of this obligation is such, that if the above-bounden A. B. do and shall within one month from the date of the said obligation commence an action of replevin against the above-named G. H. in the County Court of [], holden at [], for taking and unjustly detaining of certain goods and chattels of the said A. B., to wit, [here insert the description of the goods and chattels intended to be replevied], and prosecute such action with effect and without delay, and do and shall also make return of the said goods and chattels, if return thereof shall be awarded, then this obligation shall be void and of no effect, otherwise shall be and remain in full force.

Signed, sealed and delivered by	A. B.	(L.S.)
the above-bounden in the	C. D.	(L.S.)
presence of	E. F.	(L.S.)

(8.) *Memorandum of Deposit (p) pursuant to 19 & 20 Vict. c. 108, s. 71, where the Action of Replevin is to be brought in the County Court (ante, 469).*

MEMORANDUM made on the [] day of [], 18 []: WHEREAS A. B. of [], has this day deposited with I. K., esq., registrar of the County Court of [], holden at [], the sum of £ (q), pursuant to 19 & 20 Vict. c. 108,

(m) This form is No. 184 in schedule to C. C. Rules, 1875.

(n) The distrainer.

(o) The amount of the penalty is fixed by the registrar, pursuant to 19 & 20 Vict. c. 108, s. 66.

(p) By the note to forms Nos. 183, 184, in schedule to C. C. Rules, "if a deposit of

money be made, the memorandum thereof should follow the terms of the condition of the bond, and will not require a stamp." But no form of memorandum is given.

(q) The amount must be fixed by the registrar, pursuant to 19 & 20 Vict. c. 108, s. 66; ante, 468.

APP. E. s. 1. s. 71: NOW THE CONDITION of the said deposit is such, that the said A. B. do and shall within one month from the date of this memorandum, commence an action of replevin against C. D. of [and R. S. of], in the County Court of , holden at , for taking and unjustly detaining of certain goods and chattels of the said A. B., to wit, [here insert the description of the goods and chattels intended to be replevied], and prosecute such action with effect and without delay and do and shall also make return of the said goods and chattels, if return thereof shall be awarded, then the said deposit shall be void and returned to the said C. D.; otherwise the same shall be applied and disposed of according to law.

(Signed) A. B.
[or A. B. by E. F. his attorney.]

(9.) *Warrant to High Bailiff to Replevy (r).*

In the County Court of , holden at .
WHEREAS hath given security, as well to commence his action of replevin against for the taking and unjustly detaining of certain goods and chattels [or cattle] of the said , that is to say,

and prosecute such action with effect and without delay, as also to return the said goods and chattels, if return thereof shall be adjudged by law: Now, as registrar of the said County Court, and by virtue of the provisions of the 19 & 20 Vict. c. 108, I hereby authorize and direct you without delay to replevy and deliver the said goods and chattels [or cattle] to the said and forthwith to return to me this warrant and what you shall have done under the same.

Dated the day of , 18 .

To the high bailiff of the court.

I. K.,
Registrar of the court.

(Return to above Warrant.)

In obedience to this warrant, I have replevied and caused to be delivered to the within-named the within-mentioned goods and chattels [or cattle].

Dated this day of , 18 .

I. M.,
High bailiff.

SECT 2.—PROCEEDINGS IN HIGH COURT OF JUSTICE.

(a.) *Indorsement of Claims on Writ of Summons.*

(R. S. C., App. A., Part II., Sects. II., III., IV.)

(1.) *Rent.*

The plaintiff's claim is for £ for arrears of rent.

(2.) *Use and Occupation.*

The plaintiff's claim is for £ for the use and occupation of a house.

(3.) *Replevin.*

The plaintiff's claim is in replevin for goods wrongfully distrained.

(r) This form is No. 185 in schedule to C. C. Rules, 1875.

(4.) *Wrongful Distress.*

APP. E. s. 2.

The plaintiff's claim is for damages for improperly distraining.

(5.) *Ejectment.*

The plaintiff's claim is to recover possession of a house, No. in Street , or of a farm called Blackacre, situate in the parish of , in the county of .

(6.) *To establish Title and recover Rents.*

The plaintiff's claim is to establish his title to [here describe the property] and to recover the rents thereof.

(7.) *Fire Insurance.*

The plaintiff's claim is for damages for breach of a covenant to insure a house.

(8.) *Repair.*

The plaintiff's claim is for damages for breach of contract to keep a house in repair.

(9.) *Farming.*

The plaintiff's claim is for damages for breaches of covenants contained in a lease of a farm.

(10.) *Mesne Profits, &c.*

[Add to Indorsement where Claim is to Land or to establish Title or both.]

And for mesne profits.

And for an account of rents or arrears of rent.

And for breach of covenant [ex. gr., for repairs].

(b.) *Pleadings.*

(1.) *Recovery of Land, Arrears of Rent, Mesne Profits, &c.*

(R. S. C., App. C. No. 18.)

In the High Court of Justice,

Division.

18 . B. No. .

Writ issued

18 .

Between A. B., plaintiff,

and

C. D., defendant.

Statement of Claim.

1. On the day of the plaintiff, by deed, let to the defendant a house and premises No. , street, in the city of London [or as may be] for a term of years from the day of , 18 , at the yearly rent of £ payable ly.

2. By the said deed the defendant covenanted to keep the said house and premises in good and tenantable repair.

3. The said deed also contained a clause of re-entry, entitling the plaintiff to re-enter upon the said house and premises in case the rent thereby reserved,

APP. E. s. 2. whether demanded or not, should be in arrear for twenty-one days, or in case the defendant should make default in the performance of any covenant upon his part to be performed.

4. On the day of 18 , a quarter's rent became due, and on the day of , 18 , another quarter's rent became due. On the day of , 18 , both had been in arrear for twenty-one days, and both are still due.

5. On the same day of , 18 , the house and premises were not and are not now in good or tenantable repair, and it would require the expenditure of a large sum of money to reinstate the same in good and tenantable repair, and the plaintiff's reversion is much depreciated in value.

The plaintiff claims:

1. Possession of the said house and premises.

2. £ for arrears of rent.

3. £ damages for the defendant's breach of his covenant to repair.

4. £ for the occupation of the house and premises from the day of , 18 , to the day of recovering possession.

The plaintiff proposes that this action should be tried in .

(2.) *Recovery of Land and Mesne Profits, with Counter-claim.*

(*R. S. C., App. C. No. 24.*)

In the High Court of Justice,

Division.

18 . B. No. .

Writ issued of 18 .

Between A. B., plaintiff,

and

C. D., defendant.

Statement of Claim.

1. On the day of 18 , the plaintiff let to the defendant a house No. , street, in , as tenant from year to year at the yearly rent of £ payable quarterly, the tenancy to commence on the day of .

2. The defendant took possession of the house and continued tenant thereof until the day of last, when the tenancy determined by a notice duly given.

3. The defendant has disregarded the notice and still retains possession of the house.

The plaintiff claims:

1. Possession of the house.

2. £ for mesne profits from the day of .

The plaintiff proposes that this action should be tried in .

In the High Court of Justice,

Division.

18 . B. No. .

Between A. B., plaintiff,

and

C. D., defendant

(by Original Action),

And (s) between C. D., plaintiff,

and

A. B., defendant

(by Counter-claim).

The Defence and Counter-claim of the above-named C. D.

*1. Before the determination of the tenancy mentioned in the statement of claim the plaintiff A. B., by writing dated the day of and signed by

(s) This second title is necessary where there are defendants to the Counter-claim other than the plaintiff in the action (*R. S. C., Ord. XXII., Rule 5.*) But in

other cases it was suggested by Quain, J., at chambers, that it was not necessary. See *Bittleston's Practice Cases*, p. 48.

him, agreed to grant to the defendant C. D. a lease of the house mentioned in the statement of claim, at the yearly rent of £ , for the term of years commencing from the day of , when the defendant C. D.'s tenancy from year to year determined, and the defendant has since that date been and still is in possession of the house under the agreement. APP. E. s. 2.

2. By way of counter-claim the defendant claims to have the agreement specifically performed, and to have a lease granted to him accordingly, and for the purpose aforesaid to have this action transferred to the Chancery Division.

In the High Court of Justice,
Chancery Division.

(Transferred by order dated day of 18 . B. No. .)

Between A. B., plaintiff,
and
C. D., defendant
(by Original Action).
And between C. D., plaintiff,
and
A. B., defendant
(by Counter-claim).

The Reply of the Plaintiff A. B.

The plaintiff A. B. admits the agreement stated in the defendant C. D.'s statement of defence, but he refuses to grant to the defendant a lease, saying that such agreement provided that the lease should contain a covenant by the defendant to keep the house in good repair and a power of re-entry by the plaintiff upon breach of such covenant, and the plaintiff says that the defendant has not kept the house in good repair, and the same is now in a dilapidated condition.

[Title.]

Joinder of Issue.

The defendant C. D. joins issue upon the plaintiff A. B.'s statement in reply.

(c.) *Other Forms.*

(1.) *Judgment in Default of Appearance in Action for Recovery of Land.*
(R. S. C., App. D. No. 2.)

In the High Court of Justice,
Division.

Between A. B., plaintiff,
and
C. D. and E. F., defendants.

No appearance having been entered to the writ of summons herein, it is this day adjudged that the plaintiff recover possession of the land in the said writ mentioned.

(2.) *Præcipe for Writ of Possession.*
(R. S. C., App. E. No. 7.)

In the High Court of Justice,
Division.

Between A. B., plaintiff,
and
C. D. and others, defendants.

Seal a writ of possession directed to the sheriff of to deliver possession to A. B. of .
Judgment dated day of .

APP. E. s. 2.(3.) *Writ of Possession.*

(R. S. C., App. F. No. 7.)

In the High Court of Justice,
Division.

18 . B. No. .

Between A. B., plaintiff,
and

C. D. and others, defendants.

VICTORIA, to the sheriff of , greeting: Whereas lately in our High Court of Justice, by a judgment of the division of the same court, A. B. recovered [or E. F. was ordered to deliver to A. B.] possession of all that with the appurtenances in your bailiwick: Therefore we command you that you omit not by reason of any liberty of your county, but that you enter the same and without delay you cause the said A. B. to have possession of the said land and premises with the appurtenances; and in what manner you have executed this our writ make appear to the judges of the division of our High Court of Justice immediately after the execution thereof, and have you there then this writ. Witness, &c.

(4.) *Writ of Second Deliverance (t).*

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, To the Sheriff of greeting: If A. B. shall make you secure of prosecuting his claim, and also of returning the [cattle, goods, and chattels, &c.] which were lately adjudged to C. D. in our High Court of Justice on account of the default of the said A. B., if a return thereof shall be adjudged: We command you that if by virtue of our writ of retorno habendo to you thereupon before directed, you have caused the said [cattle, &c.] to be returned to the said C. D., then that you cause them to be re-delivered to the said A. B., and put by gages and safe pledges the said C. D., that he be before our said High Court of Justice, at Westminster, on [the return day of the writ], to answer the said A. B. in an action of replevin for the taking and unjustly detaining the [cattle, goods and chattels] aforesaid, and have you there the names of the pledges and this writ: Witness ourself at Westminster, the day of , in the year of our reign.

(5.) *Return to Writ of Second Deliverance.*

By virtue of this writ to me directed, I have caused to be delivered to the within-named A. B. his [cattle, goods and chattels] within mentioned, as I am within commanded. The pledges within mentioned are and

The answer of esq., sheriff.

(6.) *The like, where only part of the Goods, &c. could be delivered.*

By virtue of this writ to me directed, I have caused to be delivered to the within-named A. B. [describe the goods re-delivered], part of the [cattle, goods and chattels] within mentioned, being all of the said [cattle, goods and chattels] which are to be found in my bailiwick. The pledges within mentioned are and

The answer of , esq., sheriff.

(t) This and the two following forms are not in the Rules of the Supreme Court.

SECT. 3.—PROCEEDINGS IN THE COUNTY COURT.

(a.) *Proceedings in Replerin.*

(1.) *Particulars of the Goods distrained, required on entering a Plaint or Replevin.*

No. of plaint (*when known*).
In the county court of holden at
Between A. B., plaintiff,
and
C. D. and R. S., defendants.

The following are the particulars of the [cattle, or goods and chattels, &c.] taken under a distress for alleged arrears of rent by C. D. [and R. S., as his bailiff] at in the county of , and within the district and jurisdiction of this court, and with respect to which I [or the said A. B. doth] now enter my plaint in replevin in the said court and claim the sum of pounds shillings damages for their detention against sureties and pledges, until &c.

[Here enumerate the cattle, &c., intended to be replevied.]

Dated this day of 18 .

*The plaint notes are prepared and kept
printed in the registrar's office.* }

(2.) *Judgment for Plaintiff in Replevin for Rent* (ante, 474).

[Title of court and cause as ante, No. 1.]

Upon hearing this cause at a court holden this day, it is this day adjudged that the plaintiff do recover against the defendant the sum of £ for damages for the taking of the plaintiff's goods and chattels [or cattle, *stating the particulars thereof*] and £ for costs, amounting together to the sum of £ .

And it is ordered that the defendant do pay the same to the registrar of the court on the day of 18 .

Given under the seal of the court this day of 18 .

By the court,

I. K.,

Registrar of the court.

Hours of attendance [*&c.* see *ante*, 911.]

(3.) *Judgment for Defendant in Replevin for Rent (u) (ante, 476).*

Upon hearing this cause at a court holden this day, it is adjudged that the plaintiff do return to the defendant the goods and chattels [or cattle, *stating the particulars thereof*], and pay to the registrar of the court forthwith [or on the day of] the sum of £ for costs of suit. [Or, It is adjudged that the amount due for rent in arrear from the plaintiff to the defendant is £ , and that the goods and chattels [or cattle] were of the value of £ ; and that the plaintiff do forthwith [or on the day of] pay to the registrar of the court, at his office, the said sum of £ , and also the sum of £ for costs of suit.]

(u) This form is No. 186 in schedule to C. C. Rules.

APP. E. s. 3. (b.) *Forms in Actions of Replevin removed from the County Court into the High Court.*

(1.) *Affidavit for Certiorari (ante, 491).*

In the High Court of Justice (x).

I, C. D., of _____, in the county of _____ [trade or addition], make oath and say as follows:—

1. On the _____ day of _____ [instant or last] I was served with a summons issued out of the County Court of _____, holden at _____, with particulars of demand thereto annexed: and the paper writing hereto annexed, marked A, is a true copy of the said summons: and the paper writing hereto annexed, marked B, is a true copy of the said particulars of demand (y).

2. I am the defendant named in the said summons and particulars.

3. I have good ground for believing, and do verily believe, that the rent [or “damage”] in respect of which the distress mentioned in the said summons and particulars was made exceeded twenty pounds (z).

4. [Here state the facts, showing the ground of belief above mentioned, ex. gr.:] The plaintiff A. B., in the said summons and particulars named, for _____ quarters of a year next before and ending on the _____ day of _____ last, held a certain [dwelling-house or farm, lands] and premises, situate at _____, in the parish of _____ in the county of _____, wherein the said distress was taken, as my tenant at the annual rent of _____ pounds, payable [quarterly on the usual quarter days, or as the case may be], of which rent the sum of _____ pounds, for [two] quarters ending on the _____ day of _____ last, became and was due to me from the said A. B., and [the sum of £ _____, parcel thereof (the residuo having been paid)] continued in arrear and unpaid at the time of the making of the said distress [or state facts showing that the “damage done” exceeded twenty pounds].

5. I am desirous of having the said action removed by certiorari from the County Court of _____, holden at _____, into her Majesty’s High Court of Justice: And I am ready and willing to give such security as is required by the statute in such case made and provided.

C. D.

Sworn, &c. [as ante, 912].

(2.) *The like, when some Title is in Question.*

[Commence as ante, No. 1, to the end of the second paragraph.]

3. [Here state the facts specially, showing that the title to some particular hereditament, toll, market, fair or franchise is in question.]

4. I have good ground for believing, and do verily believe, that the title to the said _____ was and is in question.

I am desirous [&c. as in last form].

C. D.

Sworn, &c. [as ante, 912].

(3.) *Judge’s Order for a Certiorari to remove an Action of Replevin (a)*
(ante, 491).

Upon reading the affidavit of _____, I do order that a writ of certiorari do issue to remove an action of replevin between A. B. and C. D., with all things touching the same, from the County Court of _____, holden at _____, into her Majesty’s

(.) Not to be entitled in any cause.

(y) Let A and B be marked as exhibits.

(z) In the London court the rent or damage must exceed 50l.; 15 & 16 Vict. c. 77, s. 111.

(a) The order need not be entitled in

any division or cause. The application is usually made to a Judge at chambers; *Dowen v. Evans*, 3 Exch. 111; 6 D. & L. 193. But sometimes it may be made to the court. The form of a rule of court agrees in substance with the above order.

High Court of Justice, on the said C. D. giving security as provided for by the 19 & 20 Vict. c. 108, s. 67. APP. E. s. 3.

Dated the day of , 18 .

[Judge's signature.]

(4.) *Bond on Removal* (ante, 492).

[*Form of bond by the defendant and two sureties in a penalty not exceeding 150*l.* (b), as ante, Sect. 1, No. 7, to the date inclusive:*] WHEREAS an action of replevin was on the day of , 18 , commenced in the County Court of , holden at , wherein A. B. was plaintiff and the above-bounden C. D. was defendant: AND WHEREAS the Honorable Sir , Knight, one of the judges of her Majesty's High Court of Justice [or, "And whereas her Majesty's High Court of Justice"], on the application of the said C. D., did, on the day of , 18 , order that [*recite order for certiorari in the past tense, ex. gr.*] "a writ of certiorari should issue to remove the said action of replevin between the said A. B. and C. D., with all things touching the same, from the said County Court of , holden at , into her Majesty's High Court of Justice, on the said C. D., giving security as provided for by the 19 & 20 Vict. c. 108, s. 67;" AND WHEREAS the above-named E. F. and G. H., at the request of the said C. D., have agreed to enter into the above-written obligation as his sureties: NOW THE CONDITION of this obligation is such, that if the above-bounden C. D., do defend the said action in her Majesty's High Court of Justice, with effect (c); And unless the said A. B. shall discontinue or shall not prosecute such action or become nonsuit therein, if the said C. D. do prove before the said High Court that the said C. D. had good ground for believing either that the title to some corporeal or incorporeal hereditament, or to some toll, market, fair or franchise was in question, or that the rent or damage in respect of which the distress in this behalf was taken exceeded twenty pounds, then this obligation shall be void and of no effect, otherwise shall be and remain in full force.

I approve of this
bond
W. B.
Master.

Signed, sealed and delivered by
the above-bounden in the
presence of

C. D. { Seal.
E. F. { Seal.
G. H. { Seal.

(5.) *Memorandum of Deposit in lieu of a Bond on Removal* (ante, 492).

MEMORANDUM made on the day of , 18 : WHEREAS an action of replevin was on the day of 18 , commenced in the County Court of , holden at , wherein A. B. was plaintiff and C. D. was defendant: AND WHEREAS the Honorable Sir , Knight, one of the judges of her Majesty's High Court of Justice, [or, "And whereas her Majesty's High Court of Justice"], on the application of the said C. D., did, on the day of , order that [*recite order for certiorari in past tense, ex. gr.*] "a writ of certiorari should issue to remove the said action of replevin between the said A. B. and C. D., with all things touching the same, from the said County Court of , holden at , into her Majesty's High Court of Justice, on the said C. D. giving security as provided for by the 19 & 20 Vict. c. 108, s. 67:" AND WHEREAS the said C. D. has this day deposited with , esq., one of the masters of the Division of the said High Court of Justice, the sum of £ sterling (being the amount fixed by the said master pursuant to the said act): NOW THE CONDITION of the said deposit is such, that if the said C. D. do defend the said action in her Majesty's High Court of Justice with effect(c); And unless the said A. B. shall discontinue or shall not prosecute such action, or become non-suit therein, if the said C. D. do prove before the Division of the said High Court of Justice that the said C. D. had good ground for believing either that the title to some corporeal or incorporeal hereditament, or to some toll, market, fair or franchise, was in question, or that the rent or damage in

I approve of this
memorandum—
W. B.,
Master.

(b) The amount of the penalty not exceeding 150*l.* must be fixed by one of the masters, pursuant to 19 & 20 Vict. c. 108,

s. 67 : ante, 469.

(c) I. e. with success; *Tummons v. Ogle*, 6 E. & B. 571; ante, 464 (c).

APP. E. s. 3. respect of which the distress in this behalf was taken exceeded twenty pounds, then the said deposit shall be void and returned to the said C. D.; otherwise the same shall be applied and disposed of according to law.

(Signed) C.D.,

[or
C. D., by G. H. his attorney.]

(6.) *Writ of Certiorari to remove Action of Replevin (ante, 492).*

VICTORIA, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, To the judge of the county court, holden at, greeting: We being willing for certain causes to be certified of a plaint levied in our court before you against C. D. at the suit of A. B. in an action of replevin, command you that you send to our High Court of Justice at Westminster, on, the plaint aforesaid with all things touching the same, as fully and entirely as it remains in our court before you, by whatsoever names the parties may be called therein, together with this writ, that we may further cause to be done thereupon what of right we shall see fit to be done. Witness [name of Lord Chancellor (c)] at Westminster, the day of, in the year of our Lord 18.

(Indorsement.)

"By order of Mr. [Justice or Baron] dated the day of 18;" or "By rule of court, dated the day of 18." Add solicitor's name and address.

(7.) *Return of County Court Judge to Certiorari (ante, 492).*

(Indorsement on the Writ.)

The execution of this writ appears in the schedule hereunto annexed.

The answer of, esq., judge of the county court within mentioned.

[Annex a Schedule written on Parchment as follows:]

I, esq., the judge of the county court of, holden at, in the said county, do most humbly certify to our sovereign lady the queen, that at the date and suing forth of the writ of our said lady the queen to me directed and to this schedule annexed (to wit) on [teste of writ of certiorari] A. B. in the said writ named, entered in the office of the registrar of the said county court at, aforesaid, a plaint in writing against C. D. in the said writ also named, for taking and unjustly detaining certain goods [and cattle] of the said A. B.: And that afterwards, on, a summons on the said plaint was issued under the seal of the said court, according to the form of the statutes in that behalf, whereby the said C. D. was summoned to appear at the said court to be holden at, in aforesaid, on, to answer the said A. B. to a claim, the particulars of which were therunto annexed, and are as follows:—"In the county court of [&c., copy the particulars.]" And this is the tenor and record of the process of the said plaint, with all things touching the same, as it remains before me.

(8.) *Notice of filing Certiorari, and Demand of Statement of Claim (ante, 492).*

In the High Court of Justice.

Between A. B., plaintiff,
and
C. D., defendant.

The defendant having sued out of this honourable court a writ of certiorari directed to the judge of the county court of, holden at, for removing the above cause out of the said county court into this court, returnable on the day of last past, I do hereby give you notice, that the defendant

has filed the said writ, and the return thereto, with the proper officer of this court, and has entered his appearance in the said action in this court: And the plaintiff is hereby required to declare in the said action in four days, otherwise a judgment of non pros. will be signed against him.

APP. E. s. 3.

Dated this day of , 18 .

Yours, &c.

G. H. of

Defendant's [solicitor or agent].

To Mr. B. F., the plaintiff's }
[solicitor or agent]. }

(c.) *Forms in Actions for the Recovery of Small Tenements in the County Courts.*

(1.) *Summons to a Tenant or other Person holding over (f) (ante, 782).*

In the county court of holden at . No. of plaint.
(Seal.)

Between A. B. plaintiff

[address, description],

C. D. defendant

[address, description].

*[Issued "by leave of the court" or "by leave of the registrar."]

* Insert this when necessary.

You are hereby summoned to appear at a county court to be holden at on the day of , 18 , at the hour of in the noon, to answer the plaintiff, wherefore you neglect or refuse to deliver up to him possession of a certain [messuage, with appurtenances, or part of a house, &c., or as the case may be], situate at .

And take notice, that the plaintiff claims of you for rent [or mesne profits], [or for rent and mesne profits] the sum of for a period from the day of , 18 , to the day of , 18 .

And further take notice, if you do not appear at the said court, and show cause why you do not deliver up possession as aforesaid, the judge of the said court may order that possession of the said premises be given by you to the plaintiff forthwith, or on or before such day as the judge shall name, and that if such order be made and be not obeyed, a warrant may issue to give possession to the plaintiff.

Dated the day of , 18 .

To the defendant.

Registrar of the court.

£ s. d.

Costs of this summons

Claims for

Hours of attendance [&c. see ante, 911].

AT BOTTOM OF SUMMONS.

TAKE NOTICE.—If the plaintiff in this action be not your immediate landlord, YOU MUST upon your being served with this summons, or if this summons shall come to your KNOWLEDGE, forthwith GIVE NOTICE thereof to your IMMEDIATE LANDLORD, and if you do NOT give such NOTICE you will be liable, under section 53 of the County Courts Act, 1856, 19 & 20 Vict. c. 108, to forfeit to your immediate landlord THREE YEARS' RACK-RENT of the premises held by you of him in respect of which the summons shall have issued.

(2.) *Summons for Recovery of a Tenement for Non-payment of Rent, under Sect. 52 of 19 & 20 Vict. c. 108 (g) (ante, 788).*

[Title of court and cause, as above, No. 1.]

You are hereby summoned to appear at a court to be holden at on the day of , 187 , at the hour of in the noon, to answer the

(f) This is form No. 149 in schedule to C. C. Rules, 1875.

(g) This is form No. 150 in schedule to C. C. Rules, 1875.

— — — — — **Arr. E. s. 3.** plaintiff why possession of a certain , situate at should not be given up to the plaintiff, by reason of the rent payable in respect thereof by you being half a year in arrear, and the plaintiff having right by law to re-enter for the non-payment thereof.

If you shall pay to the registrar the rent in arrear and the costs of this action, as stated at the foot of the summons, five clear days before the day you are required to appear to this summons, this action will cease.

And take notice, that if you do not pay such rent in arrear and costs, or appear at the said court and show cause why possession of the said should not be recovered against you, you may be ordered by the court to give possession of such premises to the plaintiff, and that if such order be not obeyed a warrant may issue to give possession to the plaintiff.

Dated this day of , 18 .

Registrar of the court.

£ s. d.

Costs of this summons
Hours of attendance, [&c. see *ante*, 911].

AT BOTTOM OF SUMMONS.

TAKE NOTICE [as in No. 1, *ante*].

(3.) *Order for Recovery of Tenement (h) (ante, 783).*

[*Title of court and cause, as ante*, No. 1.]

Upon the hearing of this cause at a court holden this day, it is ordered that the defendant do give to the plaintiff possession of a certain house [or messuage with the appurtenances, or part of a certain house, or as the case may be] situate at forthwith [or on the day of]: And it is adjudged that the plaintiff do recover against the defendant the sum of £ for rent [or mesne profits], [or for rent and mesne profits], and £ costs.

And it is ordered, that the defendant do pay to the registrar of the court the sum [or sums] above mentioned on or before the day of 18 .

Given under the seal of the court this day of , 18 .

By the court,

I. K.,

To the defendant.

Registrar of the court.

TAKE NOTICE, that if you do not give such possession a warrant may issue requiring the bailiff of the court to give possession of the said to the plaintiff, and to levy the sum above mentioned together with further costs.

Hours of attendance [&c. see *ante*, 911].

(4.) *Warrant for giving Possession of Tenement (i) (ante, 783).*

In the county court of , holden at . No. of plaint .
(Seal.) No. of warrant .

Between A. B. plaintiff,
and
C. D. defendant.

Whereas at a court holden at on the day of , 18 , it was ordered by the court that the defendant should give the plaintiff possession of a certain [as in summons] situate at [and that the plaintiff should recover against defendant] the sum of £ for rent [or mesne profits], [or rent and mesne profits] and costs:

And whereas the defendant has not obeyed the said order:

These are therefore to authorize and require you to forthwith give possession of the said hereinbefore-mentioned premises to the plaintiff:

(h) This is form No. 151 in schedule to
C. C. Rules, 1875.

(i) This is form No. 152 in schedule to
C. C. Rules, 1875.

And these are therefore further to require and order you forthwith to make and levy by distress and sale of the goods and chattels of the defendant, whosoever they may be found within the district of this court (excepting the wearing apparel and bedding of the defendant or his family, and the tools and implements of his trade, if any, to the value of five pounds), the said sum and the costs of this warrant and execution, and also to seize and take any money or bank notes (whether of the Bank of England or any other bank), and any cheques, bills of exchange, promissory notes, bonds, specialties or securities for money of the defendant which may be there found, or such part or so much thereof as may be sufficient to satisfy this execution and the costs of making and executing the same, and to pay the amount so levied to the registrar of this court, and make return of what you have done under this warrant immediately upon the execution thereof.

APP. E. s. 3.

Given under the seal of the court this day of , 187 .
By the court.

To the high bailiff of the said court. Registrar of the court.
| £ s. | d. |

Rent [*or mesne profits*], [*or rent*
and mesne profits] . . .
Costs . . .
Poundage for issuing this warrant .

Total amount to be levied .

NOTICE.—The goods and chattels are not to be sold until after the end of five days next following the day on which they were seized, unless they be of a perishable nature, or at the request of the defendant.

Application was made to the registrar for this warrant at minutes past the hour of in the noon of the day of , 187 .
Hours of attendance [&c. see *ante*, 911].

(d.) *Forms in Actions of Ejectment in the County Courts.*

Summons in Action of Ejectment (k) (ante, 791).

In the county court of , holden at . No. of plaint .
(*Seal.*)

Between A. B., C. D. and E. F., plaintiffs,
[*addresses and descriptions*]
and
G. H., I. J. and K. L., defendants,
[*addresses and descriptions.*]

You the above-named defendants, and all other persons entitled to defend the possession of the property described in the statement herunto annexed, situated in the parish within the district of this court, to the possession whereof the above-named plaintiffs, some or one of them, claim to be [*or to have been* on and since the day of 187] entitled, and to eject all other persons therefrom, are hereby summoned to appear at a county court to be holden at , on the day of 187 , at the hour of in the forenoon, to defend the said property, or such part thereof as you may be advised.

And take notice, that unless you appear judgment may be given, and you turned out of possession.

Dated the day of 187 .

To the defendants.

I. K.,
Registrar of the court.
£ s. d.

Costs of this summons . . .
Hours of attendance [&c. see *ante*, 911].

(k) This is form No. 153 in schedule to C. C. Rules, 1875.

APP. E. s. 4.

AT BOTTOM OF SUMMONS.

TAKE NOTICE.—If you the defendants, or any of you, being only tenants of the property or some part thereof, YOU MUST upon being served with this summons, or if this summons shall come to your KNOWLEDGE, forthwith GIVE NOTICE thereof to your IMMEDIATE landlord or his bailiff or receiver, and if you do not give such notice you will be liable, under section 209 of 15 & 16 Vict. c. 76, to FORFEIT to your landlord THREE YEARS' RACK-RENT of the premises demised to you or holden in your possession of him in respect of which this summons has issued.

For other Forms in Ejectment in County Courts, see Forms Nos. 154 to 180 in Schedule to C. C. Rules, 1875.

SECT. 4.—FORMS UNDER 1 & 2 VICT. C. 74 (*ante*, 801).(1.) *Complaint before Two Justices (I).*

The complaint of [owner or agent, &c., as the case may be,] made before us two of her Majesty's Justices of the Peace acting for the district of , in petty sessions assembled, who saith that the said did let to a tenement, consisting of , for under the rent of , and that the said tenancy expired [or was determined by notice to quit, given by the said , as the case may be,] on the day of , and that on the day of the said did serve on [the tenant over-holding] a notice in writing of his intention to apply to recover possession of the said tenement (a duplicate of which notice is hereto annexed), by giving, &c. [describing the mode in which the service was effected]; and that notwithstanding the said notice the said refused [or neglected] to deliver up possession of the said tenement, and still detains the same.

(Signed) .

Taken the day of before us

(Signed) .

A duplicate of the notice of intention to apply is to be annexed to this complaint.

(2.) *Warrant to Peace Officers to take and give Possession.*

Whereas [set forth the complaint], we two of her Majesty's Justices of the Peace, in petty sessions assembled, acting for the of do authorize and command you, on any day within days from the date hereof [except on Sunday, Christmas Day, and Good Friday, to be added if necessary], between the hours of nine in the forenoon and four in the afternoon, to enter (by force, if needful,) and with or without the aid of the owner or agent, as the case may be, or any other person or persons whom you may think requisite to call to your assistance, into and upon the said tenement, and to eject thereout any person, and of the said tenement full and peaceable possession to deliver to the said [the owner or agent].

Given under our hands and seals this day of

To and all other constables
and peace officers acting for the
district of

(I) For notice to tenant to deliver up possession, see *ante*, p. 900.

APPENDIX F.

FORMS, ORDERS, AND FEES UNDER THE AGRICULTURAL
HOLDINGS ACT (a).

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SECT. 1.—NOTICE OF IMPROVEMENTS, CLAIMS, &c.

(1.) *Authority of Agent to act under the Act.*

I, A. B., of [name and address of landlord or tenant, as the case may be] hereby appoint C. D., of , to act for me under the Agricultural Holdings Act, 1875, generally [or] for the special purpose of [e.g.] consenting on my behalf to the execution by my tenants of first class improvements [or], to the execution of the first class improvement denominated [e.g.] "laying down of permanent pasture."

Address
Date

A. B.

(2.) *Application for Landlord's Consent to First Class Improvement (b).*

I beg to inform you that I propose to execute upon [describe holding], in the parish of , the following improvement, that is to say :—

"Laying down of permanent pasture" [or other first class improvement, as the case may be] to the extent of acres :
the same being designated a first class improvement in the 5th section of the

(a) See the act discussed ante, Ch. XXI.;
and set out at length, ante, 843.

(b) This should, but need not, be in
writing.

APP. F. s. 1. Agricultural Holdings Act, 1875; and I hereby request your consent in writing to such improvement.

Address

A. B.

Date

To C. D. [name and address of landlord].

(3.) *Consent of Landlord to First Class Improvement.*

In reply to your application of the instant, I hereby [or I hereby on behalf of , of] consent to the execution by you of the improvement therein specified, that is to say:—

“Laying down of permanent pasture” [or other first class improvement, as the case may be],

the same being designated an improvement of the first class in the 5th section of the Agricultural Holdings Act, 1875.

Address

A. B.

Date

To C. D. [name and address of tenant].

(4.) *Notice by Tenant of Second Class Improvement (c).*

I hereby give you [or give you, as and being the agent of , of] notice of my intention to execute upon [describe holding] in the parish of , the following improvement, that is to say:—

“Chalking of land” [or other second class improvement, as the case may be] to the extent of acres:

the same being designated a second class improvement in the 5th section of the Agricultural Holdings Act, 1875.

(5.) *Notice of intention to claim Compensation (sect. 20) (d).*

I hereby give you [or you as and being the agent of C. D. of] notice of my intention to claim compensation, under the Agricultural Holdings Act, 1875, for certain improvements within the meaning of that Act executed by me upon my holding called [describe holding].

The following are the particulars of my intended claim:—

[State the site, class, date, extent in acreage and cost of each improvement.]

Address

A. B.

Date

To C. D. [name and address of landlord or his agent, as the case may be].

(5A.) *Notice of intention to claim Compensation for Breach of Covenant by Landlord (sect. 18).*

Proceed as in No. 5 supra, and add,

And I also hereby give you notice of my intention to claim compensation under the above Act for the breach of an agreement on your part [or on the part of the said C. D.] to [here follow the words of the agreement if in writing, and add, such agreement being dated the day of].

&c. &c.

(c) This notice must, by sect. 12 of the act, be given not more than 42 and not less than 7 days before beginning to execute the improvement.

(d) By sect. 20 of the act this notice must be given one month before the determination of the tenancy.

(6.) Counter-notice by Landlord of Claim for Compensation (sect. 20)(e).

APP. F. 8. 1.

With reference to your claim for compensation under the Agricultural Holdings Act dated the instant, I [or I on behalf of C. D. of] hereby give you notice of my intention to make a claim upon you for compensation under that act.

The following are the particulars of my intended claim :

[Refer to Sect. 19, and describe act of waste or breach of agreement, as the case may be, with dates and references to writings, if any.]

Address A. B. [or A. B. for the said C. D.]

Date _____

To E. F. [name and address of tenant].

(7.) *Notice to Quit part of Holding in consequence of intended resumption of Improvements* (sect. 52).

I [or I on behalf of C. D. of] hereby give you notice to quit and deliver up on the day of , 18 , the possession of [describe accurately, with measurements, that part of the holding to which the notice is intended to apply] the said [repeat description of the part sufficiently for identification] being part of the holding known as [describe entire holding], situate in the parish of , in the county of , which said holding you now hold of me as tenant from year to year.

And I hereby state, in pursuance of the Agricultural Holdings Act, 1875, that the said [repeat description of part holding] is required to be resumed with a view to [state any of the purposes enumerated in section 52, e.g. the planting of trees].

Address

A. B.

Date _____

To E. F. [name and address of tenant].

(8.) Notice by Tenant that he accepts the above Notice to Quit as a Notice to Quit the entire Holding (sect. 52) (f).

With reference to your notice to quit of the _____ instant, I hereby beg to inform you that I accept the same as a notice to quit my entire holding, as I am entitled to do by virtue of the Agricultural Holdings Act, 1875, to take effect at the expiration of the current year of my tenancy, that is to say, on the day of _____, 18 ____.

Address

A. B.

Date _____

To C. D. [name and address of landlord or his agent].

(9.) *Notice of Intention to Remove Fixtures* (soct. 53, sub-soct. 4) (g).

In pursuance of the Agricultural Holdings Act, 1875, I hereby give you [or you as and being the agent of C. D. of] notice of my intention to remove from my holding known as [describe holding], the following fixtures, that is to say:

[Enumerate and describe fixtures.]

Address

A. B.

Date _____

To C. D. [name and address of landlord or his agent].

(e) By sect. 20, this counter-notice must be given before the determination of the tenancy, or within 14 days thereafter.

notice to quit.

(f) By sect. 52, this notice must be given within 28 days after service of the

(g) By sect. 53, sub-sect. 4, this notice must be given one [calendar, 13 & 14 Vict. c. 21, s. 4] month before the removal.

APP. F. s. 1. (10.) *Notice of Landlord's election to Purchase Fixtures* (sect. 53, sub-sect. 5) (h).

With reference to your notice of the instant and by virtue of the Agricultural Holdings Act, 1875, I [or I as and being the agent of C. D. of] hereby give you notice that I elect to purchase the following of the fixtures comprised in such notice, that is to say :

[Enumerate and describe fixtures.]

[or all the fixtures comprised in such notice].

Address of A. B.

A. B.

Date

To E. F. [name and address of tenant].

(11.) *Notice of Tenant's intention to Erect Steam-engine* (sect. 53).

In pursuance of the Agricultural Holdings Act, 1875, I hereby give you [or you as and being the agent of C. D. of] notice of my intention to erect a steam-engine on my holding known as [describe holding].

Address

A. B.

Date

To E. F. [name and address of landlord or his agent].

(12.) *Notice by Landlord of objection to Steam-engine* (sect. 53).

By virtue of the Agricultural Holdings Act, 1875, I [or I on behalf of C. D. of] hereby give you notice that I object to the erection by you of a steam-engine on your holding [or to the erection by you of a steam-engine on your holding as mentioned in your notice to me of the day of].

Address

A. B.

Date

To E. F. [name and address of tenant].

(13.) *Adoption of Parts of Act by Agreement* (sect. 55).

We hereby adopt, in relation to the holding known as [describe holding], of which A. B. is landlord and C. D. is tenant, the following provisions of the Agricultural Holdings Act, 1875, that is to say :

[State the sections intended to apply.]

Dated this day of 18 .

A. B. [or E. F., agent for A. B.]
C. D.

(14.) *Exclusion of Act* (sect. 56).

Provided always, and it is hereby agreed that the Agricultural Holdings Act, 1875, [or such parts of the Agricultural Holdings Act, 1875, as relate to] shall not apply to this contract of tenancy.

This clause may be the final clause in any lease or agreement. See e. g. App. B., Sect. 19, ante, 883.

(15.) *Exclusion of Operation of Act by Separate Agreement* (sect. 56).

It is hereby agreed between us that the Agricultural Holdings Act, 1875, shall not apply to a certain contract of tenancy between us, bearing date the day of , whereby A. B. of , let [or C. D. as agent for

(A) By sect. 53, sub-sect. 6, this notice must be given before the expiration of the notice of removal.

A. B. of , let], and E. F. of , took, the holding known as [describe holding] and situate in the parish of , in the county of . APP. F. S. 1.
 Dated this day of , 18 .
 A. B. landlord [or C. D. for A. B.]
 E. F. tenant.

(16.) *Revocation of Exclusion of Act from Tenancy from Year to Year* (sect. 37).

In pursuance of the Agricultural Holdings Act, 1875, I [or I as and being the agent of C. D. of] hereby revoke the notice which I [or the said C. D.] gave you dated the day of 18 , to the effect that I desired that the contract of tenancy between us [or between you and the said C. D.], whereby you hold [describe holding] of me [or the said C. D.] should remain unaffected by the said Act.

Address A. B. [or] A. B. for C. D.
 Date
 To

SECT. 2.—REFERENCES, &c.

(1.) *Appointment of Referee by Landlord and Tenant jointly*
 (sect. 22, sub-sect. 1).

In pursuance of the Agricultural Holdings Act, 1875, we hereby appoint of , to settle the amount, mode and time of payment of compensation payable by virtue of that Act in respect of [describe premises].

A. B.
C. D.

Dated this day of , 18 .

(2.) *Notice to Single Referee to act* (sect. 22, sub-sect. 2).

In pursuance of the provisions of the Agricultural Holdings Act, 1875, we [or I] hereby require you to act, within seven days after the receipt of this letter, in the reference under that act which you undertook by our [or my appointment].

Dated this day of , 18 . A. B.
C. D.
[or A. B. for C. D.]

(3.) *Appointment of Referee by either Party* (sect. 22, sub-sect. 3).

In pursuance of the Agricultural Holdings Act, 1875, I hereby appoint E. F. of , to act as one of the referees in determining the mode, time and amount of compensation payable by or to me by virtue of that act in respect of [describe premises]; [And I hereby require that the umpire (i) be appointed by the county court or the Inclosure Commissioners.]

Dated this day of , 18 . A. B.

(4.) *Appointment of Substituted Referee* (sect. 22, sub-sect. 4).

In pursuance of the Agricultural Holdings Act, 1875, I hereby appoint C. D. of , to act in the reference under that statute, which E. F., deceased [or who has become incapable of acting] undertook on our appointment.

Dated this day of , 18 . A. B.

(i) This is quite optional. See sect. 23, sub-sects. 1 & 2. If the appointment of the umpire by the county court be dissented from, notice in writing of the dissent must be given. The notice of dissent may run, "I hereby dissent from the umpire in this reference being appointed by the county court."

APP. F. s. 2.

(5.) *Notice of Appointment of Referee.*

_____,
In pursuance of the Agricultural Holdings Act, 1875, I beg to inform you that I have appointed C. D. of _____ to act as one of the referees in the reference of differences between us under that statute.

Dated this _____ day of _____, 18 ____.

To C. D.

A. B.

(6.) *Notice to appoint Referee in Fourteen Days.*

[Describe reference.]

_____,
In pursuance of the Agricultural Holdings Act, 1875, I have to ask you to be kind enough to appoint a referee in this matter forthwith, and I hereby give you notice that if you do not appoint a referee within fifteen days after the receipt of this letter I shall apply to the county court to make the appointment.

Dated this _____ day of _____, 18 ____.

To C. D. of _____.

A. B.

(7.) *Appointment of Umpire.*

[Describe reference.]

In pursuance of the Agricultural Holdings Act, 1875, we hereby appoint E. F. to act as umpire in case of difference between _____ in this reference.

Dated this _____ day of _____, 18 ____.

A. B. }
C. D. } Referees.

(8.) *Request to Referees to appoint Umpire in Seven Days.*

[Describe reference.]

_____,
I have to ask you to be kind enough to appoint an umpire in this reference, and I hereby give you notice that unless you appoint an umpire within eight days after the receipt of this letter I shall apply to the county court to make the appointment.

Dated this _____ day of _____, 18 ____.

To _____ [names and addresses of referees] (k).

A. B.

(9.) *Form of Award (sects. 28, 31, 32, 33).*

To all whom these presents shall come. We [names of referees] or I [name of umpire] having considered the matters referred to us by virtue of the Agricultural Holdings Act, 1875, touching the amount and time and mode of compensation payable by or to A. B. and C. D., now hereby award and determine as follows, that is to say:

As to improvements of the first class, we find that £ _____ is due from A. B. to C. D. in respect of [drainage of land], and that £ _____ is due from A. B. to C. D. in respect of [making of garden]. Such drainage was authorized by A. B. in the year 18 ____, and executed by C. D. in the year 18 ____ at the cost of £ _____. The lands drained are situate [describe situation], and consist of _____ acres or thereabouts. This improvement is taken, for the purposes of this award, to be exhausted in the year 18 _____. Such making of gardens was authorized by A. B. in the year 18 ____, and executed by C. D. in the year 18 ____ at the cost of £ _____. The gardens made are situate [describe situation] and cover _____ acres _____ roods and _____ perches. This improvement is taken, for the purposes of this award, to be exhausted in the year 18 ____.

[And we [or I] further award and determine that such drainage adds to

(k) Serve each referee with a copy.

the letting value of the holding £ and that such gardens add to the letting value of the holding £ (l.) APP. F. s. 2.

As to improvements of the second class, we [or I] find that £ is due from A. B. to C. D. in respect of [liming of land]. This improvement was executed by C. D. in the year 18 , at the cost of £ . Such improvement extends over the lands called [describe lands], consisting of acres or thereabouts, and is taken, for the purposes of this award, to be exhausted in the year 18 .

As to improvements of the third class, we find that £ is due from A. B. to C. D. in respect of purchased manure, being guano, applied to land. This improvement was executed by C. D. in the year 18 , at the cost of £ . Such improvement extends over the lands called [describe lands], consisting of acres or thereabouts, and is taken, for the purposes of this award, to be exhausted in the year 18 [or to be now exhausted, which will generally be the case].

And with respect to breaches of covenant, we find that the said C. D. committed two breaches of covenant in this, that he underlet the farmhouse called to in the years 18 and 18 without having first obtained the leave of the said A. B., whereby the said farmhouse became and is in a bad state of repair. And we [or I] award and determine that the sum of £ is due from C. D. to A. B. in respect of such breaches of covenants.

WHEREFORE we award, adjudge and determine that there is due from A. B. to C. D. the sum of £ , and that the said sum of £ be paid by A. B. to C. D. on or before the day of 18 .

And we award that all costs of and incident to this reference be borne [by the said A. B., or by the said C. D., or by the said A. B. and C. D. between them] or in the following proportions, that is to say [three-fourths] by the said and [one-fourth] by the said

Date

E. F.
G. H.

SECT. 3.—COUNTY COURT RULES AND FEES.

ORDER XXXIV.

AGRICULTURAL HOLDINGS (ENGLAND) ACT, 1875.

1. When an appeal is made to the judge against an award made under the Agricultural Holdings (England) Act, 1875, the party prosecuting the appeal shall be called the appellant and the party supporting the award the respondent. Interpretation.

2. The appellant shall, within four days after the delivery of the award, file a copy thereof, together with a concise statement in writing of his grounds of appeal, which shall contain the following particulars:— Statement of grounds of Appeal to be filed.

(1.) If the appeal shall be made on the ground mentioned in section 36, sub-section 1, of the last-mentioned act, a statement of the several objections to the validity of the award on which he relies:

(2.) If the appeal is on any of the grounds mentioned in sub-section 2 of the last-mentioned section, a statement showing in respect of what matters compensation is alleged to have been improperly awarded:

(3.) If the appeal is made on any of the grounds mentioned in sub-section 3 of the last-mentioned section, a statement showing in respect of what matters compensation is alleged to have been improperly withheld:

(4.) No ground of appeal shall be allowed at the trial unless the foregoing provision of this rule shall, in respect of such ground, have been complied with:

(5.) The names, in full, and address of the respondent and of the appellant, and of his solicitor if the proceedings are commenced through a solicitor.

3. The registrar shall, within 24 hours after the filing of the concise statement, transmit a copy thereof by post to every respondent at the address furnished to him, accompanied by a notice requiring the respondent to comply with the provisions of the next following rule, according to the form in the schedule. Copy of Statement to be sent to Respondent.
Form.

(l) Add this only if landlord be limited owner.

- APP. F. s. 3.**
Respondent to deliver Statement in reply.
4. The respondent shall, within eight days after the transmission of the grounds of appeal to him, deliver to the registrar a statement in writing signed by himself or his solicitor disclosing the following matters:—
- (1.) Whether he disputes the validity in law of all, or any, and which of the grounds of objection to the award:
 - (2.) Whether he disputes the truth in fact of all, or any, and which of the grounds of appeal:
 - (3.) Whether he admits the validity in law and truth in fact of all, or any, and which of the grounds of appeal:
 - (4.) Whether he prays that the case may be remitted to be re-heard:
 - (5.) His name and address, and that of his solicitor, if the statement be delivered through a solicitor.
- Order.**
5. The judge shall hear and determine the appeal, and the order thereupon may be enforced in the same manner as any other judgment of the court.
- Copies of both Statements to be sent to Judge.
6. Upon the receipt of the statement mentioned in the next preceding rule, the registrar shall transmit a copy thereof and of the award and grounds of appeal to the judge, who shall, as soon as conveniently may be, appoint a time and place for the hearing of the appeal, and instruct the registrar to give notice thereof forthwith to the parties.
- Proceedings in applications for Referee or Umpire.
7. Every application for the appointment of a referee or umpire under section 22, sub-sections 6 and 9, or under section 23, sub-section 2, of the act, shall be by summons sealed with the seal of the court, and returnable not less than seven days from the date thereof, except by consent. Such summons shall be taken out by the party applying, and shall be addressed to the other party, and shall direct the party summoned to attend at the judge's or registrar's chambers (as the case may be) on the return day thereof, for the purpose of proceeding with the appointment asked for. Such summons shall be personally served by the applicant's solicitor. The appointment may be made by indorsement on the summons.
- Appeal to High Court.
8. All rules for the time being in force regulating the conduct of appeals by way of special case shall apply to appeals from the judge to the High Court of Justice, so far as circumstances will permit.

ORDER XXXVIII.

APPLICATION OF PRECEDING ORDERS.

Application of Rules of Procedure.

The rules of procedure contained in the preceding orders (County Court Orders, 1875) shall apply to proceedings under the Agricultural Holdings (England) Act, 1875, except where Order XXXIV. (order under the Agricultural Holdings Act) provides any other or inconsistent mode of procedure.

FEES UNDER TREASURY ORDER OF 26TH OCTOBER, 1875.

	£	s.	d.
For every sitting under the Agricultural Holdings Act, 1875.	1	0	0
Taxing costs under section 23 of the Agricultural Holdings (England) Act	0	10	6
For drawing up, sealing and issuing every order under Order XXXIV. Rule 7	0	4	0
For drawing, sealing and issuing every special judgment or order in the nature of a decree, where Court exercises jurisdiction under Order XXXIV.	0	15	0
For every notice or summons under Order XXXIV.	0	2	6

APPENDIX G.

BILLS FOR RELIEF AGAINST FORFEITURE. [*See ante*, 302.]

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SECT. 1.—*A Bill to amend the Law relating to Leases (a).*[*See 304, ante.*]

Be it enacted as follows:—

1. This act may be cited as the Leases Act, 1880.

Short Title.
Relief against
Forfeiture.

2. In any action or proceeding in which the court is asked, whether by claim or defence, or otherwise, to give effect to any proviso for re-entry or other stipulation by way of forfeiture for breach of any covenant or engagement in any lease or agreement for a lease, whether such lease or agreement be in writing or verbal, the court may inquire into the case and may refuse to give effect to such proviso or stipulation and may relieve against the forfeiture; and such refusal and relief may be either absolute or upon terms as to making good any defect of repair or other defect, paying costs or damages, or preventing a future breach, or as to any other matter, according to what shall appear to the court to be just and reasonable under the circumstances of the case.

3. Provided always, that no effect shall be given in any such action or proceeding as aforesaid to any proviso for re-entry or other stipulation by way of forfeiture for breach of any covenant or engagement that any assignment or underlease shall be prepared or made by or under the direction of the lessor's solicitor or any particular solicitor or person.

No Forfeiture
for Non-prepa-
ration of
Assignment or
Underlease by
Lessor's
Solicitor.

4. Where several tenants hold, by underlease, assignment, or otherwise, under the same lease or agreement for a lease, whether such lease or agreement be in writing or verbal, they shall be mutually entitled to require that each tenant in respect of his tenement shall perform and observe every or any covenant or engagement which ought to be performed and observed in respect of such tenement for protecting every or any other tenant from forfeiture of his tenement, and from any other liability for a breach of such covenant or engagement under such lease or agreement; and any right conferred by this section may be enforced by action; and in any such action the court, upon summary application or otherwise, may order that any repairs or other things requisite to be done for giving effect to this section be done by the party by whom the same ought to be done, and that in case he make default in so doing the same be done at his expense by the applicant, or any person appointed by the court for the purpose; and the court may order that the expense so incurred be paid by the party in default to the applicant or other person incurring the same, and that the applicant or such other person shall have a charge on the estate and interest of the party in default in the premises for the reimbursement of such expense with interest thereon.

Mutual Rights
of several
Tenants under
the same Lease.

5. This act shall not extend to Scotland.

Extent of Act.

SECT. 2.—*Extracts from the Conveyancing and Law of Property Amendment Bill (b).*[*See 304, ante.*]

18. (1.) A right of re-entry or forfeiture under any proviso or stipulation in a lease for a breach of any covenant or condition in the lease shall not be enforce-

(a) Prepared and brought in by Mr.
Marten, Sir Henry Jackson, Mr. Gregory,
and Mr. Lewis in the first session of 1880.

(b) Presented by Lord Chancellor Cairns
in both sessions of 1880.

APP. G. s. 2. able, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of, and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and in any case requiring the lessee to make compensation in money for the breach, and the lessee fails within a reasonable time thereafter to remedy the breach if it is capable of remedy, and to make reasonable compensation in money to the satisfaction of the lessor for the breach.

(2.) Where a lessor is proceeding by action or otherwise to enforce such a right of re-entry or forfeiture, the lessee may, in the lessor's action, if any, or in any action brought by himself, apply to the court for relief, and the court may grant or refuse relief as the court having regard to the proceedings and conduct of the parties under the foregoing provisions of this section and to all the other circumstances thinks fit; and in case of relief, may grant it on such terms, if any, as to costs, expenses, damages, compensation, penalty or other matters relative to the breach or to any subsequent like or other breach as the court in the circumstances of each case thinks fit.

(3.) For the purposes of this section a lease includes an original or derivative under-lease, also a grant at a fee-farm rent, or securing a rent by condition; and a lessee includes an original or derivative under-lessee, and the heirs, executors, administrators and assigns of a lessee; also a grantee under such a grant as aforesaid, his heirs and assigns; and a lessor includes an original or derivative under-lessor, and the heirs, executors, administrators and assigns of a lessor; also a grantor as aforesaid and his heirs and assigns.

(4.) This section applies, although the proviso or stipulation under which the right of re-entry or forfeiture accrues is inserted in the lease in pursuance of the directions of any act of parliament (c).

(5.) For the purposes of this section a lease limited to continue as long only as the lessee abstains from committing a breach of covenant, shall be and take effect as a lease to continue for any longer term for which it could subsist, but determinable by a proviso for re-entry on such a breach.

(6.) This section does not extend—

(i.) To a covenant or condition against the assigning, underletting, parting with the possession, or disposing of the land leased, or to a condition for forfeiture on the bankruptcy of the lessee, or on the taking in execution of the lessee's interest; or

(ii.) In case of a mining lease, to a covenant or condition for allowing the lessor to have access to or inspect books, accounts, records, weighing machines or other things, or to enter or inspect the mine or workings thereof.

(7.) The enactments described in Part I. of the second schedule to this act (d) are hereby repealed.

(8.) This section shall not affect the law relating to re-entry or forfeiture or relief in case of non-payment of rent.

(9.) This section applies to leases made either before or after the commencement of this act, and shall have effect notwithstanding any stipulation to the contrary.

[See 304, *ante*.]

SECT. 3.—*A Bill to amend the Law relating to Leases (e).*

Be it enacted as follows:—

1. This act may be cited as the Leases Act, 1880.

2. *From and after the commencement of this act* no proviso for re-entry or other stipulation by way of forfeiture for breach of any covenant or engagement contained in any lease or agreement for a lease, whether such lease or agreement be in writing or verbal, shall be enforced except with the consent and by the order of the High Court of Justice, to be obtained on application made by claim or defence in any action, or by motion in a summary manner. Upon any application as aforesaid, the court may refuse to give effect to such proviso or stipulation.

(e) See *e. g.* 10 Geo. 4, c. 50, s. 27, *ante*, 13. *Query*, whether this act, as relating to the Crown, ought not to be more expressly named.

(d) 23 & 24 Vict. c. 36, ss. 4—9, and 23 & 24 Vict. c. 126, s. 2.

(e) Prepared and brought in by Mr. Warton and Mr. McIntyre in the second session of 1880.

lation, and may relieve against the forfeiture, and such refusal and relief may be either absolute or upon such terms as to making good any defect of repair or other defect, or as to doing anything requisite to be done in order to comply with any covenant or engagement contained as aforesaid, or as to payment of compensation for any past breaches, or as to the prevention of any future breaches, or as to the payment of costs or damages, or as to any other matter or thing as to the court may appear just and reasonable. APP. G. s. 3.

3. No effect shall be given in any such action or proceeding as aforesaid to any proviso for re-entry, or other stipulation by way of forfeiture for breach of any covenant or engagement that any assignment or under-lease shall be prepared or made by or under the direction of the lessor's solicitor, or any particular solicitor or person, if it shall appear to the satisfaction of the court in respect of any assignment or under-lease that due notice was given by the lessee or tenant to the lessor or landlord of such assignment or under-lease, and of the name, residence and occupation of any assignee or under-lessee, and that in all cases when by the lease or agreement it was covenanted or agreed that the consent of the lessor or landlord to any assignment or under-lease should be obtained in writing or otherwise that such consent had been duly obtained. No Forfeiture for Non-preparation of Assignment or Underlease by Lessor's Solicitor.

4. Where several tenants hold, by under-lease, assignment, or otherwise, under the same lease or agreement for a lease, whether such lease or agreement be in writing or verbal, they shall be mutually entitled to require that each tenant in respect of his tenement shall perform and observe every or any covenant or engagement which ought to be performed and observed in respect of such tenement for protecting every or any other tenant from forfeiture of his tenement, and from any other liability for a breach of such covenant or engagement under such lease or agreement; and any right conferred by this section may be enforced by action; and in any such action the court, upon summary application or otherwise, may order that any repairs or other things requisite to be done for giving effect to this section be done by the party by whom the same ought to be done, and that in case he make default in so doing the same be done at his expense by the applicant, or any person appointed by the court for the purpose, and the court may order that the expense so incurred be paid by the party in default to the applicant or other person incurring the same, and that the applicant or such other person shall have a charge on the estate and interest of the party in default in the premises for the reimbursement of such expense with interest thereon. Mutual Rights of several Tenants under the same Lease.

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